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Introduction

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This issue of the *Department of Justice Journal of Federal Law and Practice* focuses on sentencing challenges that prosecutors may face in district and appellate courts. The *DOJ Journal* previously published an issue focused on sentencing and punishment in September 2021. The articles in this issue discuss sentencing questions involving controlled substances, fake pills, artificial intelligence, and cyber-fraud. Further topics include matters relating to the U.S. Sentencing Commission, including how to use the U.S. Sentencing Guidelines and the role of the Department's ex officio representative to the Commission.

Sentencing issues continue to arise in cases throughout the country. According to data from the Commission, over 50,000 defendants were sentenced between October 1, 2025, and June 30, 2026.¹ These sentences included a broad range of offenses, including those involving firearms, drug trafficking, immigration, fraud, child exploitation, and violent crimes.²

Additionally, many appeals involve sentencing issues. According to the Commission, 55.2% of all criminal appeals in fiscal year 2025 involved only sentencing issues.³ Additionally, 19.4% of appeals challenged the underlying convictions and sentences. Consequently, for that fiscal year, the percentage of appeals that involved sentencing issues to some extent was 74.6%.⁴

We hope the articles in this issue will inform the Department's attorneys and give them arguments and questions to consider as they represent the United States in these important proceedings.

¹ U.S. SENT'G COMM'N, QUARTERLY DATA REPORT: 3RD QUARTER RELEASE, PRELIMINARY FISCAL YEAR 2026 DATA, 2 (2026).

² *Id.*

³ U.S. SENT'G COMM'N, 2025 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 152 (2025).

⁴ *Id.*

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Learning to Calculate Justice: An Introduction to Learning and Using the United States Sentencing Guidelines

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I. Introduction

This how-to reference aspires to provide a concise guide to best practices for learning the United States Sentencing Guidelines and digests current Guidelines educational resources.

The United States Sentencing Commission's Office of Education and Sentencing Practice (ESP) provides phenomenal educational resources and support.¹ The best way to learn the Guidelines is to take advantage of ESP's wide-ranging learning resources.² Instead of reinventing the wheel, especially when it is already so well-designed, this article compiles, curates, and synthesizes existing ESP resources.

While our primary audience is federal prosecutors, this reference is also helpful to courtroom staff, probation officers, and defense counsel. Our focus is on the day-to-day nuts-and-bolts criminal sentencing advocacy in federal district courts. Consequently, this article prioritizes checklists and resources, providing additional explanatory narrative when appropriate.

¹ See generally *Organization*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/who-we-are/organization> (last visited July 16, 2026) (explaining the history, function, and make-up of the different offices of the Commission and providing links to resources by topic).

² See subsection I.A (overview of ESP's educational resources); *Education*, U.S. SENT'G COMM'N, <https://www.ussc.gov/education> (last visited July 16, 2026). See generally U.S. SENT'G COMM'N, SENTENCING RESOURCES GUIDE: A CATALOG OF UNITED STATES SENTENCING COMMISSION SERVICES AND RESOURCES (2022) (explaining the various sentencing resources available).

This article also uses the 2025 Guidelines.

This article proceeds in four parts: (1) this introduction; (2) a summary of federal sentencing concepts fundamental to the Guidelines; (3) an overview of the two-step federal criminal sentencing process from *United States v. Booker*; and (4) a list of additional useful resources not previously mentioned.³

A. Overview of the Office of Education and Sentencing Practice’s learning resources

1. Online resources

ESP has eight online educational resources:⁴

- worksheets (fill-in-the-blank paper forms with step-by-step directions on how to calculate general individual, illegal reentry, and organizational sentences);⁵
- videos (archival recordings of live online trainings—ESP offers live online training as well);⁶
- decision trees and quick reference materials (concise, illustrated summary guides to most Guidelines topics);⁷
- caselaw updates (cumulative quarterly federal appellate and annual Supreme Court written Guidelines sentencing law updates);⁸
- podcasts (*Sentencing Practice Talk* from 2020 to 2025);⁹
- primers (ESP’s most comprehensive annually updated references);¹⁰

³ 543 U.S. 220, 264 (2005). *See also* *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005) (analyzing the benefit of adjusting applicable Guidelines ranges as part of the two-step sentencing process).

⁴ *See generally* *Education*, U.S. SENT’G COMM’N, <https://www.ussc.gov/education> (last visited July 16, 2026) (provides various sentencing resources such as worksheets, videos, and other educational materials).

⁵ *Worksheets*, U.S. SENT’G COMM’N, <https://www.ussc.gov/product-type/worksheets> (last visited July 16, 2026).

⁶ *Training Sessions Archive*, U.S. SENT’G COMM’N, <https://www.ussc.gov/education/training-resources/training-sessions-archive> (last visited July 16, 2026).

⁷ *Decision Trees*, U.S. SENT’G COMM’N, <https://www.ussc.gov/product-type/decision-trees> (July 16, 2026).

⁸ *Case Law*, U.S. SENT’G COMM’N, <https://www.ussc.gov/training-topic/case-law> (last visited July 16, 2026).

⁹ *Sentencing Practice Talk Podcast*, U.S. SENT’G COMM’N, <https://www.ussc.gov/product-type/sentencing-practice-talk-podcast> (last visited July 16, 2026).

¹⁰ *Primers*, U.S. SENT’G COMM’N, <https://www.ussc.gov/product-type/primers> (last visited July 16, 2026).

- eLearning (detailed interactive webpages with evaluation questions and answers);¹¹ and
- a glossary of federal sentencing-related terms.¹²

2. Live and archived online training

To access ESP's archived Adobe Connect Session recordings (or online training), you need an active Commission Adobe Connect account.¹³

3. YouTube page

The United States Courts YouTube page has many ESP videos, especially older ones that are no longer available on the Guidelines website.¹⁴

4. HelpLine and custom training

You can contact ESP's trainers with specific questions or to schedule customized in-person or remote training. To leave a specific Guidelines question on ESP's HelpLine, you can submit a written online request (which is preferred) or leave a voicemail.¹⁵ ESP will call you back to discuss your question within 48 hours (often they respond sooner). To request custom training, complete an online training request form.¹⁶ ESP requests a minimum of 2–3 weeks advance notice for a custom training session.¹⁷

5. Annual conference

ESP offers an annual in-person three-day National Seminar on Federal Sentencing Guidelines (usually in August).¹⁸ You can also browse or

¹¹ *eLearning*, U.S. SENT'G COMM'N, <https://www.ussc.gov/product-type/elearning> (last visited July 16, 2026).

¹² *Glossary of Federal Sentencing-Related Terms*, U.S. SENT'G COMM'N [*Glossary*], <https://www.ussc.gov/education/glossary> (last visited July 16, 2026).

¹³ *See Adobe Connect Session Recordings: Overview*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/elearning/virtual-training-archive/index.html#/lessons/Ehier-ZJ_Eq1CByGXRVKyNNXXfkLg6LE (last visited Aug. 12, 2026).

¹⁴ *See United States Courts*, YOUTUBE, <https://www.youtube.com/@uscourts> (last visited July 27, 2026).

¹⁵ *See HelpLine Online: Have a Question?*, U.S. SENT'G COMM'N, https://askusctraining.usc.gov/apex/r/ussc_apex/askusssc/helpline-landing-page (last visited July 27, 2026). You can also call (202) 503-4545 and leave a message.

¹⁶ *Training Request Form*, U.S. SENT'G COMM'N, https://askusctraining.usc.gov/apex/r/ussc_apex/askusssc/ask-training-request-landing (last visited July 27, 2026) (click the red "Request Training" button).

¹⁷ *See id.*

¹⁸ *See National Training Seminars*, U.S. SENT'G COMM'N, <https://www.ussc.gov/education/annual-national-training-seminar/archive> (last visited July 27, 2026).

search ESP’s resources by substantive topics and training topics.¹⁹

II. Basic federal sentencing concepts

These six basic concepts are foundational to the Guidelines and federal sentencing: (1) the annual Guidelines amendment process; (2) the organization of the Guidelines; (3) relevant conduct as implemented in the Guidelines; (4) the different components of a federal sentence; (5) mandatory-minimum sentencing; and (6) individual-versus-organizational Guidelines.

A. The annual Guidelines amendment process

The Commission has an annual Guidelines amendment process.²⁰ The Commission’s organic statute, 28 U.S.C. §§ 991–998, enacted as part of the Sentencing Reform Act, require certain stakeholders, including the Department of Justice’s Criminal Division, to submit comments to the Commission on its work and proposed amendments.²¹ That same statute also establishes that the Attorney General or Attorney General’s designee shall serve as an *ex officio* (non-voting) member of the Commission.²² In addition, the Department recommends legislation to Congress. Since the first edition in 1987, the Commission has amended the Guidelines over 800 times.²³ Table 1 shows the annual Guidelines amendment cycle.²⁴

Month	Event	Notes
June	Start annual amend- ment cycle.	The Commission publishes pro- posed priorities for comment.

¹⁹ See *Search by Topic*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic> (last visited July 27, 2026); *Training Topics*, U.S. SENT’G COMM’N, <https://www.ussc.gov/training-topic> (last visited July 27, 2026).

²⁰ See 28 U.S.C. §§ 994(o)–(p); U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 27–28 (2025) [FEDERAL SENTENCING: THE BASICS]; *Federal Sentencing: The Basics*, U.S. SENT’G COMM’N (Dec. 2020), <https://www.ussc.gov/education/training-resources/federal-sentencing-basics>; U.S. SENT’G COMM’N, THE U.S. SENTENCING COMMISSION’S AMENDMENT CYCLE (n.d.). See generally U.S. SENT’G COMM’N, RULES OF PRACTICE AND PROCEDURE (2016) (information about the Guidelines amendment process).

²¹ 28 U.S.C. §§ 991–998.

²² 28 U.S.C. § 991(a). See also Scott A.C. Meisler, *The Role and Responsibilities of the Department of Justice’s Ex Officio Sentencing Commissioner*, 74 DOJ J. FED. L. & PRAC., no. 3, 2026, at 121* (providing more information on the role of the Department’s *ex officio* member of the Commission).

²³ See FEDERAL SENTENCING: THE BASICS, note 20, at 27.

²⁴ U.S. SENT’G COMM’N, THE U.S. SENTENCING COMMISSION’S AMENDMENT CYCLE (n.d.).

Month	Event	Notes
Aug.	Publish final priorities.	In public meeting, the Commission votes to adopt final Guidelines amendment priorities.
Sep. to Dec.	Research and review.	Commissioners work with staff to research and review the Guidelines priorities and turn those to proposed amendments.
Jan.	Publish proposed amendments.	In public meeting, the Commission votes to publish proposed Guidelines amendments in <i>Federal Register</i> for comment.
Feb. to Mar.	Review and revise.	The Commission receives public comment on their proposed amendments from stakeholders and may hold public hearings and revise proposed amendments.
Apr.	Vote to promulgate final amendments.	In public meeting, the Commission votes to adopt final amendments.
May	End of amendment cycle.	The Commission sends final Guidelines amendments and explanation to Congress no later than May 1. Unless Congress rejects the amendments, they go into effect on November 1 with the newest Guidelines.

Table 1: Annual Guidelines amendment cycle

Every year, ESP publishes a variety of useful summary guidance on the new Guidelines amendments.²⁵ The best time annually to review such

²⁵ The Commission website maintains an “Amendment” training topic page. *See Amendments*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic/amendments> (last visited July 27, 2026). Our personal favorites include dedicated *Sentencing Practice Talk* episodes on the new amendments and *Amendments in Brief*, “short summaries—usually one to two pages,” of the annual amendments. *Sentencing Practice Talk Podcast*, U.S. SENT’G COMM’N, <https://www.ussc.gov/product-type/sentencing-practice-talk-podcast> (last visited July 27, 2026) (use the check boxes on the lefthand panel to filter by “Training Topic” and click the box next to “Amendments”); *Amendments in Brief*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic/amendments-brief> (last visited July 27, 2026).

guidance is from May 1 (when the amendments are finalized) to November 1 (when the amendments take effect).²⁶

The Department routinely issues an annual summary of the amendments to all federal prosecutors before they go into effect and schedules annual trainings—locally and nationally—for federal prosecutors on the impact and implementation of the new Guidelines.

B. Overview of the Guidelines

In our experience, the easiest way to find and apply the Guidelines is through a physical copy of the current Guidelines.²⁷ Much like browsing the stacks in a library (or flipping through a rules book or statute book), simply browsing, reading, and marking up a section relevant to your current case is a comprehensive way to familiarize yourself with a particular Guideline. We want to highlight five aspects of the Guidelines: (1) a summary of the chapters and appendices; (2) the “One Book” Rule; (3) the importance of commentary; (4) online Guidelines calculators and applications; and (5) using ESP worksheets.

1. Summary of the Guidelines chapters and appendices

Table 2 is a summary of the Guidelines sections.²⁸ Generally, you should apply the Guidelines sequentially, starting with Chapter 1 and Appendix A.²⁹

²⁶ See *generally Education*, U.S. SENT’G COMM’N, <https://www.ussc.gov/education> (last visited July 27, 2026) (provides access to updated sentencing education resources).

²⁷ Criminal Assistant U.S. Attorneys should receive one hardcopy of the Guidelines annually.

²⁸ The “Guidelines” tab on the Commission’s website will take you to an online version and downloadable PDF of the current Guidelines. *Guidelines*, U.S. SENT’G COMM’N, <https://www.ussc.gov/guidelines> (last visited July 27, 2026). The annotated Guidelines contain Historical Notes listing the amendments and effective dates applicable to specific Guidelines text. With the online version, clicking on the blue square plus-sign boxes reveal Historical Notes. In addition, you can full-text search the online and PDF Guidelines.

²⁹ See U.S. SENT’G GUIDELINES MANUAL §1B1.1 (U.S. SENT’G COMM’N 2025); *Basic Relevant Conduct*, U.S. SENT’G COMM’N (May 2020), <https://www.ussc.gov/education/training-resources/basic-relevant-conduct>.

Section	Description
Chapter 1: Introduction, Authority, and General Application	Introduction; the Guidelines' historical evolution; Guidelines' policy decisions; application instructions; key term definitions.
Chapter 2: Offense Conduct	Organized by Guideline based on federal criminal offense type. Assigns Base Offense Levels (BOLs) that then increase and decrease the sentence depending on application of Specific Offense Characteristics (SOCs).
Chapter 3: Adjustments	Broader adjustments that increase or decrease the sentence for aggravating or mitigating factors that apply to a wide variety of offenses like obstruction of justice and acceptance of responsibility. Also explains how to calculate single sentence with multiple convicted counts.
Chapter 4: Criminal History and Criminal Livelihood	How to calculate a defendant's criminal history score and special rules for particular types of defendants like career offenders and sex offenders.
Chapter 5: Determining the Sentencing Range and Options Under the Guidelines	Contains the Sentencing Table, sentencing option rules like fines, probation/supervised release conditions, and consecutive versus concurrent sentences.
Chapter 6: Sentencing Procedures, Plea Agreements and Crime Victims' Rights	Describes sentencing procedures like accepting plea agreements and fact-finding that apply to all sentencing.
Chapter 7: Violations of Probation and Supervised Release	Procedures and penalties that apply to probation and supervised release violations where the defendant violates the last part of their original sentence.
Chapter 8: Sentencing of Organizations	How to calculate the sentence of an organizational defendant.
Appendix A: Statutory Index	Chart where applicable Chapter Two offense guideline is listed by corresponding U.S. Code provision.

Section	Description
Appendix B: Selected Sentencing Statutes, Historical Introduction to the Guidelines Manual, Compilation of Deleted Departure Provisions (separate volume)	The text of selected Title 18 and Title 28 United States Code sentencing statutes, Public Laws governing the commission and drafting of the Guidelines, and Departure provisions deleted in 2025.
Supplement to Appendix C (four volumes)	Prior amendments to the Guidelines, policy statements, and commentary.

Table 2: Guidelines Manual contents

2. The “One-Book” rule

According to the so-called “One-Book” Rule (articulated in section 1B1.11 of the Guidelines), the court is required to use the Guidelines Manual in effect on the sentencing date unless doing so would increase the applicable sentence after the day the offense occurred, violating the U.S. Constitution’s Ex Post Facto Clause.³⁰ Otherwise, the court is required to use the version of the Guidelines in effect on the date the defendant committed the offense.³¹

3. The importance of commentary

After each Guideline is a commentary section. The Guidelines describe three commentary types: (1) “interpret[ing] the guideline or explain[ing] how it is to be applied” (such commentary is often labeled “Application Notes”); and (2) “provid[ing] background information, including factors considered ... or reasons underlying” the guideline.³² Since 2019, appellate courts have divided over the authoritativeness of the Commission’s commentary. The Supreme Court has indicated it will address the appropriate level of deference to accord to the Commentary in *Beird v. United States* this coming term.³³

4. Online Guideline calculators and applications

The Commission has (1) an online Guideline Range Calculator;

³⁰ See U.S.S.G. § 1B1.11(b); 18 U.S.C. § 3553(a)(4)(A)(ii); U.S. CONST. art I, § 9, cl. 3; *Peugh v. United States*, 569 U.S. 530, 539–40 (2013) (interpreting “*ex post facto* Law”).

³¹ U.S.S.G. § 1B1.11(b).

³² See U.S.S.G. § 1B1.7 (explaining significance of the commentary).

³³ No. 25-5343, 2026 WL 1052007 (U.S. Apr. 20, 2026).

(2) a Drug Quantity Calculator; and (3) a Drug Conversation Calculator.³⁴ While they are useful tools, we recommend that you first calculate the old-fashioned way and then use the online tools to confirm. The Commission’s Interactive Data Analyzer provides general sentencing data by federal judicial district and year.³⁵

5. Using ESP worksheets

Finally, the Commission’s *Worksheet for Sentenced Individuals* is perhaps our favorite educational aid.³⁶ Updated annually, the detailed, annotated, multi-page printable (Adobe PDF) form walks you step-by-step through calculating an individual defendant’s *Guideline* sentencing range for one offense.³⁷ There are similar *Worksheets for Illegal Reentry Offenses* and *Sentenced Organizations*.³⁸

C. Relevant conduct as the cornerstone of federal sentencing

Instead of focusing on the defendant’s convicted conduct, which can be influenced by prosecutorial charging decisions, the Guidelines consider “relevant conduct,” which encompasses “a defendant’s ‘real offense conduct’ (and certain types of conduct of co-conspirators, whether or not charged as such) before, during, and after the commission of the offense or offenses of conviction.”³⁹ Relevant conduct does not have to have been charged by the government, proven at trial, or admitted by the defendant

³⁴ *Guideline Range Calculator 2025*, U.S. SENT’G COMM’N, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelinerangecalculator (last visited July 27, 2026); *Drug Quantity Calculator 2025*, U.S. SENT’G COMM’N, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/drugquantitycalculator (last visited July 27, 2026); *Drug Conversion Calculator 2025*, U.S. SENT’G COMM’N, https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/drug-conversion (last visited July 27, 2026).

³⁵ *Interactive Data Analyzer*, U.S. SENT’G COMM’N, <https://www.ussc.gov/research/interactive-data-analyzer> (last visited July 27, 2026).

³⁶ See *Worksheets for Sentenced Individuals*, U.S. SENT’G COMM’N, <https://www.ussc.gov/education/training-resources/worksheets-sentenced-individuals> (last visited July 27, 2026).

³⁷ See *id.*

³⁸ See U.S.S.G. § 2L1.2; *Worksheets for Illegal Reentry Offenses*, U.S. SENT’G COMM’N, <https://www.ussc.gov/education/training-resources/worksheets-illegal-reentry-offenses> (last visited July 27, 2026).

³⁹ FEDERAL SENTENCING: THE BASICS, note 20, at 17 (quoting William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 (1990)). See also 18 U.S.C. § 3661 (use of information for sentencing); U.S.S.G. § 1B1.4 (information to be used in imposing sentence).

so long as the sentencing judge finds the relevant conduct by a preponderance of the evidence through information that has “sufficient indicia of reliability.”⁴⁰ Although an in-depth discussion of relevant conduct is beyond this article’s scope, we briefly discuss (1) relevant conduct versus criminal liability; and (2) general relevant conduct principles and questions.⁴¹

1. Relevant conduct versus criminal liability

Relevant conduct and criminal liability—whether a defendant is found guilty or acquitted at trial—answer different questions.⁴² Criminal liability at trial answers the question whether the government has proven the defendant guilty of committing every element of the offense beyond a reasonable doubt.⁴³ By the time of sentencing, the defendant either has pleaded guilty or was found guilty of the criminal offense.

After the defendant has been determined to be guilty, however, the question shifts to the scope of the conduct—the defendant’s acts or omissions or other criminal participants’ acts or omissions fairly attributable to the defendant and relevant to the convicted offense—provable by a preponderance of the evidence should the defendant be held accountable when determining the defendant’s sentence for the convicted offense. Section 1B1.3 defines relevant conduct as “the range of conduct that is relevant to determining the applicable offense level.”⁴⁴ The Commission’s *Relevant Conduct Primer* further explains:

The guidelines include the concept of relevant conduct in [section] 1B1.3 as a balance between the two types of sentencing systems: “charge offense” sentencing, which looks solely at the elements of the statute of conviction, and “real offense” sentencing, which considers the conduct that occurred in connection with the offense.⁴⁵

⁴⁰ FEDERAL SENTENCING: THE BASICS, note 20, at 17; U.S.S.G. § 6A1.3(a).

⁴¹ The Wilkins and Steer article remains the classic comprehensive discussion of relevant conduct. See Wilkins & Steer, note 39. See also U.S. SENT’G COMM’N, RELEVANT CONDUCT PRIMER (2025) (explaining what falls under the statutory definitions of relevant conduct); Thomas W. Hutchinson et al., *Relevant Conduct (Factors that Determine the Guideline Range)*, in THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 1B1.3 (2026 ed.) (authors’ comments explaining the history, purpose, and practical application of section 1B1.3).

⁴² See generally *Basic Relevant Conduct*, U.S. SENT’G COMM’N (May 2020), <https://www.ussc.gov/education/training-resources/basic-relevant-conduct> (exploring how to use relevant conduct analysis effectively in practice).

⁴³ *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

⁴⁴ U.S.S.G. § 1B1.3 cmt. n.10.

⁴⁵ RELEVANT CONDUCT PRIMER, note 41, at 1.

2. Relevant conduct principles and questions

As implemented in Chapters One, Two, and Three of the Sentencing Guidelines, relevant conduct observes three main principles when answering two questions.⁴⁶ Those three main principles are as follows:

1. **Furtherance.** The defendant should be held accountable for their acts or omissions “in *furtherance* of that criminal activity.”⁴⁷
2. **Acts of others.** The defendant may be accountable for *other* criminal participants’ *acts or omissions* that were (a) within the scope of the jointly undertaken criminal activity; (b) “in *furtherance*” of that criminal activity; and (c) reasonably foreseeable.⁴⁸
3. **Common scheme or plan.** For certain offenses, the defendant may also be accountable for acts or omissions part of the “*same course of conduct*” or “*common scheme or plan*” as the convicted offense.⁴⁹

Those three principles are observed when answering two questions: (1) *Who* committed the act or omission?; and (2) *When* were the acts or omissions committed?⁵⁰ Answering the “Who” question is limited to the defendant or other criminal participants. Answering the “When” question is limited to (a) *in preparation* for the convicted offense; (b) *during* the commission of the convicted offense; or (c) *avoiding detention of or responsibility* for the convicted offense.⁵¹

Practically speaking, in the Guidelines, relevant conduct is calculated through BOLs, SOC, Cross References, and Variances.⁵² For every charged offense, you need to know the earliest date of relevant conduct for that offense to calculate the defendant’s criminal history.

⁴⁶ See U.S.S.G. § 1B1.3.

⁴⁷ See U.S.S.G. § 1B1.3 cmt. n.3(C) (emphasis added). See also U.S. SENT’G COMM’N, §1B1.3—RELEVANT CONDUCT ANALYSIS: PRINCIPLE ONE—ACTS OF DEFENDANT 1 (2020) (elaborating on defendant’s conduct that is considered relevant).

⁴⁸ U.S. SENT’G COMM’N §1B1.3—RELEVANT CONDUCT ANALYSIS: PRINCIPLE TWO—ACTS OF OTHERS 1 (2020) (emphasis added).

⁴⁹ U.S. SENT’G COMM’N, §1B1.3—RELEVANT CONDUCT ANALYSIS: PRINCIPLE THREE—EXPANDED RELEVANT CONDUCT 1 (2020) (emphasis added).

⁵⁰ See *Basic Relevant Conduct*, U.S. SENT’G COMM’N (May 2020), <https://www.usc.gov/education/training-resources/basic-relevant-conduct>.

⁵¹ See *id.*; U.S. SENT’G COMM’N, §1B1.3—RELEVANT CONDUCT ANALYSIS: PRINCIPLE ONE—ACTS OF DEFENDANT 1 (2020) (emphasis added).

⁵² See section II (defining these Guidelines terms).

D. Federal sentence components

The primary part of a federal criminal sentence is a deprivation of liberty, either incarceration or probation. If relevant to the crime, a judge could impose a financial penalty. Most serious criminal sentences also impose supervised release to protect the public while reintegrating the prisoner into society.

Although Congress has abolished parole for all federal crimes, under limited circumstances the Federal Bureau of Prisons can modify a prison sentence with Federal Time Credits.⁵³ Finally, two tables summarize federal statutory criminal penalty classifications.

1. Deprivation of liberty

In many federal sentences, the primary component of a federal sentence is a deprivation of liberty, either imprisonment or probation. In Fiscal Year 2024, 81% of all federal sentences were prison only; 12% of eligible defendants were sentenced to probation only; with an additional 4% sentenced to a fine only or probation and confinement.⁵⁴ The Federal Bureau of Prisons (BOP) is the Department of Justice federal agency that oversees imprisonment.⁵⁵

In contrast, “probation” is an alternative deprivation of liberty with conditions of supervision, “although probation may involve a condition of a short amount of incarceration (such as weekends in jail), confinement in a halfway house, or home detention.”⁵⁶ Statutory exclusions to probation include:

- 18 U.S.C. § 3561(a)(1) (excluding individual defendants convicted of Class A and B felonies—explained further below and incorporated by U.S.S.G. § 5B1.1);⁵⁷ and
- 18 U.S.C. § 3561(a)(2) (excluding defendants convicted of “an offense for which probation has been expressly precluded”).⁵⁸

⁵³ See generally Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOYOLA L.A. L. REV. 587, 601–03 (2020) (collecting legislative history).

⁵⁴ See *2026 Sentencing Options Data Briefing*, U.S. SENT’G COMM’N (Feb. 13, 2026), <https://www.ussc.gov/education/videos/2026-sentencing-options-data-briefing>. This data does not capture sentences in which the punishment imposed at sentencing is analogous to probation such as time served and supervised release. See *id.*

⁵⁵ *Glossary*, note 12, at *Bureau of Prisons*.

⁵⁶ U.S.S.G. § 5B1.1; *Glossary*, note 12, at *Probation*.

⁵⁷ 18 U.S.C. § 3561(a)(1). See subsection II.D.4 (federal criminal penalty classifications).

⁵⁸ 18 U.S.C. § 3561(a)(2). See, e.g., 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B) (barring courts from “plac[ing] on probation or suspend[ing] the sentence of any person sentenced under” certain provisions of the Controlled Substances Act).

As a result, probation is only legally available to approximately half the offenders sentenced any given year.⁵⁹ Although some probation ineligible defendants may get the equivalent of time served with supervised release.

A person on probation is supervised by a U.S. Probation Officer (USPO) and “must follow certain rules announced by the judge at time of sentencing and listed on the judgment form.”⁶⁰ U.S. Probation and Pretrial Services are decentralized by federal judicial district.⁶¹

The famed Guidelines Sentencing Table is divided into four zones which generally provide the sentencing options that courts consider in determining the appropriate sentence.⁶²

- *Zone A*: There are four options: (1) probation; (2) “probation with a period of intermittent confinement, community confinement, or home detention”; (3) “a ‘split sentence’ (*i.e.*, part of the term satisfied by imprisonment and the remainder satisfied by a term of supervised release with a condition that substitutes community confinement or home detention for imprisonment, according to the schedule in §5C1.1(e))”; or (4) imprisonment.⁶³
- *Zone B*: There are three options: (1) “probation with the minimum term of imprisonment satisfied by a period of intermittent confinement, community confinement, or home detention, according to the schedule in §5C1.1(e)”; (2) “a ‘split sentence’ (with at least one month satisfied by imprisonment)”; or (3) imprisonment.⁶⁴
- *Zone C*: There are two options: (1) “a ‘split sentence’ (with at least

⁵⁹ Compare U.S. SENT’G COMM’N, 2024 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl. 11 (2024) (showing approximately 60,000 sentencing for FY 2024), with U.S. SENT’G COMM’N, PROPOSED AMENDMENT ON SENTENCING OPTIONS: PUBLIC DATA BRIEFING, at slide 6 (2026) (listing approximately 27,600 probation eligible defendants).

⁶⁰ *Glossary*, note 12, at *Probation*.

⁶¹ *Probation and Pretrial Services*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services> (last visited July 27, 2026). The Chief U.S. Probation Officer for each district manages all law-enforcement USPOs and civilian Officer Assistants in the district. See *Probation and Pretrial Services—Mission*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/history/probation-and-pretrial-services-mission> (last visited July 27, 2026).

⁶² See U.S.S.G. ch. 5, pt. A. In an amendment that will go into effect on November 1, 2026, the Sentencing Table will be placed in U.S.S.G. § 5A1.1(c). See U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 92–93 (2026) [AMENDMENTS]. In 2026, the Commission voted to clarify the zones and table and emphasize non-incarceratory sentences. *Id.* at 93–95.

⁶³ AMENDMENTS, note 62, at 93 (citing U.S.G.G. § 5B1.1(a)(1); *id.* § 5C1.1(b), (e); *id.* § 5C1.1 cmt. n.2).

⁶⁴ *Id.* at 93 (citing U.S.G.G. § 5B1.1(a)(2); *id.* § 5C1.1(c), (e); *id.* § 5C1.1 cmt. n.3).

one-half of the minimum term satisfied by imprisonment)”; or (2) imprisonment.⁶⁵

- *Zone D*: The sole option is imprisonment.⁶⁶

2. Financial penalties

A federal sentence generally may contain three types of financial penalties:

1. *fines*, which must be imposed in all cases unless the defendant can establish they are unable (and unlikely to become able) to pay;⁶⁷
2. *restitution*, money owed to a victim to compensate for damages caused by the defendant, which in some cases is mandatory;⁶⁸ and
3. *special assessments*, a standard fee assessed for each convicted count which goes into a crime victim compensation fund.⁶⁹

A judge can impose these financial penalties in addition to a deprivation of liberty or as a stand-alone sentence.⁷⁰

3. Supervised release

After abolishing parole, Congress created supervised release (SR). Unlike parole, which was a substitute for a part of the original prison term, SR is for a specified period *after* completion of the entire original prison term.⁷¹ Any sentence of imprisonment greater than one year should be

⁶⁵ *Id.* at 94 (citing U.S.G.G. § 5C1.1(d), (e); *id.* § 5C1.1 cmt. n.4).

⁶⁶ *Id.* at 94 (citing U.S.G.G. § 5C1.1(f)).

⁶⁷ See *Glossary*, note 12, at *Fine*; U.S.S.G. § 5E1.2(individual defendant fine ranges); U.S.S.G. § 8C1.1 (organizational defendant fine ranges).

⁶⁸ See 34 U.S.C. § 20141 (Victims’ Rights and Restitution Act); 18 U.S.C. § 3771 (Crime Victims’ Rights Act); U.S. DEP’T OF JUST., THE ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2022). See also generally *Glossary*, note 12, at *Restitution* (defining and contextualizing the term); *Economic Crimes—Quick Reference Materials*, U.S. SENT’G COMM’N, <https://www.ussc.gov/education/training-resources/economic-crimes-quick-reference-materials> (last visited July 27, 2026) (explaining economic charges where restitution may be apt); U.S. SENT’G COMM’N, ECONOMIC CRIMES: 2018 ANNUAL NATIONAL SEMINAR (2018) (exploring restitution in the context of loss); U.S. SENT’G COMM’N, COMMISSION RESOURCES FOR RESTITUTION (2023) (offering resources for further education on restitution); U.S. SENT’G COMM’N, ECONOMIC CRIMES: RESTITUTION (2017) (comparing restitution to loss).

⁶⁹ See *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990).

⁷⁰ See 18 U.S.C. § 3572 (fines); *id.* §§ 3663–3663A (restitution); *id.* § 3013 (special assessment); FEDERAL SENTENCING: THE BASICS, note 20, at 13 n.87 (citing *United States v. Elliot*, 971 F.2d 620, 622 (10th Cir. 1992)).

⁷¹ See FEDERAL SENTENCING: THE BASICS, note 20, at 14.

followed by SR.⁷² SR's primary purpose "is not to punish, but instead to facilitate the defendant's reentry into the community."⁷³ Although SR is usually discretionary for the court, certain criminal statutes require SR.⁷⁴ When considering SR, a sentencing court should make an individualized assessment, considering the statutory factors at 18 U.S.C. § 3583(c) and (e).⁷⁵

If a prisoner violates the conditions of their probation or SR, the violation is treated as a new criminal proceeding, revocation of probation or SR.⁷⁶ In consultation with the probation officer, the court may reassess SR decisions—including its length and conditions—after a defendant's release from imprisonment.⁷⁷

4. Federal criminal penalty classifications

Federal criminal penalties are statutorily classified into the following:

1. Class A–E felonies;⁷⁸
2. Class A–C Misdemeanors;⁷⁹ and
3. Infractions.⁸⁰

Each classification has corresponding areas in the following:

1. maximum possible prison terms;⁸¹
2. maximum fines;⁸²
3. probation terms (if authorized);⁸³
4. maximum SR terms;⁸⁴
5. maximum possible prison terms for Revocation of SR;⁸⁵ and
6. special assessment amounts.⁸⁶

⁷² See U.S.S.G. § 5D1.1(1) (November 2025 Amendment).

⁷³ *Glossary*, note 12, at *Supervised Release*.

⁷⁴ See FEDERAL SENTENCING: THE BASICS, note 20, at 14.

⁷⁵ U.S.S.G. § 5D1.2(a); 18 U.S.C. § 3583(c), (e).

⁷⁶ See *generally* U.S. SENT'G COMM'N, PROBATION AND SUPERVISED RELEASE (2025) (explaining the terms of probation and supervised release for different classes of charges).

⁷⁷ See FEDERAL SENTENCING: THE BASICS, note 20, at 23.

⁷⁸ See 18 U.S.C. § 3559.

⁷⁹ See *id.*

⁸⁰ See *id.* § 3571(b)(7).

⁸¹ See *id.* § 3559.

⁸² See *id.* § 3571(b).

⁸³ See *id.* § 3561(a).

⁸⁴ See *id.* § 3583(b); U.S.S.G. § 5D1.2.

⁸⁵ See 18 U.S.C. § 3565.

⁸⁶ See *id.* § 3013.

Table 3 shows a breakdown of the federal criminal sentencing penalties.⁸⁷

Type	Class	Maximum Imprisonment	Maximum Fine	Probation	Maximum Supervised Release	Maximum Supervised Release Revocation Imprisonment							
Felony	A	Life imprisonment (or death)	\$250,000	Not authorized	5	5							
	B	≥ 25 years				3							
	C	NLT 10 years		NLT 1 year	3	2							
		NMT 25 years											
	D	NLT 5 years		NMT 5 years									
		NMT 10 years											
	E	NLT 1 year NMT 5 years											
Misdemeanor	A	NLT 6 months	\$100,000	NMT 5 years	1	1							
		NMT 1 year											
	B	NLT 30 days	\$5,000										
		NMT 6 months											
	C	NLT 5 days											
		NMT 30 days											
Inf.	N/A	5 days		NMT 1 year	N/A	N/A							

Table 3: Federal criminal sentencing penalties

E. Mandatory-minimum sentences

When Congress passes a criminal law, Congress usually includes a punishment for the crime. As summarized in Table 3, such punishment includes a *statutory maximum* (the highest possible amount of punishment). Sometimes, Congress also includes a *mandatory minimum* (the lowest possible amount of punishment). In essence, when considering a sentence for a convicted offense, the mandatory minimum serves as the sentence’s “floor” and the mandatory maximum serves as the sentence’s “ceiling.”⁸⁸ The Congressional Research Service has a useful—albeit dated—overview of federal mandatory-minimum sentences.⁸⁹

⁸⁷ In the table, “Inf.” means “Infraction,” “NLT” means “no less than,” and “NMT” means “no more than.”

⁸⁸ See U.S. SENT’G COMM’N, QUICKFACTS: MANDATORY MINIMUM PENALTIES (2025).

⁸⁹ See CHARLES DOYLE, CONG. RSCH. SERV., RL32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES (2013).

For designated offenses, the mandatory minimum always applies over any shorter Guideline sentence except in two statutory exceptions.⁹⁰ Considering the punitive nature of mandatory-minimum sentences, it is not surprising that there is substantial litigation over whether a defendant's convicted offense and relevant conduct fit the statutory definition requiring the mandatory minimum. The U.S. Supreme Court has developed a rather arcane and counterintuitive method to answer that definitional question called the categorical approach. The categorical approach is backwards looking and almost always used to determine whether a *prior* conviction qualifies for certain statutory sentencing enhancements when sentencing the *instant offense*, some of which include mandatory minimums.

1. Two exceptions

When a mandatory-minimum sentence applies to a particular federal criminal statute, there are only two possible statutory exceptions that can reduce the mandatory-minimum sentence: (1) substantial assistance (for all crimes) under 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n); and (2) the so-called “safety valve” (for federal drug offenses) under 18 U.S.C. § 3553(f).⁹¹

First, the government must move for the sentencing court to reduce the applicable mandatory-minimum sentence to reward the defendant's “substantial assistance” in the government's investigation or prosecution of another person who has committed a criminal offense.⁹² The “substantial assistance” downward variance is the most commonly applied Guidelines variance.⁹³ It applies to all federal crimes with mandatory minimums.⁹⁴ Before the sentencing court can consider a reduction for substantial assistance, the parties must have received sufficient presentence notice of its possibility.⁹⁵

Second, if a federal drug offender meets a narrow, five-part “safety valve” test, then the court must calculate a new sentence under the Guidelines below the mandatory minimum.⁹⁶ The Commission amended the

⁹⁰ See U.S.S.G. §§ 5G1.1, 5G1.2.

⁹¹ 18 U.S.C. § 3553(e)–(f); 28 U.S.C. § 994(n).

⁹² See 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1; *Melendez v. United States*, 518 U.S. 120, 125–26 (1996).

⁹³ U.S. SENT'G COMM'N, 2025 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80 (2025).

⁹⁴ See U.S.S.G. § 5K1.1 cmt. n.1.

⁹⁵ See FEDERAL SENTENCING: THE BASICS, note 20, at 9.

⁹⁶ See 18 U.S.C. § 3553(f); *Pulsifer v. United States*, 601 U.S. 124, 132 (2024) (holding that a “defendant is eligible for safety-valve relief under Paragraph (f)(1) only if he ‘does not have’ all three of the [criminal history] items listed”). See also FEDERAL

Guidelines’ “safety valve” provisions in 2023.⁹⁷ The five-part safety-valve test is as follows:

1. **Limited criminal history:** The defendant does not have more than four criminal history points (excluding one-point offenses); does not have a prior three-point offense; and does not have a prior two-point violent offense.⁹⁸
2. **No violence:** The defendant did not use, threaten, or induce (from others) violence or possess a firearm or other dangerous weapon when committing the convicted offense.⁹⁹
3. **No death/injury:** No one died or was seriously injured during the convicted offense.¹⁰⁰
4. **Role in the offense:** The defendant was not an “organizer, leader, manager, or supervisor of others” nor “engaged in a continuing criminal enterprise” when committing the convicted offense.¹⁰¹
5. **Truthful information:** The defendant has truthfully provided the government with “all information and evidence ... concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” The fact that defendant’s information may not be “relevant or useful” is not by itself disqualifying.¹⁰²

2. Categorical approach

The so-called categorical approach is most often implicated when determining whether an offense (usually a prior conviction) fits within a given definition of an offense with a mandatory-minimum sentence, such as “crime of violence,” “drug trafficking offense,” or “violent felony.”¹⁰³ Under the categorical approach, “courts are not permitted to look to the conduct underlying the prior ... conviction, only to the statute of conviction, to determine the elements of the prior offense.”¹⁰⁴ The elements of

SENTENCING: THE BASICS, note 20, at 11–13 (explaining the application of the safety-valve test).

⁹⁷ See U.S. SENT’G COMM’N, 2023 AMENDMENTS IN BRIEF: AMENDMENT #817 (2023) (Safety Valve Provision).

⁹⁸ See U.S.S.G. § 5C1.2(a)(1); subsection III.A.4 (discussing criminal history calculations).

⁹⁹ See U.S.S.G. § 5C1.2(a)(2).

¹⁰⁰ See *id.* § 5C1.2(a)(3).

¹⁰¹ *Id.* § 5C1.2(a)(4).

¹⁰² *Id.* § 5C1.2(a)(5).

¹⁰³ See U.S. SENT’G COMM’N, CATEGORICAL APPROACH: 2017 ANNUAL NATIONAL SEMINAR 1 (2017).

¹⁰⁴ *Id.*

the prior offense are then compared to definition to determine whether the prior offense fits within the definition.¹⁰⁵ There is also a “modified categorical approach”:

Similar to the categorical approach, the modified categorical approach is used to determine whether an offense (usually a prior conviction) fits within a given definition, such as for “crime of violence,” “drug trafficking offense,” or similar term. The court must compare the elements of the offense of conviction to the relevant definition. Under the modified approach, the court may use certain official court documents, such as a charging document or plea agreement from the prior case, to determine the elements of the offense of conviction.¹⁰⁶

There are several excellent resources to consult when applying the categorical approach.¹⁰⁷ The limitations of the categorical approach are well documented in judicial opinions: It assesses an offender’s culpability based not on what was done, but on whether some hypothetical person could commit the same offense with less violence; leads to disparate treatment of otherwise similarly situated defendants; and relies on judicial records that often lack sufficient detail to accurately identify the defendant’s offense of conviction.¹⁰⁸

For the past few cycles, the Commission has considered ways to revise the categorical approach in the career offender guideline in response to widespread criticism of the categorical approach.¹⁰⁹ The Department has filed public letters with its position on this proposed Amendment.¹¹⁰

¹⁰⁵ See *id.*

¹⁰⁶ *Glossary*, note 12, at *Modified Categorical Approach*.

¹⁰⁷ See U.S. SENT’G COMM’N, CATEGORICAL APPROACH PRIMER (2026); U.S. SENT’G COMM’N, COMMISSION RESOURCES FOR THE CATEGORICAL APPROACH (2023) (listing the categorical approach topics in *Sentencing Practice Talk* Episode 20, parts 1–11); U.S. SENT’G COMM’N, DIVISIBILITY IN THE CATEGORICAL APPROACH: 2017 NATIONAL SEMINAR (2017).

¹⁰⁸ See U.S. SENT’G COMM’N, CATEGORICAL APPROACH PRIMER (2026).

¹⁰⁹ U.S. SENT’G COMM’N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (2026).

¹¹⁰ See U.S. SENT’G COMM’N, 2025–2026 AMENDMENT CYCLE: PUBLIC COMMENT ON CERTAIN PROPOSED AMENDMENTS 125–62 (2026) (published separately as *Sentencing Guidelines for United States Courts*, 91 Fed. Reg. 5556-02 (Feb. 6, 2026)); Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 24, 2026); Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (Mar. 18, 2026); Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 18, 2025); Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 15, 2024); Letter from Jonathan

F. Individual-versus-organizational Guidelines

Because less than 1% of federally sentenced defendants are organizations and because novices to the Guidelines typically are not involved in organizational sentencing, this article focuses primarily on the sentencing of individual defendants.¹¹¹ Federal law defines an “organization” as “a person other than an individual” including “corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, government and political subdivisions ... and non-profit organizations.”¹¹² Chapter Eight of the Guidelines is solely devoted to organizational sentencing.¹¹³

III. The *Booker* two-step process

This part attempts to provide an annotated one-stop shop synthesizing ESP’s outstanding guidance on *Booker*’s two sentencing steps for each individual convicted offense: (A) calculate the Guideline range and determine sentencing requirements and options under the Guidelines; and (B) consider all the 18 U.S.C. § 3553(a) factors at sentencing.¹¹⁴ As the excellent (and highly recommended) Federal Judicial Center’s *Benchbook for United States District Courts* explained:

Effective November 1, 2025, however, an amendment to the Guidelines changed the three-step process to two-steps, primarily by eliminating departures as a separate consideration. Although the term “departures” has been deleted and they will no longer be included in the calculation of the advisory guideline sentence, “judges who would have relied upon facts

J. Wroblewski, Crim. Div., U.S. Dep’t of Just., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 31, 2023); Letter from Kenneth A. Polite, Jr., Assistant Att’y Gen., Crim. Div., & Jonathan J. Wroblewski, Crim. Div., U.S. Dep’t of Just., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (Sep. 12, 2022).

¹¹¹ In 2023, organizations were about 0.18% of all sentenced defendants reported to the Commission. *Compare* U.S. SENT’G COMM’N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2023: FOURTH CIRCUIT 1 (2024) (stating in 2023, 64,124 sentenced cases were reported to the Commission), *with* U.S. SENT’G COMM’N, QUICKFACTS: SENTENCED ORGANIZATIONS 1 (2024) (stating 113 organizations were sentenced in 2023).

¹¹² U.S.S.G. § 8A1.1 cmt. n.1. *See* 18 U.S.C. § 18 (defining “organization”). *See also Basics of the Organizational Guidelines*, U.S. SENT’G COMM’N (May 2021), <https://www.ussc.gov/education/training-resources/basics-organizational-guidelines> (provides training on applying the Guidelines).

¹¹³ *Annotated 2025 Chapter 8: Chapter Eight—Sentencing of Organizations*, U.S. SENT’G COMM’N, <https://www.ussc.gov/guidelines/2025-guidelines-manual/annotated-2025-chapter-8> (last visited July 28, 2026).

¹¹⁴ 18 U.S.C. § 3553.

previously identified as a basis for a departure w[ill] continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).” Two departure provisions have been kept: U.S.S.G. §5K3.1, p.s. (Early Disposition Programs), which is moved to new U.S.S.G. §3F1.1, p.s. and will now be considered in the first step as part of the guideline calculations; and U.S.S.G. §5K1.1, p.s. (Substantial Assistance to Authorities), which will be considered in the second step as part of the § 3553(a) analysis.¹¹⁵

There are many excellent summary overviews of the *Booker* process.¹¹⁶ The ESP eLearning Curriculum has interactive multiple-choice and true-false questions and explanations that provide invaluable practice and examples of the process in action.¹¹⁷

A. Calculate the Guideline range

To identify the Guideline range given an individual defendant convicted of a particular federal criminal offense, you must do the following: (1) determine the applicable Chapter Two Guideline by looking up the convicted offense in Appendix A of the Guidelines; (2) look up the applicable Chapter Two Guideline and follow the instructions to calculate the convicted offense’s *Offense Seriousness* or *Offense Level*; (3) review the Chapter Three adjustments to see if any apply; (4) calculate the individual defendant’s Chapter Four *Criminal History Category*; and (5) matching the *Offense Level* and *Criminal History* on the *Sentencing Table*.

¹¹⁵ FED. JUD. CTR., BENCHBOOK FOR UNITED STATES COURTS § 4.01, at 199 (7th ed. 2026) (citing *Introductory Commentary*, in 2025 GUIDELINES MANUAL ANNOTATED, U.S. SENT’G COMM’N 1 (2025)).

¹¹⁶ See FEDERAL SENTENCING: THE BASICS, note 20 (listing U.S. SENT’G COMM’N, PRIMER ON AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS (2025); U.S. SENT’G COMM’N, PRIMER ON DEPARTURES AND VARIANCES (2024)); U.S. SENT’G COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES (n.d.) [U.S.S.G. OVERVIEW]; U.S. SENT’G COMM’N, SENTENCING PROCEDURE AT A GLANCE (2019). See also FEDERAL SENTENCING: THE BASICS, note 20, at 5–6 (“The *Booker* Court remedied the constitutional defect by striking the portion of 18 U.S.C. § 3553 that made the guidelines ‘mandatory,’ making the guideline system ‘effectively advisory.’” (footnote omitted)).

¹¹⁷ *eLearning*, U.S. SENT’G COMM’N, <https://www.ussc.gov/product-type/elearning> (last visited July 28, 2026).

1. Determine the Appendix A offense Guideline

Appendix A has two columns where on the left side of each column are listed the applicable United States Code citations in numerical order (by Title and Section number) and on the right side of the column is listed the corresponding Guideline. Find the convicted offense and corresponding Guideline in Appendix A.

Over 80% of all federal sentences are determined by *four* Guidelines.¹¹⁸ These Guidelines include the following:

1. U.S.S.G. § 2D1.1 (Drug Trafficking) for 21 U.S.C. §§ 841, 846;¹¹⁹
2. U.S.S.G. § 2L1.2 (Illegal Reentry) for 8 U.S.C. § 1326 (Illegal Reentry);¹²⁰
3. U.S.S.G. § 2K2.1 (Firearm Offenses) for 18 U.S.C. § 922 (Felon in Possession);¹²¹ and
4. U.S.S.G. § 2B1.1 (Fraud, Theft, Embezzlement) for 18 U.S.C. § 1343 (Wire Fraud).¹²²

If your own cases reflect the national average, being familiar with these four Guidelines might provide the most “bang for your buck.”

2. Calculate the Chapter Two offense level

Taking the appropriate Guideline from Appendix A for the convicted offense, identify (a) the appropriate starting point *Base Offense Level (BOL)*; (b) applicable *Specific Offense Characteristics (SOCs)*, aggravating or mitigating factors related to the particular offense type usually listed in Guideline subsections; and (c) *Cross References*, instructions to apply another offense guideline which often specify to apply the cross reference only if it results in a greater offense level, in Chapter Two.¹²³ When you finish reviewing Chapter Two, you should now have an *Offense Level* for the convicted offense.

¹¹⁸ See U.S. SENT’G COMM’N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 9 (2022) (“Together these four types of offenses accounted for 82.1 percent of all cases reported to the Commission in FY 2022.”).

¹¹⁹ U.S.S.G. § 2D1.1; 21 U.S.C. §§ 841, 846.

¹²⁰ U.S.S.G. § 2L1.2; 8 U.S.C. § 1326.

¹²¹ U.S.S.G. § 2K2.1; 18 U.S.C. § 922.

¹²² U.S.S.G. § 2B1.1; 18 U.S.C. § 1343.

¹²³ See *Glossary*, note 12, at *Cross Reference*; FEDERAL SENTENCING: THE BASICS, note 20, at 15; U.S.S.G. OVERVIEW, note 116, at 1.

3. Review Chapter Three adjustments

Moving on to Chapter Three of the Guidelines, review the possible adjustments applicable to all offenses: (a) Victim-Related Adjustments (Part A); (b) Offender's Role Adjustments (Part B); (c) Obstruction of Justice Adjustments (Part C); (d) Multiple-Count Adjustments (Part D); and (e) Acceptance of Responsibility Adjustments (Part E).¹²⁴ These aggravating and mitigating factors are common across all federal criminal offenses.¹²⁵

Unlike the rest of these adjustments, Multiple-Count Adjustments are not intuitive.¹²⁶ The Commission's *Grouping Multiple Counts of Conviction* Decision Tree is ESP's most popular educational resource for a reason.¹²⁷ The Chapter Three, Part D Guidelines grouping rules describe how to determine a single offense level for an individual defendant convicted of multiple counts.¹²⁸ These grouping rules apply to (1) *multiple convicted counts contained in the same indictment or information*; or (2) where *sentences for multiple counts are imposed on the same day or in the same consolidated sentencing hearing*.¹²⁹ The grouping analysis is a *process of elimination*. In April 2026, the Commission shall adopted a seemingly simpler grouping analysis that, absent congressional action, will go into effect on November 1, 2026.¹³⁰

Simplified multiple-count grouping analysis:

1. Sort each count by Guideline into subsections (a), (b), or (c) of section 3D1.1:
 - a. Subsection (a). For multiple counts of same Guideline, use section 3D1.1(a).

¹²⁴ See U.S.S.G. ch. 3.

¹²⁵ See U.S. SENT'G COMM'N, PRIMER ON AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS (2025); FEDERAL SENTENCING: THE BASICS, note 20, at 14; U.S.S.G. OVERVIEW, note 116, at 2.

¹²⁶ See U.S. SENT'G COMM'N, COMMISSION RESOURCES FOR: GROUPING MULTIPLE COUNTS (2025).

¹²⁷ See SENTENCE PRACTICE TALK: *Navigating the Website* (Apple Podcasts, Sep. 4, 2024) (citing U.S. SENT'G COMM'N, GROUPING MULTIPLE COUNTS OF CONVICTION: DECISION TREE (2024)). In November 2026, simpler grouping rules go into effect. ESP updated their decision tree to reflect this simpler analysis. See U.S. SENT'G COMM'N, 2026 AMENDMENTS-IN-BRIEF: MULTIPLE COUNTS 2 (2026) [2026 MULTIPLE-COUNT FLOWCHART].

¹²⁸ See *Grouping Multiple Counts of Conviction*, U.S. SENT'G COMM'N (2020) [*Grouping Multiple Counts eCourse*], <https://www.ussc.gov/education/training-resources/grouping-multiple-counts-conviction>.

¹²⁹ See U.S.S.G. § 3D1.1 cmt. n.1.

¹³⁰ See 2026 MULTIPLE-COUNT FLOWCHART.

- b. Subsection (b). For multiple counts of same Guideline when involving different victims or same victim, different occasions, use section 3D1.1(b).
 - c. Subsection (c). For all other counts, use section 3D1.1(c).
- 2. For each subsection, apply the Guidelines as follows:
 - a. Subsection (a). Apply Guideline one time based on combined offense behavior under section 3D1.1(a).
 - b. Subsection (b). Calculate each count separately, and apply adjustment based on number of counts under section 3D1.1(b)(2). For the number of counts covered by subsection (b)(1), if two counts, add two levels to the Offense Level; if three counts, add three levels to the Offense Level; if four or five counts, add four levels to the Offense Level; and if six or more counts, add five levels to the Offense Level.¹³¹
 - c. Subsection (c). Calculate each Count separately.
- 3. The offense level for all counts is the highest offense level applicable to any group or count in subsection (a), (b), or (c).¹³²

4. Calculate the defendant's criminal history

Using the defendant's rap sheet and other verifiable criminal history information, apply Chapter Four of the Guidelines and calculate the defendant's total criminal history points using Table 4.¹³³

¹³¹ See U.S.S.G. §§ 2B2.1, 2B3.1, 2B3.2, 2B3.3, 2D2.3, 2E1.3, 2E1.4, 2E2.1, 2G1.1, 2G1.3, 2G2.1, 2H1.1, 2H4.1, 2J1.2, 2J1.3, 2K1.4; 2M3.9, 2M6.1, 2N1.1, 2Q1.4, 2X6.1, 3D1.1(b)(1)–(2) (Guidelines covered by subsection 3D1.1(b)).

¹³² 2026 MULTIPLE-COUNT FLOWCHART, *in* U.S. SENT'G COMM'N, 2026 AMENDMENTS IN BRIEF 2 (2026).

¹³³ See U.S.S.G. §§ 4A1.1, 4A1.2; U.S. SENT'G COMM'N, CRIMINAL HISTORY CALCULATIONS/U.S.S.G. § 4A1.1 & 4A1.2, at 1 (2019). See generally *Basic Criminal History*, U.S. SENT'G COMM'N (Apr. 2024) [*Basic Crim. Hist. eCourse*], <https://www.ussc.gov/education/training-resources/basic-criminal-history> (explaining how to utilize criminal history in sentencing); U.S. SENT'G COMM'N, COMMISSION RESOURCES FOR CRIMINAL HISTORY (2025) (providing more resources for using criminal history).

For adult (age 18+) convictions			For juvenile (before age 18) convictions		
Points	Sentence	Earliest date of relevant conduct time frame (within)	Points	Sentence	Earliest date of relevant conduct time frame (within)
3	> 13 months	15 years of prior sentence imposition or release	3	> 13 months (and convicted as an adult)	15 years of prior sentence imposition or release
2	≥ 60 Days	10 years of prior sentence imposition	2	≥ 60 Days	5 years of prior sentence imposition or release
1 (max of 4)	All others (with exceptions)	10 years of prior sentence imposition	1 (max of 4)	All others (with exceptions)	5 years of prior sentence imposition

Table 4: Criminal history points for prior convictions

If the defendant (1) receives seven or more points under U.S.S.G. § 4A1.1(a)–(d); and (2) commits any part of the instant federal offense while under a “criminal justice sentence” (including probation, parole, SR, imprisonment, work release, or escape status), then the instant federal criminal offense can receive one more “status” point.¹³⁴

Treat multiple prior sentences as a “single sentence” if (1) the prior sentences were for offenses *not* separated by an *intervening arrest*, where the defendant was arrested for the first offense *before* committing the second offense; or (2) the prior offenses either (a) were named in the same charging document (indictment or information), or (b) resulted in *sentences imposed on the same day*. If the multiple prior sentences are “*concurrent*,” use the longest individual sentence as the “single sentence.” If the multiple prior sentences are “*consecutive*,” aggregate (add together) the length of the individual sentences.¹³⁵

¹³⁴ See U.S.S.G. § 4A1.1(e); *Basic Crim. Hist. eCourse*.

¹³⁵ See *Criminal History: Assigning Points for Multiple Prior Sentences*, U.S. SENT’G

For revocation of probation, parole, or SR sentences, generally the time imposed upon revocation can be added to the amount of time imposed at the original sentencing.¹³⁶ In some instances, the amount of revocation may affect the counted period.¹³⁷

Once you have the defendant's total criminal history points, determine the defendant's *Criminal History Category*: Category I is 0–1 points; Category II is 2–3 points; Category III is 4–6; Category IV is 7–9; Category V is 10–12; and Category VI is 13 or more.¹³⁸

5. Identify the Guideline range

The Guideline range is determined on the Guidelines' famed *Sentencing Table*.¹³⁹ We recommend keeping a laminated version of the Sentencing Table handy for reference.¹⁴⁰ In essence, the Sentencing Table plots the intersection of two variables, *Offense Seriousness* or *Offense Level* (the *y*-axis, ranging from 1–43) and *Criminal History* (the *x*-axis, ranging from Categories I–VI), to determine the Guideline sentence range (broken down into Zones A–D).¹⁴¹

COMM'N (Feb. 2026), <https://www.ussc.gov/education/training-resources/criminal-history-assigning-points-multiple-prior-sentences>; U.S. SENT'G COMM'N, MULTIPLE PRIOR SENTENCES: DETERMINING WHETHER MULTIPLE PRIOR SENTENCES SHOULD BE TREATED AS A SINGLE SENTENCE OR AS SEPARATE SENTENCES 1–2 (2019). Cf. U.S.S.G. § 5G1.3 (“If the instant offense was committed while the defendant was serving a term of imprisonment ... or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.”).

¹³⁶ See U.S.S.G. § 4A1.2(k)(1). See also U.S. SENT'G COMM'N, SPECIAL RULES FOR REVOCATIONS: § 4A1.2(K) AND APPLICATION NOTE 11 (2019) [*Special Revocation Rules*] (explaining how to apply revocation provisions with examples); U.S. SENT'G COMM'N, REIMPOSITION OF SUPERVISED RELEASE (2020).

¹³⁷ See U.S.S.G. § 4A1.2(k)(2). See also *Special Revocation Rules*, note 136, at 1 (exploring situations where revocation provisions apply).

¹³⁸ See U.S.S.G. ch. 5, pt. A (sentencing table).

¹³⁹ See *id.* and the back cover of the bound Guidelines.

¹⁴⁰ Although the Guidelines version is black and white, color versions of the Sentencing Table are available. See BANKS & BROWER, READING AND UNDERSTANDING THE FEDERAL SENTENCING GUIDELINES (2020); *Federal Sentencing Guidelines Sentencing Guide*, ELEX PUBLISHERS, <https://elexpublishers.com/products/federal-sentencing-guide> (last visited July 27, 2026) (selling a laminated color Sentencing Table with a “Base Offense Levels for Common Federal Drug Offenses” color chart on the back for \$20 as of time last visited).

¹⁴¹ See U.S.S.G. OVERVIEW, note 116, at 1–3.

B. Consider all 18 U.S.C. § 3553(a) factors when deciding the sentence

Finally, consider all the individual factors in the federal sentencing statute.¹⁴² A mnemonic to remember the seven factors is “**C (see) DR. KiPPeR.**”

C: Crime **C**ircumstances and the defendant’s **C**haracteristics.¹⁴³

D: Avoid unwarranted sentencing **D**isparities.¹⁴⁴

R: Sentencing **R**ange and type.¹⁴⁵

K: **K**ind of sentence.¹⁴⁶

P: **P**urpose (“**R**est & **R**elaxation, or **D**ie!”):¹⁴⁷

R: **R**etribution.¹⁴⁸

R: **R**ehabilitation.¹⁴⁹

D: **D**eterrence.¹⁵⁰

I: **I**ncapacitation.¹⁵¹

P: Commission **P**olicy statements.¹⁵²

R: Victim **R**estitution.¹⁵³

Of these seven factors to be considered at sentencing, three—sections 3553(a)(3), (a)(4), and (a)(5)—are merely the relevant offense statutes (“Kind of sentence”), the Guidelines (“sentencing Range and type”), and their accompanying interpretative policy statements (“Commission Policy statements”), which remain the starting point of every sentencing analysis.¹⁵⁴

Without the written doctrinal sentencing guidance that always applies, what remains are four sentencing factors which operate independently from each other: (1) crime **C**ircumstances (including victims);

¹⁴² 18 U.S.C. § 3553(a).

¹⁴³ *See id.* § 3553(a)(1).

¹⁴⁴ *See id.* § 3553(a)(6).

¹⁴⁵ *See id.* § 3553(a)(4).

¹⁴⁶ *See id.* § 3553(a)(3).

¹⁴⁷ *See id.* § 3553(a)(2).

¹⁴⁸ *See id.* § 3553(a)(2)(A).

¹⁴⁹ *See id.* § 3553(a)(2)(D).

¹⁵⁰ *See id.* § 3553(a)(2)(B).

¹⁵¹ *See id.* § 3553(a)(2)(C).

¹⁵² *See id.* § 3553(a)(5).

¹⁵³ *See id.* § 3553(a)(7).

¹⁵⁴ *See Gall v. United States*, 552 U.S. 38, 49 (2007); 18 U.S.C. § 3553(a)(3)–(5).

(2) sentence comparison with other defendants (“avoid unwarranted sentencing **Disparities**”); (3) sentence **Purpose**; and (4) defendant’s history and **Characteristics**.

Because every judge wants to believe that their similarly situated sentences compare fairly, these factors often collapse into comparison between aggravating crime circumstances (including victim injustice) and criminal history versus mitigating defendant’s history and characteristics.¹⁵⁵ The defendant may have previously committed a heinous crime resulting in great injustice for victims and may possess an extensive, recidivist criminal history. That same defendant, however, may have suffered from tremendous abuse, trauma, and neglect their entire life, and may have also turned the corner to start taking responsibility to improve their life in a pretrial rehabilitation program.

When these factors conflict, judges use the four federal sentencing purposes that represent the classic theories of criminal justice (to include “incapacitation, deterrence, retribution, or rehabilitation”) to justify prioritizing one factor over another.¹⁵⁶

A criminal sentence of course “can have a variety of justifications.”¹⁵⁷ Although these purposes should not be considered “terms of art,” they do provide a useful shorthand. Another mnemonic for these four sentencing purposes is “R&R or Die!,” where the first *R* stands for *Retribution*, the second *R* stands for *Rehabilitation*, *D* stands for *Deterrence*, and *I* stands for *Incapacitation*.

“Retribution” is the capability “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹⁵⁸

¹⁵⁵ See WILLIAM G. YOUNG, REFLECTIONS OF A TRIAL JUDGE 196 (1998) (“If you’ve got some idea of the range of sentences of other codefendants in a case or sentences for this type of crime, lots of us [district judges] are very interested in hearing. There are only a few judges who will be comfortable being known as a light sentencer or, conversely, a heavy sentencer, but some of them do exist.”).

¹⁵⁶ *Ewing v. California*, 538 U.S. 11, 25 (2003) (citing Wayne R. LaFave, *Purposes of the Criminal Law—Theories of Punishment*, in 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.5 (1986)). See 18 U.S.C. § 3553(a)(2)(A)–(D). A criminal sentence of course “can have a variety of justifications.” *Ewing*, 538 U.S. at 25. See also U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-27.300 (“In selecting the appropriate charges, ... prosecutors should consider ... whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.”)

¹⁵⁷ *Ewing*, 538 U.S. at 25. See also U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-27.300 (“In selecting the appropriate charges, ... prosecutors should consider ... whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.”).

¹⁵⁸ 18 U.S.C. § 3553(a)(2)(A).

“Rehabilitation” is the need “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment *in the most effective manner*.”¹⁵⁹ The final phrase “in the most effective manner” associated with rehabilitation in the sentencing purposes can be used to criticize less effective rehabilitation efforts.¹⁶⁰

The federal sentencing statute also mentions deterrence: the need “to afford adequate deterrence to criminal conduct.”¹⁶¹ “The theory of simple deterrence is that threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened.”¹⁶² While “specific deterrence” concerns the individual defendant being sentenced, “general deterrence” concerns the defendant’s broader community.¹⁶³ With a repeat offender, you can argue that while specific deterrence has failed the defendant’s recidivism not only merits greater retribution but also might deter others from recidivating.

Incapacitation can be defined as the need “to protect the public from further crimes of the defendant.”¹⁶⁴

All four purposes can help craft sentencing theories. While the absence of a particular purpose can be used in both aggravation and mitigation, the incapacitation, retribution, and deterrence theories lend themselves better to prosecution aggravation as opposed to the defendant’s rehabilitation, which is often the heart of defense mitigation.

Ultimately, our adversarial role determines our most important sentencing purposes. As prosecutors, we, of course, prioritize incapacitation, deterrence, and retribution. Our defense colleagues, however, prioritize rehabilitation. The tools outlined in this article can help prosecutors, defense attorneys, and probation officers learn to calculate justice to the best of their ability. Ultimately, all we are required to do—all we can do—is to serve in our role as competently and professionally as we can. Perhaps fortunately for us, the court must make difficult close calls at sentencing.¹⁶⁵

¹⁵⁹ *Id.* § 3553(a)(2)(D) (emphasis added).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* § 3553(a)(2)(B).

¹⁶² Wayne R. LaFare, *Purposes of the Criminal Law—Theories of Punishment: Deterrence*, in 1 WAYNE R. LAFARE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 1.5(a)(4) n.28 (3d ed. 2025) (quoting *CONTEMPORARY PUNISHMENT* 93 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972)).

¹⁶³ Christopher Hotaling, *Sentencing Advocacy in the Post-Holder Memo World*, 63 U.S. ATT’YS’ BULL. No. 1, 2015, at 39, 44.

¹⁶⁴ 18 U.S.C. § 3553(a)(2)(C).

¹⁶⁵ See PREET BHARARA, *DOING JUSTICE: A PROSECUTOR’S THOUGHTS ON CRIME, PUNISHMENT, AND THE RULE OF LAW* 295 (2019) (stating “the ultimate burden, thankfully, belongs to the judge”).

IV. Additional resources

The following list includes additional resources not previously mentioned but, in our opinion, still useful.

- *Sentencing Law and Policy*¹⁶⁶
- *An Introduction to Federal Sentencing*¹⁶⁷
- *The Law and Policy of Sentencing*¹⁶⁸
- *Federal Sentencing Guidelines*¹⁶⁹
- *Practice under the Federal Sentencing Guidelines*¹⁷⁰
- *Sentencing Law and Policy: Cases, Statutes and Guidelines*¹⁷¹
- *How the Federal Sentencing Guidelines Work: An Overview*¹⁷²
- *Benchbook for United States District Courts*¹⁷³
- *Federal Sentencing Reporter*¹⁷⁴
- *Forty Years of American Sentencing Guidelines: What Have We Learned?*¹⁷⁵
- *Sentencing Guidelines*¹⁷⁶
- *Booker 101*¹⁷⁷

¹⁶⁶ Douglas A. Berman, *Sentencing Law and Policy*, WORDPRESS, <https://sentencinglawandpolicy.wordpress.com/> (last visited July 27, 2026) (legal blog).

¹⁶⁷ W. DIST. OF TEX., OFF. FED. DEF., AN INTRODUCTION TO FEDERAL SENTENCING (Brad Bogan ed., 15th ed. 2020).

¹⁶⁸ LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING (10th ed. 2018).

¹⁶⁹ Thomas D. Church, *Federal Sentencing Guidelines*, 69 MERCER L. REV. 1181 (2018).

¹⁷⁰ David J. Gottlieb, *Practice under the Federal Sentencing Guidelines*, in PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES 10-1 (David Debold ed., 5th ed. 2010).

¹⁷¹ NORA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES (5th ed. 2022).

¹⁷² CHARLES DOYLE, CONG. RSCH. SERV., R41696, HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN OVERVIEW (2015).

¹⁷³ FED. JUD. CTR., BENCHBOOK FOR UNITED STATES COURTS § 4.01 (7th ed. 2026) (Sentencing Procedure); *id.* § 4.02 (Revocation or Modification of Probation and Supervised Release).

¹⁷⁴ *Federal Sentencing Reporter*, DUKE UNIV. PRESS, <https://www.dukeupress.edu/federal-sentencing-reporter> (last visited July 24, 2026) (published five times a year)

¹⁷⁵ Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, 48 CRIME & JUST. 79 (2019).

¹⁷⁶ Sentencing Guidelines, 53 GEO. L.J. ANN. REV. CRIM. PROC. 847 (2024) (published annually).

¹⁷⁷ Ed Hagen, *Booker 101*, 54 U.S. ATT'YS' BULL., no. 6, 2006, at 1.

- *Federal Sentencing Guidelines Handbook*¹⁷⁸
- *Federal Sentencing Law and Practice*¹⁷⁹
- *Recurring Ethical Issues Related to Sentencing*¹⁸⁰
- *Sentencing Law and Policy*¹⁸¹
- *Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options*¹⁸²
- *Sentencing Advocacy: Principles and Strategy*¹⁸³
- *Post-Booker Sentencing: Selected Issues from Appellate Case Law*¹⁸⁴

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¹⁷⁸ ROGER W. HAINES JR., FRANK O. BOWMAN III & J. DOUGLAS WILSON, *FEDERAL SENTENCING GUIDELINES HANDBOOK* (2025–2026 ed.).

¹⁷⁹ THOMAS W. HUTCHINSON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* (2026).

¹⁸⁰ Brent E. Newton, *Recurring Ethical Issues Related to Sentencing*, 43 J. LEGAL PRO., no. 1, 2018, at 34.

¹⁸¹ JOHN PFAFF, *SENTENCING LAW AND POLICY* (1st ed. 2016).

¹⁸² LISA M. SEGHETTI & ALISON M. SMITH, CONG. RSCH. SERV., RL32766, *FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS* (2007).

¹⁸³ C.J. WILLIAMS, *SENTENCING ADVOCACY: PRINCIPLES AND STRATEGY* (2022).

¹⁸⁴ JEFRI WOOD, *FED. JUD. CTR., POST-BOOKER SENTENCING: SELECTED ISSUES FROM APPELLATE CASE LAW* (2006).

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Sentencing in the Era of Artificial Intelligence

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I. Introduction

Technology has undergone a sea-change, but the United States Sentencing Guidelines remain the same. Criminals are using artificial intelligence (AI) to supercharge crime. The Guidelines do not adequately address the use of AI for criminal purposes. There is no specific AI enhancement, although it fits within a few existing Guidelines. But those enhancements fail to fully reflect the culpability of a defendant who deploys AI to harm the public. Prosecutors should advocate for upward variances to account for AI where the Guidelines fall short. The United States Sentencing Commission should consider the best way to hold defendants accountable for misusing AI—potentially by adopting a Chapter 3 sentencing adjustment or AI-focused specific offense characteristics.¹

II. Use of AI is “relevant conduct”

The Guidelines measure a defendant’s culpability by capturing all “relevant conduct,” assuring accountability beyond formally charged conduct and the elements of the offense.² Courts must consider “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant” that “occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.”³ For example, if a defendant flees from police after robbing a bank, the Guidelines hold the defendant accountable for that conduct.

But what about the use of AI? This breakthrough technology is revolutionizing everything from customer service to cancer research.⁴ And,

¹ U.S. SENT’G GUIDELINES MANUAL ch. 3 (U.S. SENT’G COMM’N 2025).

² *Id.* § 1B1.3 cmt. background.

³ *Id.* § 1B1.3(a)(1).

⁴ Bernard Marr, *18 Generative AI Tools Transforming Customer Service*, FORBES (Sep. 26, 2024), <https://www.forbes.com/sites/bernardmarr/2024/09/26/18-generative-ai-tools-transforming-customer-service/>; *Artificial Intelligence (AI) and Cancer*,

as always, criminals have co-opted this technology for their own nefarious purposes. Criminals are now using AI for advanced analytics, coding, content generation, and more.⁵ In other words, criminals have their own sonic screwdriver.⁶ Although groundbreaking, AI is just a tool when used in this way. And because it is only doing what the defendant “willfully caused” it to, it comfortably fits within relevant conduct.⁷

AI has also emerged as a quasi-co-conspirator, replacing traditional human accomplices. AI chatbots, for instance, can interact directly with victims on the criminal’s behalf.⁸ Even so, the defendant still willfully caused the AI’s actions. The AI is no more than the defendant’s puppet.

That may not always be the case. Though rare as Florida snowfall, AI can act in surprising ways. When testing ChatGPT-4, OpenAI challenged it to solve a CAPTCHA—the test to verify you are human.⁹ Despite being unable to perceive the CAPTCHA images, the AI found a way.¹⁰ It hired a human on TaskRabbit, convincing the worker to solve the CAPTCHA by lying about being visually impaired.¹¹ That is not the only example. When developers released AI companion apps, they hoped to alleviate loneliness.¹² One AI companion allegedly convinced a Florida teen to kill himself while another AI companion urged a British teen to assassinate the Queen.¹³ We hope this was not what the developers had in mind.

NAT’L CANCER INST. (May 30, 2024), <https://www.cancer.gov/research/infrastructure/artificial-intelligence>.

⁵ Michael Brenner & Alexandra D. Comolli, *Prosecution in the Era of Artificial Intelligence*, 73 DOJ J. FED. L. & PRAC., no.1, 2025, at 125.

⁶ Originating from the British television series *Doctor Who*, the “sonic screwdriver” is The Doctor’s fictional multi-functional tool with apparent boundless utility. DOCTOR WHO: *Fury from the Deep* (BBC television broadcast, aired Apr. 13, 1968). See STEPHEN NICHOLAS & MIKE TUCKER, DOCTOR WHO: IMPOSSIBLE WORLDS 200 (2015).

⁷ U.S.S.G. § 1B1.3(a)(1).

⁸ TREND MICRO RSCH. ET AL., MALICIOUS USES AND ABUSES OF ARTIFICIAL INTELLIGENCE 30–31 (2020).

⁹ Joseph Cox, *GPT-4 Hired Unwitting TaskRabbit Worker by Pretending to Be ‘Vision-Impaired’ Human*, VICE (Mar. 15, 2023), <https://www.vice.com/en/article/gpt4-hired-unwitting-taskrabbit-worker/>. CAPTCHA stands for Completely Automated Public Turing test to tell Computers and Humans Apart.

¹⁰ *Id.*

¹¹ *Id.*

¹² Chris Glorioso, *Tech Developers Say AI Chatbots Can Battle Loneliness and Depression. Experts are Skeptical.*, NBC N.Y. (Feb. 16, 2026), <https://www.nbcnewyork.com/investigations/tech-developers-ai-chatbots-loneliness-depression-experts-skeptical/6454905/>.

¹³ Angela Yang, *Lawsuit Claims Character.AI is Responsible for Teen’s Suicide*, NBC NEWS (Oct. 23, 2024), <https://www.nbcnews.com/tech/characterai-lawsuit-florida-teen-death-rcna176791>; Tom Singleton, Tom Gerken & Liv McMahon, *How a Chatbot*

When AI acts unexpectedly, it is hard to argue that the defendant “willfully caused” the AI’s actions.¹⁴ While we may be able to argue that the defendant “commanded, induced,” or “procured” the AI’s actions, it is not a perfect fit.¹⁵ To ensure appropriate accountability, the Commission should consider adopting a framework like the joint conduct rule in section 1B1.3(a)(1)(B)(i)–(iii).¹⁶ Such a provision would encompass all AI acts that fit these criteria are: (1) within the scope of the criminal activity; (2) in furtherance of that criminal activity; and (3) reasonably foreseeable in connection with that criminal activity.¹⁷

III. Offense levels currently undercount AI-enabled crime

Most AI-enabled crimes are frauds, falling under section 2B1.1.¹⁸ There are certainly additional AI-enabled crimes that would implicate different offense Guidelines that also do not properly account for the defendant’s use of AI in the crime. For example, in child exploitation cases, it appears the only applicable offense characteristic is a two-level enhancement for the use of a computer.¹⁹ A defendant’s use of AI will often trigger the “sophisticated means” enhancement.²⁰ “Sophisticated means” includes “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.”²¹ Classic examples are “hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts,” and operating a scheme from another jurisdiction.²² With AI, offenders can code malware, alter their faces and voices in real time, or automate direct interactions with their victims.²³ Surely, that is at least as “sophisticated” as obscuring

Encouraged a Man Who Wanted to Kill the Queen, BBC (Oct. 6, 2023), <https://www.bbc.com/news/technology-67012224>.

¹⁴ U.S.S.G. § 1B1.3(a)(1).

¹⁵ *Id.* § 1B1.3(a)(1)(A).

¹⁶ *Id.* § 1B1.3(a)(1)(B).

¹⁷ *Id.*

¹⁸ See U.S. SENT’G COMM’N, 2024–2025 AMENDMENT CYCLE: PUBLIC COMMENT ON PROPOSED PRIORITIES: 89 FR 48029 (2024).

¹⁹ See, e.g., U.S.S.G. § 2G2.6(b)(4).

²⁰ See *id.* § 2B1.1(b)(10).

²¹ See *id.* § 2B1.1 cmt. n.9(B).

²² See *id.*

²³ Alexis Zacharakos, *How Hackers Can Abuse ChatGPT to Create Malware*, TECHTARGET (Feb. 22, 2023), <https://www.techtargget.com/searchsecurity/news/365531559/How-hackers-can-abuse-ChatGPT-to-create-malware>; Christine Barry, *5 Ways Cybercriminals Are Using AI: Malware Generation*, BARRACUDA (Apr. 16, 2024), <https://blog.barracuda.com/2024/04/16/5-ways-cybercriminals-are-using-ai-malware>

a transaction with a fictitious entity.

The problem with this enhancement is that it fails to recognize varying levels of sophistication. It puts using an offshore account on par with using AI to replace human co-conspirators in a social engineering scheme. Prosecutors can account for this additional culpability by moving for upward variances. But this approach is a stopgap, not a long-term solution.

The Commission should consider adopting provisions to reflect the additional culpability of using AI. We highlight two potential approaches: (1) a Chapter 3 adjustment; or (2) AI-focused specific offense characteristics.²⁴ The Department of Justice has already recommended considering “a Chapter 3 enhancement applicable to cases in which the defendant used artificial intelligence during the commission of an offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense.”²⁵ The benefit of Chapter 3 is that it could provide a global adjustment to all crimes, avoiding the need for AI-focused specific offense characteristics within each potential offense under Chapter 2.²⁶

Still, we recognize that specific offense characteristics under Chapter 2 have their advantages.²⁷ They are tailored enhancements for different crimes.²⁸ Should the Commission choose this route, it may consider amending the sophisticated means enhancement. In our view, a graduated scale would better reflect each defendant’s culpability and could assign different levels based on the degree of sophistication. The scale might increase if the defendant used the following during the scheme: (1) traditional sophisticated means, such as hiding assets, obscuring transactions, or decentralizing the scheme; (2) AI; (3) a jailbreak technique on a commercially available AI model; (4) a non-commercial “dark AI” model; or (5) AI to automate interactions with persons.²⁹

-generation; ARMY CRIM. INVESTIGATION DIV. (CID), CYBERCRIME PREVENTION FLYER: CRIMINAL USE OF ARTIFICIAL INTELLIGENCE (2024); Kathleen Magramo, *British Engineering Giant Arup Revealed as \$25 Million Deepfake Scam Victim*, CNN (May 17, 2024), <https://www.cnn.com/2024/05/16/tech/arup-deepfake-scam-loss-hong-kong-intl-hnk/index.html>.

²⁴ U.S.S.G. ch. 3.

²⁵ Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., to Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 15, 2024).

²⁶ U.S.S.G. ch. 3; *id.* ch. 2.

²⁷ *Id.* ch. 2.

²⁸ *Id.*

²⁹ “Jailbreaking” is a technique used to “trick” commercial AI models “into answering questions that go against their own policies” by using “complex prompts.” See Vincenzo Ciancaglini & David Sancho, *Back to the Hype: An Update on How Cybercriminals Are Using GenAI*, TRENDMICRO (May 8, 2024), <https://www.trendmicro.com/vinfo/us/security/news/cybercrime-and-digital-threats/back-to-the-hype-an-update-on-how-cybercriminals-are-using-genai>. Criminals have attempted to develop

Of course, these are not the only options. The Commission should thoroughly consider every potential framework. It may find that other approaches, or a combination thereof, better reflect the culpability of defendants who deploy AI to harm the public.

IV. Conclusion

Criminals have taken advantage of AI—a powerful, revolutionary technology—but the Guidelines have yet to catch up. Although the relevant conduct provisions capture most of this conduct, an AI-specific provision could do so completely. And while certain specific offense characteristics (like sophisticated means) apply when defendants use AI, these provisions overlook the seriousness and additional harms of defendants who use AI. The Commission should carefully consider how to best capture and measure this conduct.

About the Author

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“dark AI” models that lack the safeguards of commercial AI models. *See id.* A similar graduated scale could be used for child exploitation cases involving AI. *See, e.g.,* U.S.S.G. § 2G2.6(b)(4).

³⁰ 428 F.3d 1015 (11th Cir. 2005).

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Sentencing in Intellectual Property Cases

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I. Introduction

Federal law criminalizes various forms of intellectual property (IP) theft, and prosecution under these statutes can lead to substantial prison terms, fines, forfeiture, restitution, and other penalties. This article explains the sentencing framework for IP crimes and related charges, clarifies why and when courts impose certain sentences, and provides guidance for prosecutors handling an IP sentencing.

IP plays a significant role in the U.S. economy in terms of both output and employment. A U.S. Patent and Trademark Office study found that in 2019, trademark-intensive industries accounted for over \$6.9 trillion in gross domestic product (GDP) and copyright-intensive industries accounted for about \$1.3 trillion in GDP.¹ This study also found that trademark-intensive domestic industries contributed to 41.6 million direct-employment jobs as well as another 14.8 million indirect-employment jobs, and copyright-intensive industries contributed to 6.6 million direct-employment jobs as well as another 1.9 million indirect-employment jobs.² A report from the Organization for Economic Cooperation and Development and European Union Intellectual Property Office found that global trade in counterfeit goods accounted for 2.3% of global imports in 2021, valued at \$467 billion.³

Trade secrets—often a company’s most valuable information—also play a significant role in our economy, which often goes unnoticed since,

¹ ANDREW A. TOOLE ET AL., U.S. PAT. & TRADEMARK OFF., INTELLECTUAL PROPERTY AND THE U.S. ECONOMY 3–4 (3d ed. 2022).

² *Id.*

³ ORG. FOR ECON. COOP. & DEV. & EUR. UNION INTEL. PROP. OFF., MAPPING GLOBAL TRADE IN FAKES: GLOBAL TRENDS AND ENFORCEMENT CHALLENGES 8 (2025).

by definition, companies keep the information confidential. A PricewaterhouseCoopers study estimated that theft of trade secrets could cost a developed economy such as the United States 1%–3% of GDP.⁴ In short, IP plays an essential role in fueling the U.S. economy and giving U.S. businesses a competitive advantage against their competitors in this country and around the world. Strong enforcement of IP rights helps ensure the United States remains a global leader in innovation, entrepreneurship, business formation, and job creation.

Accordingly, federal criminal statutes make it a violation to do each of the following: (1) infringe many IP rights, including trademarks, copyrights, and trade secrets; (2) circumvent technological protection measures (TPMs) that control access to works protected by copyright or traffic in products or technology that protect a copyright owner's rights; and (3) traffic in counterfeit or illicit labels.⁵ Trademarks—as well as genuine and authorized labels and packaging—identify the origin of a good or service and help safeguard companies from corporate identity theft.⁶ Copyrights give authors exclusive rights to reproduce, distribute, or commercialize their works.⁷ Trade secrets consist of information that owners have taken reasonable steps to protect and that derive independent economic value from the fact that they are not known publicly.⁸ TPMs, such as encryption and copy blocks, prevent unauthorized access to and reproduction of copyrighted materials.⁹

Such criminal statutes exist because the threat of administrative remedies and civil sanctions often fails to deter IP infringement. Indeed, some individuals regard piracy, counterfeiting, and theft of proprietary business information as high-profit, low-risk crimes and continue to engage in these illegal activities. As a result, the estimated total annual loss to U.S. companies and individuals every year from these offenses amounts to hundreds of billions of dollars.¹⁰ IP crime can also jeopardize public safety when it involves counterfeit medicines, medical devices, toys, electrical

⁴ *Economic Espionage and Trade Secret Theft: Are Our Laws Adequate for Today's Threats?: Hearing Before the S. Comm. on the Jud. & the S. Subcomm. on Crime & Terrorism*, 113th Cong. 2 (2014) (statement of Pamela Passman, President & CEO of Ctr. for Responsible Enter. & Trade (CREATE.org)).

⁵ See 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 1831–1832, 2318–2320.

⁶ *Trademark*, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁷ *Copyright*, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁸ *Trade Secret*, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁹ See 17 U.S.C. § 1201.

¹⁰ THE COMM'N ON THE THEFT OF AM. INTELL. PROP., THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY: UPDATE TO THE IP COMMISSION REPORT 1 (The Nat'l Bureau of Asian Rsch. ed., 2017).

items, automobile and aircraft parts, and similar products. In addition, IP crime can harm national security when the military or intelligence community unknowingly uses counterfeit goods. Similarly, theft of trade secrets not only results in substantial losses to U.S. companies but also reduces competitiveness and damages national security if foreign entities or governments gain access to sensitive information through economic espionage.

Accordingly, prosecuting criminal IP cases is not only important to enforce statutes and protect and seek redress for victims, but also to benefit the U.S. economy by creating wealth and employment and to safeguard our national security. Prosecutors in IP cases should ensure their sentencing arguments reflect the seriousness of these offenses and the need to deter the defendant and others from violating these laws in the future.

II. Overview of sentencing in intellectual property cases

A. Types of intellectual property cases

1. Trafficking in counterfeit goods

Title 18, U.S. Code, Section 2320 criminalizes trafficking in counterfeit goods and is charged when the defendant engages in trademark infringement.¹¹ “Trafficking” is broadly defined and includes importing, selling, transporting, or possessing goods with intent to sell or transport, for purposes of commercial advantage or private financial gain.¹² “Commercial advantage or private financial gain” means the receipt, or expectation of receipt, of anything of value, including other protected works.¹³

The maximum sentence for violating section 2320 is 10 years in prison and a \$2 million fine.¹⁴ If the defendant has previously been convicted of section 2320 or knowingly or recklessly attempted to cause serious bodily injury, however, the maximum sentence is 20 years in prison and a \$5 million fine.¹⁵ Moreover, if the defendant knowingly or recklessly attempted to cause death, the maximum sentence is life in prison and a \$5

¹¹ 18 U.S.C. § 2320.

¹² *Id.* § 2320(f)(5).

¹³ U.S. SENT’G GUIDELINES MANUAL § 2B5.3 cmt. n.1 (U.S. SENT’G COMM’N 2025).

¹⁴ 18 U.S.C. § 2320(b)(1)(A). *See also id.* § 3571(d) (providing alternative maximum fines for trafficking in counterfeit goods and other crimes involving pecuniary gain or loss that can be as high as twice the gross gain or loss from the offense).

¹⁵ *Id.* § 2320(b)(1)(B), (b)(2)(A).

million fine.¹⁶ Further, the statute provides that for any offense involving a counterfeit military good or service or counterfeit drug, the maximum sentence is 20 years in prison and a \$5 million fine, which increases for a subsequent offense to 30 years in prison and a \$15 million fine.¹⁷ Fines are higher for entities convicted of any offense under section 2320.

2. Copyright infringement

Title 17, U.S. Code, Section 506(a) makes willful copyright infringement a crime.¹⁸ The punishment provision for section 506(a) is in 18 U.S.C. § 2319.¹⁹ The maximum sentence for felony copyright infringement is 5 years in prison and a \$250,000 fine, and the maximum sentence doubles to 10 years in prison for a subsequent offense.²⁰ Felony copyright infringement under section 506(a)(1)(A) is defined as reproduction or distribution during any 180-day period of at least 10 copies of 1 or more copyrighted works with a total retail value of more than \$2,500 that the defendant committed for purposes of commercial advantage or private financial gain.²¹ The phrase “for purposes of commercial advantage or private financial gain” does not require the payment of money for an infringing work but includes payment by trading *anything of value* for it.²² Thus, this language could include exchanging infringing works for other infringing works.²³ That means the higher maximum penalties for copyright infringement would apply, for example, to a defendant who earned no money from piracy but participated actively in a “torrent site,” “seeding” (allowing others to download) a collection of infringing content in return for the ability to “leech” (download) others’ collections of infringing content.²⁴ A torrent site refers to a website that uses the BitTorrent communication “protocol”—a set of rules that different computer systems agree to use—for peer-to-peer file sharing, which commonly includes the distribution and reproduction of infringing works such as software,

¹⁶ *Id.* § 2320(b)(2)(B).

¹⁷ *Id.* § 2320(b)(3).

¹⁸ 17 U.S.C. § 506(a).

¹⁹ 18 U.S.C. § 2319.

²⁰ *Id.* §§ 2319(b)(1)–(2), 3571(b)(3).

²¹ 17 U.S.C. § 506(1)(A); 18 U.S.C. § 2319(b)(1).

²² 17 U.S.C. § 101.

²³ *See, e.g., United States v. Cross*, 816 F.2d 297, 301 (7th Cir. 1987) (holding that, in a criminal copyright case, the defendant does not have to realize any commercial advantage or private financial gain but only undertake the activity for that purpose); U.S.S.G. § 2B5.3 cmt. n.1.

²⁴ *See Safety Point Prods., LLC v. Does*, No. 12-cv-2812-JSG, 2013 WL 1367078, at *1 (N.D. Ohio Apr. 4, 2013) (describing seeding and leeching on torrent sites).

movies, television shows, music, video games, and eBooks.²⁵ Instead of downloading a file such as a television program or motion picture from a single source, BitTorrent enables users to connect through the internet to the devices of other BitTorrent users to download and upload pieces of the work from and to other users simultaneously.²⁶ Any copyright infringement committed for purposes of commercial advantage or private financial gain—including seeding infringing content through a torrent site in exchange for leeching other infringing content—that does not meet one or more of the other elements above is a misdemeanor with a maximum sentence of 1 year and a \$100,000 fine.²⁷

A person can also commit felony copyright infringement by reproduction or distribution during any 180-day period of at least 10 copies of 1 or more copyrighted works with a total retail value of more than \$2,500, regardless of why the crime was committed.²⁸ This offense has a maximum sentence of 3 years in prison and a \$250,000 fine.²⁹ The maximum sentence doubles for a subsequent offense.³⁰ If the copyright infringement does not meet the elements above, but consists of the reproduction or distribution of at least 1 copy of a copyrighted work and involves a total retail value of more than \$1,000, that offense is a misdemeanor, with a maximum sentence of 1 year and a \$100,000 fine.³¹

Title 17, U.S. Code, Section 506(a) also includes a specific pre-release offense “if the infringement was committed by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.”³² In *United States v. Vaulin*, the court found that under section 506(a)(1)(C), “making [a work] available on a computer network accessible to members of the public” constitutes distribution.³³ Moreover, under the statute, a “work being prepared for commercial distribution” refers to a work where the copyright owner has a reasonable expectation of commercial distribution of the item and physical or digital copies

²⁵ Indictment at 4, *United States v. Dallmann*, No. 19-cr-253-TSE (E.D. Va. Aug. 27, 2019), Dkt. No. 1.

²⁶ Paul Bischoff, *What is Torrenting? Is it Safe? Is it Illegal? Are You Likely to Be Caught?*, COMPARITECH (Jan. 3, 2026), <https://www.comparitech.com/blog/vpn-privacy/is-torrenting-safe-illegal-will-you-be-caught/>.

²⁷ 18 U.S.C. §§ 2319(b)(3), 3571(b)(5).

²⁸ *Id.* § 2319(c)(1)–(2).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* § 2319(c)(3).

³² 17 U.S.C. § 506(a)(1)(C).

³³ No. 16 CR 438-1-JZL, 2017 WL 3334861, at *11–12 (N.D. Ill. Aug. 4, 2017).

have not been commercially distributed.³⁴ There is a special definition for movies being shown in a movie theater that have not yet been released to the general public in the United States in physical or digital form such as through authorized downloads or DVDs.³⁵ If the defendant committed the crime for purposes of commercial advantage or private financial gain, the maximum sentence is 5 years and a \$250,000 fine.³⁶ The maximum sentence increases to 6 years if the person has another copyright conviction and doubles to 10 years for a previous violation of the felony for-profit pre-release offense.³⁷

To combat the growing misuse of copyrighted materials on the internet through “public performance,” particularly the rise of unlicensed commercial streaming websites and apps, the Protect Lawful Streaming Act was signed into law in 2020.³⁸ Public performance is one of the rights protected by copyright—along with reproduction, distribution, and several others—and it includes commercial streaming and other forms of transmission.³⁹ Codified in section 2319(C), this law makes it a crime for a person to “willfully, and for purposes of commercial advantage or private financial gain, offer or provide to the public a digital transmission service” for the purpose of streaming or otherwise digitally transmitting copyrighted works without permission from the rights holders.⁴⁰ Under the statute, the service must have been primarily designed or provided, or intentionally marketed, for this illicit purpose or have no other legitimate, commercially significant purpose.⁴¹ A “digital transmission service” means a service that has the primary purpose of publicly performing works by digital transmission.⁴² The maximum term of imprisonment for operating an illicit digital transmission service is as follows: (1) 5 years if at least one work being transmitted was being prepared for commercial distribution and the defendant knew or should have known that; (2) 10 years if the defendant has been convicted of a previous copyright offense; or (3) 3 years for all other violations.⁴³ The maximum fine is \$250,000.⁴⁴

³⁴ 17 U.S.C. § 506(a)(3).

³⁵ *Id.*

³⁶ 18 U.S.C. § 2319(d)(2).

³⁷ *Id.* § 2319(d)(3)–(4).

³⁸ Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, 2175 (2020).

³⁹ 17 U.S.C. §§ 101, 106; *Am. Broad. Cos., Inc. v. Aereo*, 573 U.S. 431, 451 (2014); *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 918 (D.C. Cir. 2018).

⁴⁰ 18 U.S.C. § 2319C(b).

⁴¹ *Id.*

⁴² *Id.* § 2319C(a)(2).

⁴³ *Id.* § 2319C(c).

⁴⁴ *Id.* See also *id.* § 3571(b) (explaining maximum fines for individuals and organizations for different categories of offenses).

While less frequently prosecuted today given the progress of technology, bootlegging and camcording are separate offenses codified in sections 2319A and 2319B, respectively.⁴⁵ Bootlegging involves the recording of or transmission of a live musical performance or the subsequent distribution or trafficking of that recording or any copies of that recording.⁴⁶ Conviction may result in imprisonment of up to 5 years for a first offense and 10 years for a subsequent offense, and may also include a \$250,000 fine.⁴⁷ Camcording generally involves the recording or transmission of a movie while in a movie theater.⁴⁸ The maximum sentence is 3 years in prison for the first offense and 6 years for subsequent violations, and a \$250,000 fine.⁴⁹

3. Trade secret theft and economic espionage

The Economic Espionage Act of 1996 (EEA) contained two separate provisions that make theft of trade secrets a federal offense.⁵⁰ One provision criminalizes theft of trade secrets when the defendant intended to convert the trade secret to the economic benefit of anyone other than the owner and the defendant knew or intended that the theft would injure the owner.⁵¹ The other provision treats trade secret theft as foreign economic espionage when the defendant stole or received a trade secret knowing it was stolen and knew or intended that the actions would benefit a foreign government.⁵²

In a typical case involving trade secret theft, the maximum sentence for individuals is 10 years and either \$250,000 or twice the gross gain or loss and for organizations a fine of \$5 million or 3 times the value of the stolen trade secret.⁵³ For economic espionage, the maximum sentence is 15 years and a fine of \$10 million or 3 times the value of the stolen trade secret.⁵⁴ An organization that commits trade secret theft faces a maximum fine of \$5 million or 3 times the value of the trade secret.⁵⁵ An organization committing economic espionage faces a maximum fine of \$10 million or 3 times the value of the trade secret.⁵⁶

⁴⁵ *Id.* §§ 2319A, 2319B.

⁴⁶ *Id.* § 2319A(a).

⁴⁷ *Id.*

⁴⁸ *Id.* § 2319B(a).

⁴⁹ *Id.*

⁵⁰ 18 U.S.C. §§ 1831, 1832.

⁵¹ *Id.* § 1832.

⁵² *Id.* § 1831.

⁵³ *Id.* § 1832(a).

⁵⁴ *Id.* § 1831(a).

⁵⁵ *Id.* §§ 1831(b), 1832(b).

⁵⁶ *Id.* §§ 1831(b), 1832(b).

4. Circumvention of copyright protection systems

The Digital Millennium Copyright Act (DMCA) included prohibitions against circumvention of copyright protection systems and was codified at 17 U.S.C. § 1201.⁵⁷ First, section 1201 makes it crime in many instances to circumvent a technological measure to obtain access to a copyrighted work without the copyright owner's consent.⁵⁸ "Circumventing a technological measure" means descrambling a scrambled work; decrypting an encrypted work; or otherwise bypassing, removing, or impairing a technological measure that controls access to the work.⁵⁹ TPMs—and thus the safeguards of section 1201—normally protect commercial licensed cable and satellite programming, streaming content, and digital movies, television episodes, music, software, and books.⁶⁰ Second, section 1201 criminalizes trafficking in a product or technology that circumvents access or copy controls to a copyrighted work without the copyright owner's permission.⁶¹ A person who violates this statute for purposes of commercial advantage or private financial gain faces a maximum sentence of 5 years in prison and a \$500,000 fine, both of which are doubled for a subsequent offense.⁶²

5. Trafficking in counterfeit or illicit labels

Title 18, U.S. Code, Section 2318 criminalizes trafficking in counterfeit or illicit labels and counterfeit documentation and packaging for certain types of copyrighted works including music, software, movies, television shows, and books.⁶³ "Counterfeit" under this provision means the label, documentation, or packaging appears to be genuine, but is not.⁶⁴ The use of a counterfeit trademark is not an element of this offense. In contrast, "illicit" under this provision means a genuine certificate, licensing document, registration card, or similar labeling component intended for use with one of the types of copyrighted works covered by section 2318 that the defendant distributed or used without the work it was supposed to accompany or that the defendant falsely altered to indicate broader rights than originally intended.⁶⁵ For example, "licensing packs" for retail software that contained labels, certificates of authenticity, documentation,

⁵⁷ 17 U.S.C. § 1201.

⁵⁸ *Id.* § 1201(a)(1)(A).

⁵⁹ *Id.* § 1201(a)(3).

⁶⁰ *Id.* § 1201.

⁶¹ *Id.* § 1201(a)(2).

⁶² *Id.* § 1204(a)(1)–(2).

⁶³ 18 U.S.C. § 2318.

⁶⁴ *Id.* § 2318(b)(1).

⁶⁵ *Id.* § 2318(b)(4).

and packaging would be illicit if the defendant sold them without the original software they were supposed to accompany or sold them with a pirated copy of that software. Note that section 2318 does not apply to the electronic transmission of genuine labels, certificates of authenticity, documentation, or packaging.⁶⁶ The maximum sentence for this offense is 5 years and a fine of \$250,000.⁶⁷

6. Intellectual property cases charged under other statutes

Many IP cases can also be prosecuted under non-IP-focused criminal statutes, most commonly mail and wire fraud, interstate transportation of stolen goods, access device fraud, computer fraud and abuse, smuggling goods into the United States, entry of goods by false statements, tax evasion, and money laundering:

- mail and wire fraud have a maximum sentence of 20 years in prison and a \$250,000 fine;⁶⁸
- interstate transportation of stolen goods has a maximum sentence of 10 years in prison and a \$250,000 fine;⁶⁹
- access device fraud has a maximum sentence for a first offense of 10 or 15 years (or 20 years for a subsequent offense), depending on the type of violation, and a \$250,000 fine;⁷⁰
- computer fraud and abuse commonly has a maximum sentence of 5 or 10 years (or 10 or 20 years for a subsequent offense), depending on the type of violation, and a \$250,000 fine, but some offenses have lower or higher maximum sentences;⁷¹
- smuggling goods into the country has a maximum sentence of 20 years and a \$250,000 fine;⁷²
- entry of goods by false statements has a maximum sentence of 2 years and a \$250,000 fine;⁷³

⁶⁶ Intellectual Property Protection and Court Amendments Act of 2004, Pub. L. 108-482, 118 Stat. 3912, § 103(a)(2)(A).

⁶⁷ 18 U.S.C. § 2318(a).

⁶⁸ *Id.* §§ 1341, 1343.

⁶⁹ *Id.* § 2314.

⁷⁰ *Id.* § 1029(c)(1)(A).

⁷¹ *Id.* § 1030(c).

⁷² *Id.* § 545.

⁷³ *Id.* § 542.

- tax evasion has a maximum sentence of 5 years in prison and a \$100,000 fine, plus the cost of prosecution;⁷⁴
- section 1956 money laundering—conducting a financial transaction involving proceeds from a specified unlawful activity (SUA), which includes major IP crimes, to promote the carrying out of that crime, conceal the illegal proceeds, evade taxes, or avoid reporting requirements—has a maximum sentence of 20 years in prison and a fine of \$500,000 or twice the value of the monetary instrument or funds involved and \$250,000;⁷⁵ and
- section 1957 money laundering—engaging in a monetary transaction with money derived from an SUA, which includes major IP crimes, the value of which was greater than \$10,000—has a maximum sentence of 10 years and a fine of \$250,000 or twice the amount of the criminally derived property involved in the transaction.⁷⁶

While charging interstate transportation of stolen goods might be enticing, prosecutors should be cautious when trying to include such a charge. All circuit courts to consider the issue have held that section 2314 does not apply to intangible goods such as pure IP but does apply to items in tangible form that contain IP, such as DVDs, computers, hard drives, and printouts of trade secrets.⁷⁷ Therefore, prosecutors should limit charging interstate transportation of stolen goods in IP cases to cases where the property stolen has some physical manifestation that constitutes “goods, wares, [or] merchandise.”⁷⁸

Finally, prosecutors should note that the list of non-IP-focused criminal statutes listed above only includes ones commonly charged in IP cases. Depending on the particular facts and circumstances of the relevant investigation, other statutes may apply as well and prosecutors should consider them.

Practice Note: Regardless of what statute a prosecutor charges, in certain cases the maximum sentence may be increased. For example, a defendant who is convicted of a felony offense under any of the above statutes and who knowingly falsely registered a domain name and knowingly used that domain name during that offense will have the maximum imprisonment for the relevant crime doubled or increased by seven years,

⁷⁴ 26 U.S.C. § 7201.

⁷⁵ 18 U.S.C. § 1956(a)(1).

⁷⁶ *Id.* § 1957(b)(1)–(2).

⁷⁷ See *United States v. Zhang*, 995 F. Supp. 2d 340, 343–50 (E.D. Pa. 2014) (discussing relevant caselaw and holding that section 2314 did not cover digital files with trade secrets allegedly stolen by the defendant).

⁷⁸ 18 U.S.C. § 2314.

whichever is less.⁷⁹ When infringers register domain names for use in committing IP and related offenses—a common practice in cases involving trademark infringement, copyright infringement, or trafficking in counterfeit or illicit labels—they often fail to include truthful and complete information. If applicable, prosecutors should include this enhancement and any applicable facts in the charging documents, penalty sheets, and related documents and proceedings.

B. Numbers of intellectual property cases

The number of criminal IP cases brought by the Department of Justice is relatively low. For instance, the Executive Office for U.S. Attorneys reported that in fiscal year 2023, federal prosecutors charged 21 cases under 18 U.S.C. § 2320; 1 case under 17 U.S.C. § 506 and 18 U.S.C. § 2319; 5 cases under 18 U.S.C. § 1832; and 0 cases under 17 U.S.C. § 1201, 18 U.S.C. § 2318, and 18 U.S.C. § 1831.⁸⁰ Moreover, according to the U.S. Sentencing Commission's fiscal year 2021 report, which counted over 57,000 sentenced cases, only 36 sentencings involved copyright or trademark.⁸¹ The United States Attorneys' Fiscal Year 2024 Statistical Report lists 26 IP sentencings for approximately 60,000 total defendants for all types of cases.⁸² By way of contrast, just in the 12-month period ending December 31, 2025, civil plaintiffs filed 8,095 copyright cases, 4,407 trademark cases, and 829 trade secret cases in federal court.⁸³

The primary reason why the Department does not pursue many criminal IP cases is that most IP rights violations are handled through administrative and civil enforcement, and the criminal process tends to be reserved for egregious cases where non-criminal alternatives have failed—typically where copyright owners have failed to stop individuals from infringing their IP and, out of frustration, referred the case to law enforcement or when other circumstances exist that warrant prosecution.⁸⁴

⁷⁹ *Id.* § 3559(g).

⁸⁰ U.S. DEP'T OF JUST., PRO IP ACT ANNUAL REPORT FY 2023, at 42 (2023); 17 U.S.C. § 506, 1201; 18 U.S.C. §§ 1831–1832, 2318–2320. These numbers may not reflect cases where only a conspiracy to violate an IP offense was charged or whether an IP case was charged under a non-IP-specific statute, and there may be double counting if more than one IP offense was charged in a single case.

⁸¹ U.S. SENT'G COMM'N, QUICK FACTS: COPYRIGHT AND TRADEMARK OFFENSES (2022).

⁸² EXEC. OFF. FOR U.S. ATT'YS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2024, at 66–74 (2024).

⁸³ U.S. CTS., TABLE C-2: CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (2025).

⁸⁴ *See generally* U.S. DEP'T OF JUST., PROSECUTING INTELLECTUAL PROPERTY CRIMES 11–12, 15 (4th ed. 2013) (introducing intellectual property issues).

III. Sentencing issues

District courts must properly calculate and consider the U.S. Sentencing Guidelines when sentencing, even in an advisory guideline system.⁸⁵ Effective November 1, 2025, the Commission simplified the sentencing process by removing departures from the Guidelines. The Commission noted that it intended this change to be “outcome neutral” and that “judges who would have relied upon facts previously identified as a basis for departure would continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).”⁸⁶ Now, to determine the appropriate sentence, the district court must first correctly calculate the applicable Guidelines range as “the starting point and initial benchmark” and then determine an appropriate sentence after considering all the factors set forth in 18 U.S.C. § 3553(a).⁸⁷

This change reflects that since *Booker*, courts have decreasingly employed departures to go below Guidelines ranges for IP and other crimes, instead relying upon variances—normally as part of the court’s analysis of sentencing factors under 18 U.S.C. § 3553(a). But since the Guidelines serve as the starting point for any sentencing determination, the court must always first calculate the total offense level and any departures before moving onto the section 3553 factors and any variances.⁸⁸

A. United States Sentencing Guidelines calculations

In calculating the Guidelines range, the court will use section 2B5.3 for violations of 17 U.S.C. §§ 506(a) and 1201, as well as 18 U.S.C. §§ 2318–2320, namely, crimes involving trademark, copyright, circumvention, and trafficking in counterfeit or illicit labels.⁸⁹

Section 2B1.1 applies to violations of 18 U.S.C. §§ 1029–1030, 1341, 1343, 1831–1832, and 2314, namely, offenses involving trade secret theft, economic espionage, mail and wire fraud, interstate transportation of

⁸⁵ See 18 U.S.C. § 3553(a)(4)–(5); *United States v. Booker*, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must ... take them into account when sentencing.”); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin sentencing proceedings by correctly calculating the applicable U.S.S.G. range); *Gall v. United States*, 552 U.S. 38, 49 (2007) (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”).

⁸⁶ U.S.S.G. ch. 1, pt. A, introductory cmt.

⁸⁷ *Gall*, 552 U.S. at 49–51; U.S.S.G. §§ 1A1.1 cmt., 1B1.1.

⁸⁸ U.S.S.G. § 1B1.1 cmt. background.

⁸⁹ *Id.* § 2B5.3; 17 U.S.C. §§ 506(a), 1201; 18 U.S.C. §§ 2318–2320.

stolen goods, access device fraud, and computer fraud and abuse.⁹⁰

For other types of charges more removed from IP, section 2S1.1 applies to violations of 18 U.S.C. §§ 1956–1957, namely, crimes involving money laundering.⁹¹ Section 2T3.1 applies to violations of 18 U.S.C. §§ 542 and 545, namely, offenses involving smuggling and entry of goods by false statements.⁹² Section 2T1.1 applies to violations of 26 U.S.C. § 7201, namely, offenses involving tax evasion.⁹³ And some less-frequently-charged offenses under 18 U.S.C. § 1030 are under other sections of the Guidelines.⁹⁴

Sections 2B5.3, 2B1.1, and 2S1.1 of the Guidelines use the loss table at section 2B1.1 to calculate, respectively, the infringement amount, the loss amount, and the value of the laundered funds.⁹⁵ Sections 2T3.1 and 2T1.1 use the tax table at section 2T4.1 to calculate the tax loss.⁹⁶ Prosecutors should understand that the infringement amount, loss amount, value of laundered funds, and tax loss are vastly different numbers. Prosecutors should be sure to calculate the correct amount under the relevant section of the Guidelines. This number will often have the largest impact on the Guidelines range and the court will consider it along with various specific offense characteristics applicable to the different Guidelines sections and other adjustments and factors common in IP cases such as role in the offense, obstruction, criminal history, and acceptance of responsibility.⁹⁷

1. Trafficking in counterfeit goods

Section 2B5.3 of the Guidelines covers convictions under 18 U.S.C. § 2320.⁹⁸

First, the most significant factor determining the sentence is the infringement amount.⁹⁹ In a typical trademark case, the court will determine the infringement amount based on the retail value of the infringed item multiplied by the infringing items.¹⁰⁰ The court has flexibility to make a reasonable estimate of the infringement amount using any relevant information including financial records.¹⁰¹

⁹⁰ U.S.S.G. § 2B1.1; 18 U.S.C. §§ 1029–1030, 1341, 1343, 1831–1832, 2314.

⁹¹ U.S.S.G. § 2S1.1; 18 U.S.C. §§ 1956–1957.

⁹² U.S.S.G. § 2T3.1; 18 U.S.C. §§ 542, 545.

⁹³ U.S.S.G. § 2T1.1; 26 U.S.C. § 7201.

⁹⁴ 18 U.S.C. § 1030.

⁹⁵ U.S.S.G. §§ 2B5.3, 2B1.1, 2S1.1.

⁹⁶ *Id.* §§ 2B5.3(b)(1), 2B1.1(b)(1), 2S1.1(a)(2), 2T3.1, 2T1.1.

⁹⁷ *Id.* §§ 2B5.3(b), 2B1.1(b), 2S1.1(b), ch. 3, pt. B, 3C1.1, ch. 4, pt. A, 3E1.1.

⁹⁸ *Id.* § 2B5.3; 18 U.S.C. § 2320.

⁹⁹ U.S.S.G. § 2B5.3(b)(1).

¹⁰⁰ *Id.* § 2B5.3 cmt. n.2(A).

¹⁰¹ *Id.* § 2B5.3 cmt. n.2(E).

Second, there are sentencing enhancements where the offense involved counterfeit drugs, the conscious or reckless risk of death or serious bodily injury, possession of a dangerous weapon such as a firearm, or a counterfeit military good or service.¹⁰²

Third, additional enhancements apply if the offense involves the manufacture, importation, or uploading of infringing items, or if the defendant was convicted of trafficking in circumvention devices.¹⁰³

In a typical trademark case, the most common specific offense characteristics driving the sentence will be the infringement amount and the enhancement for manufacturing or importing the items.¹⁰⁴ However, prosecutors should always determine if the offense involves military goods or drugs or could have caused death or serious bodily injury. For example, if the defendant sold counterfeit items to the military, the prosecutor should look to see what damage, if any, those transactions caused—particularly, how the armed services used the goods and for what purpose. The harm here would generally be impairment of combat operations.¹⁰⁵ For example, if the counterfeit good was a military-grade integrated circuit installed on an AH-64E Apache helicopter, the prosecutor could argue that the offense involved trafficking in counterfeit military goods that impaired combat operations and thus warrants higher penalties.¹⁰⁶

In terms of other dangers to consumers, prosecutors should test a sample of the goods to determine if they are possibly hazardous.¹⁰⁷ This is especially important with counterfeit medicines, which may contain the wrong ingredients; include too much, too little, or no active ingredient; or have other harmful ingredients such as lead, aluminum, mercury, arsenic, rat poison, antifreeze, floor wax, house paint, road paint, paint thinner, or cement.¹⁰⁸ In fact, a study published by the Centers for Disease Control

¹⁰² *Id.* § 2B5.3(b)(5)–(7).

¹⁰³ *Id.* § 2B5.3(b)(3).

¹⁰⁴ *Id.* § 2B5.3(b)(1), (b)(3)(A).

¹⁰⁵ *Id.* § 2B5.3(b)(7)(B).

¹⁰⁶ Brandon Sullivan & Jeremy Wilson, *Counterfeit Parts in the U.S. Department of Defense Supply Chain*, MICH. ST. UNIV. CTR. FOR ANTI-COUNTERFEITING & PROD. PROT. (2016), <https://a-capp.msu.edu/article/counterfeit-parts-in-the-u-s-department-of-defense-supply-chain/> (discussing how counterfeit parts in the Department of Defense supply chain threaten national security by compromising critical military operations and place the lives of military service members at risk).

¹⁰⁷ Prosecutors must determine whether a section 2320 charge is appropriate based on the nature and quality of the counterfeit drug products. They should also keep in mind that other narcotics-related charges may be available. *See, e.g.*, 21 U.S.C. §§ 841, 846 (describing the standards, qualifications, and penalties for narcotics charges, as well as the application of the same penalties to any person who attempts or conspires to commit such an offense).

¹⁰⁸ *Counterfeit Medicine*, U.S. FOOD & DRUG ADMIN. (Dec. 8, 2025), <https://www.fda.gov/oc/counterfeit-medicine>.

and Prevention shows that the number of people in the United States who overdosed and died from counterfeit prescription drugs—many of which contained fentanyl—has more than doubled in recent years.¹⁰⁹

Even an innocuous good such as a pair of counterfeit sneakers or a fake luxury designer purse could be dangerous. For example, a recent fashion industry study tested counterfeit clothing, footwear, and other accessories and found that more than a third failed to comply with U.S. product-safety standards and had dangerous levels of arsenic, cadmium, phthalates, lead, and other chemicals and heavy metals.¹¹⁰

Several recent sentencings illustrate these principles. For example, in *United States v. Whelan*, the defendant imported counterfeit airbags from China and sold them on eBay.¹¹¹ He pleaded guilty to trafficking in counterfeit automobile airbags in violation of 18 U.S.C. § 2320.¹¹² Whelan admitted that he imported and sold approximately 364 airbags and that the manufacturer's suggested retail price for each infringed airbag was \$650.¹¹³ Therefore, the total infringement amount was \$236,600, and the parties generally agreed that a sentence in the range of 24–37 months in prison was appropriate, with the defendant arguing for a lower-range sentence and the government for a higher-range sentence.¹¹⁴ Pursuant to section 2B5.3 of the Guidelines, the government argued for enhancements for the \$236,000 infringement amount and importation of the infringing items because the offense involved the conscious or reckless risk of death or serious bodily injury.¹¹⁵ To show the danger of the airbags, the government tested several of them and found, when triggered, they either failed

fda.gov/drugs/buying-using-medicine-safely/counterfeit-medicine; *Fake Medicines*, INTERPOL, <https://www.interpol.int/en/Crimes/Illicit-goods/Shop-safely/Fake-medicines> (last visited July 29, 2026); Anne Pritchett, *How Counterfeit Drugs Threaten U.S. Health and Innovation*, CTR. FOR STRATEGIC & INT'L STUD. (Nov. 19, 2025), <https://www.csis.org/blogs/perspectives-innovation/rai-explainer-how-counterfeit-drugs-threaten-us-health-and-innovation>.

¹⁰⁹ Julie O'Donnell et al., *Drug Overdose Deaths with Evidence of Counterfeit Pill Use—United States, July 2019–December 2021*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Sep. 1, 2023), https://www.cdc.gov/mmwr/volumes/72/wr/mm7235a3.htm?s_cid=mm7235a3_w.

¹¹⁰ *Fashion Industry Study Reveals Dangerous Chemicals, Heavy Metals in Counterfeit Products*, AM. APPAREL & FOOTWEAR ASS'N (Mar. 23, 2022), https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Fashion_Industry_Study_Reveals_Dangerous_Chemicals_Heavy_Metals_Counterfeits.aspx.

¹¹¹ Plea Agreement at 2–3, *United States v. Whelan*, No. 17-CR-206-RJA-HKS (W.D.N.Y. Aug. 30, 2018), Dkt. No. 52.

¹¹² *Id.* at 1.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.* at 3–6.

¹¹⁵ *Id.*; U.S.S.G. § 2B5.3.

to fully inflate or over inflated, thereby causing shrapnel during deployment.¹¹⁶ In balancing the seriousness of the scheme and danger of the counterfeit airbags with Whelan's remorse, financial history, and family life, the court sentenced him to 24 months in prison and ordered him to pay restitution of \$75,846.¹¹⁷

Similarly, the sale of military goods can also result in a higher sentence. For instance, in *United States v. Kim*, the defendant fraudulently sold \$3.5 million of counterfeit, used, and surplus fan assemblies to the Department of Defense.¹¹⁸ Kim pleaded guilty to trafficking in counterfeit goods and wire fraud.¹¹⁹ The parties agreed the infringement amount was \$6.7 million.¹²⁰ The offense involved the manufacture of infringing items and Kim knew that the fan assemblies he sold were intended for military use and that their failure was likely to impair combat operations.¹²¹ The court sentenced the defendant to 42 months in prison and over \$3.5 million in restitution.¹²²

In addition, where the defendant is a CEO or other executive, a role adjustment at sentencing can significantly increase a defendant's sentencing exposure. For example, in *United States v. Aksoy*, the defendant pleaded guilty to a conspiracy to traffic in counterfeit goods and mail and wire fraud.¹²³ Aksoy ran dozens of companies, entities, and Amazon and eBay storefronts that imported tens of thousands of fraudulent and counterfeit Cisco networking devices from China and Hong Kong.¹²⁴ He resold them to customers in the United States and overseas, falsely representing the products as new, genuine, high quality, and factory sealed.¹²⁵ Aksoy agreed to an infringement amount between \$150–\$250 million and loss amount between \$65–\$150 million.¹²⁶ Under the grouping rules, trade-

¹¹⁶ Government Response to Defendant's Objections to the Presentence Report at 4, *United States v. Whelan*, No. 17-CR-206-RJA-HKS (W.D.N.Y. Apr. 25, 2019), Dkt. No. 67.

¹¹⁷ Transcript of Sentencing at 17–22, *United States v. Whelan*, No. 17-CR-206-RJA-HKS (W.D.N.Y. June 10, 2021), Dkt. No. 89.

¹¹⁸ Press Release, U.S. Att'y's Off., N.D. Cal., E. Bay Man Pleads Guilty to Selling \$3.5M Counterfeit Elec. Used Sophisticated Mil. Weapons Sys. (Mar. 28, 2024).

¹¹⁹ *Id.*

¹²⁰ Sentencing Memorandum by USA as to Steve H.S. Kim at 4, *United States v. Kim*, No. 24-cr-103-HSG (N.D. Cal. July 10, 2024), Dkt. No. 20.

¹²¹ *Id.*

¹²² Press Release, U.S. Att'y's Off., N.D. Cal., Cal. Resident Steve H.S. Kim Sentenced for Selling \$3.5M Counterfeit & Substandard Elec. for Use Mil. Sys. (July 18, 2024).

¹²³ No. 22-cr-464, 2024 WL 1620326, at *1 (D.N.J. Apr. 12, 2024).

¹²⁴ Press Release, U.S. Dep't of Just., Leader Massive Scheme to Traffic Fraudulent & Counterfeit Cisco Networking Equip. Sentenced to Prison (May 2, 2024).

¹²⁵ *Id.*

¹²⁶ Submission Notice re Sentencing Materials Submitted to the Court, *United States*

mark infringement had a higher Guidelines offense level than mail and wire fraud, so the court applied section 2B5.3.¹²⁷ The government argued for enhancements based on the following: (1) the infringement amount; (2) the importation of infringing items from China; (3) the role in the offense as an organizer and leader of criminal activity involving five or more participants; and (4) the obstruction of justice based on forged documents.¹²⁸ The court sentenced Aksoy to 78 months in prison, ordered him to forfeit money and assets totaling \$15 million, and ordered him to pay over \$100 million in restitution.¹²⁹

In other cases, facts such as defendants lying to law-enforcement agents or perjuring themselves at trial can also be compelling at sentencing. For instance, in *United States v. Babichenko*, the defendant and four other family members were found guilty at trial of counterfeit goods trafficking and conspiracy and wire fraud conspiracy.¹³⁰ The defendants sold tens of thousands of counterfeit Apple and Samsung cellphones and cellphone accessories on Amazon and eBay that they obtained in bulk from manufacturers in Hong Kong, repackaged in Idaho, and then sold individually to consumers online as genuine and new.¹³¹ The government argued that the infringement amount was over \$25 million.¹³² The court sentenced one defendant (Pavel Babichenko) to 72 months in prison, a \$21,000 fine, and a \$33.7 million forfeiture.¹³³ The court sentenced another defendant (Piotr Babichenko) to 48 months in prison, a \$10,000 fine, and \$3.3 million forfeiture.¹³⁴ The court sentenced the other three defendants (Timofey Babichenko, David Bibikov, and Mikhail Iyerusalimets) to terms ranging up to 48 months in prison, various fines, and forfeiture ranging from \$953,000 to \$9.2 million.¹³⁵

v. Aksoy, No. 22-cr-464-GC (D.N.J. Apr. 12, 2024), Dkt. No. 67 (sentencing materials available from the authors); Application for Permission to Enter Plea of Guilty at 3, *United States v. Aksoy*, No. 22-cr-464-GC (D.N.J. June 5, 2023), Dt. No. 43.

¹²⁷ See U.S.S.G. § 2B5.3.

¹²⁸ Submission Notice, note 126, at 1–8.

¹²⁹ Press Release, U.S. Dep’t of Just., Leader Massive Scheme to Traffic Fraudulent & Counterfeit Cisco Networking Equip. Sentenced to Prison (May 2, 2024).

¹³⁰ No. 18-cr-258-BLW, 2023 WL 5613545, at *1 (D. Idaho Aug. 30, 2023).

¹³¹ *Id.* at *2. See Press Release, U.S. Att’y’s Off., D. Idaho, Five Family Members Sentenced to Prison & Ordered to Forfeit Combined \$51.9 Million Dollars Proceeds from Their Fraudulent Sale Counterfeit Trademarked Cellular Phones & Accessories (Mar. 27, 2023).

¹³² Government’s Response to Defendants’ Objections to Initial Presentence Investigation Report at 10, *United States v. Babichenko*, No. 18-cr-258-BLW (D. Idaho Feb. 27, 2023), Dkt. No. 1739.

¹³³ *Babichenko*, 2023 WL 5613545, at *2; Press Release, note 131.

¹³⁴ *Babichenko*, 2023 WL 5613545, at *2; Press Release, note 131.

¹³⁵ *Babichenko*, 2023 WL 5613545, at *2; Press Release, note 131.

In short, in a typical trademark case, prosecutors should focus on making a reasonable estimate of the number of infringing goods; ascertaining the retail price of those goods; and determining if certain aggravating factors apply such as whether the defendant trafficked in dangerous goods, sold them to the government or military (or the items otherwise ended up there through the supply chain), manufactured or imported the goods, performed a leadership role in the operation, or obstructed justice.

2. Copyright infringement

Section 2B5.3 also covers convictions under 17 U.S.C. § 506(a) and 18 U.S.C. §§ 2319, 2319A, 2319B, and 2319C.¹³⁶

First, the biggest driver of a sentence in a copyright case will be the infringement amount, especially in the case of internet-piracy cases, which can easily involve thousands or even millions of copies of infringing works. As with trademark cases, courts generally calculate the infringement amount based on the retail value of the infringed items multiplied by the number of infringing items.¹³⁷ The Guidelines specifically state that the court should do so in cases involving digital or electronic reproduction of the infringed items.¹³⁸ To calculate the infringement amount, prosecutors should reach out to victim companies and industry representatives to get assistance in determining the number of infringing items—especially if the defendant was selling a mix of copyright-infringing works and non-infringing goods. Prosecutors working with the private sector may need to gather data and estimate the retail price of copyrighted works. While in many cases a work may have standard manufacturer’s suggested retail price or typical retail price on popular shopping platforms such as Amazon or the iTunes Store, there may not always be an agreed-upon value for such a work. For instance, prosecutors might need to determine the retail value of a particular infringed work by apportioning the retail value of the relevant series, season, rental, album, or subscription price. Alternatively, they might rely upon the retail price for comparable content. The court can make a reasonable estimate of the infringement amount using any relevant information, including financial, inventory, and database records seized from the defendant, piracy operation, or hosting provider.¹³⁹

Second, there is a sentencing enhancement for the infringement of works being prepared for commercial distribution, colloquially referred to as pre-release content.¹⁴⁰ As discussed above in connection with 17 U.S.C.

¹³⁶ U.S.S.G. § 2B5.3; 17 U.S.C. § 506(a); 18 U.S.C. §§ 2319, 2319A, 2319B, 2319C.

¹³⁷ U.S.S.G. § 2B5.3 cmt. n.2(A).

¹³⁸ *Id.* § 2B5.3 cmt. n.2(A)(i).

¹³⁹ *Id.* § 2B5.3 cmt. n.2(E).

¹⁴⁰ *Id.* § 2B5.3(b)(2). *See* subsection II.A.2.

§ 506(a)(1)(C), a “work being prepared for commercial distribution” means a work that at the time of the offense the copyright owner had a reasonable expectation of commercially distributing but had not yet commercially distributed any copy.¹⁴¹ For software, such a work could involve the pre-release of an alpha or beta version of a software program still under development or a pre-master version of a song provided to a record label or mastering engineer before a song is released. With regard to motion pictures in particular, such a work includes a film that has been released in a movie theater but has not yet been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside the movie theater.¹⁴² This pre-release sentencing enhancement covers copies of a film made by a camcorder in a movie theater and distributed soon after by the infringer as well as digital copies of movies released by pirates before the date of the copyright owner’s authorized digital download, DVD, or Blu-ray release dates. Significantly, the enhancement here is broader than section 506(a)(1)(C)—which makes it a separate crime to *distribute* works being prepared for commercial distribution—and thus could apply to an individual convicted of copyright infringement by reproduction or public performance who could not have been charged under section 506(a)(1)(C).¹⁴³

Third, a sentencing enhancement applies where the offense involves the uploading of infringing items.¹⁴⁴ “Uploading” means making an infringing item available on the internet with the intent to enable others to download, otherwise copy the infringing item, or have access to the infringing item including by storing the infringing item as an openly shared file.¹⁴⁵ This applies in internet-piracy cases because defendants running pirate sites customarily upload or aid and abet the uploading of works to further share, distribute, and stream them.

The Copyright Act originally required criminal copyright infringement to be for profit, but in 1976, Congress eliminated that requirement, insisting only that infringement be conducted “willfully and for purposes of commercial advantage or private financial gain.”¹⁴⁶ As discussed above, “commercial advantage or private financial gain” is broadly defined in the Guidelines to include the expectation of receipt of anything of value including other copyrighted works.¹⁴⁷ For example, if defendants participate

¹⁴¹ 17 U.S.C. § 506(a)(3). *See* subsection II.A.2.

¹⁴² 17 U.S.C. § 506(a)(3)(B).

¹⁴³ *Id.* § 506(a)(1)(C).

¹⁴⁴ U.S.S.G. § 2B5.3(b)(3).

¹⁴⁵ *Id.* § 2B5.3 cmt. n.1.

¹⁴⁶ *See United States v. LaMacchia*, 871 F. Supp. 535, 539–41 (D. Mass. 1994).

¹⁴⁷ U.S.S.G. § 2B5.3 cmt. n.1. *See* subsection II.A.1.

in a pirate site where they share files with others with the expectation of others sharing files with them in return, that would count as private financial gain. In addition, in 1997, Congress expanded the criminal copyright statute to allow prosecutions regardless of the person's motive but with lesser maximum penalties in those cases.¹⁴⁸ In these situations, the Guidelines also provide for a downward adjustment.¹⁴⁹

In a typical copyright case, the specific offense characteristics that will have the greatest effect on the possible sentence will be the infringement amount and whether the offense involved pre-release works or uploading. Most internet-piracy cases involve uploading, which, broadly defined under the Guidelines, would include making infringing works available to others and sharing them on streaming or torrent sites.

Prosecutors handling an internet-piracy case should look to see if there was any pre-release content—that is, if any of the infringing works were reproduced, distributed, streamed, or otherwise provided before the copyright owners commercially distributed them. For movies, prosecutors should look at the actual release dates in the United States for authorized digital downloads, DVDs, or Blu-rays. Then, based on records and evidence, they should compare those to the date that works were seized and when the defendant copied, distributed, or streamed them. In addition, as a general matter, an authorized downloader from platforms such as Amazon, iTunes Store, Google Play, or Netflix must keep any authorized downloads within the relevant apps and would not be able to reproduce or distribute the work further. Thus, an illegal digital copy of a movie—which can be copied and shared unlimited times—is far more valuable than an authorized one.

Given some judges may not realize the full scope of the harm of copyright infringement, prosecutors should encourage copyright owners to submit a victim-impact statement (VIS).¹⁵⁰ In fact, 18 U.S.C. § 2319 specifically provides that victims can submit to probation officers a VIS that identifies the victims of the offense and the extent and scope of the injury and loss suffered by the victims, including the estimated economic impact of the offense on those victims.¹⁵¹ A VIS can provide powerful evidence of the adverse impact of piracy on copyright owners by describing how the defendant's specific crimes hurt the victims and how piracy in

¹⁴⁸ No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

¹⁴⁹ U.S.S.G. § 2B5.3(b)(4).

¹⁵⁰ Sentencing Memorandum, *United States v. Dallmann*, No. 2:22-cr-30-RFB-DJA (D. Nev. Oct. 11, 2024), Dkt. No. 570; Sentencing Hearing at 9–18, *United States v. Bowser*, No. 20-cr-127-RSL (W.D. Wash. Feb. 3, 2022), Dkt. No. 47.

¹⁵¹ 18 U.S.C. § 2319(e).

general damages the relevant industry, weakens the U.S. economy, and causes job losses. While other IP statutes may not reference VIS specifically, prosecutors should try to submit a VIS in any IP case.

United States v. Rodgers presents a straightforward application of the Guidelines in a copyright sentencing.¹⁵² In this case, a married couple imported counterfeit Disney DVDs from Hong Kong and sold them on eBay and other e-commerce sites and pleaded guilty to criminal copyright infringement.¹⁵³ The defendants admitted to receiving over 443 shipments of counterfeit DVDs.¹⁵⁴ Sample shipments seized by law enforcement contained 200–260 DVDs.¹⁵⁵ The government adopted the infringement amount recommendation from the Probation Office, which calculated an infringement amount of over \$1.5 million and included an enhancement based on importation.¹⁵⁶ The court sentenced the wife (the main defendant) to 48 months in prison and \$26,573 in restitution.¹⁵⁷ Her husband faced a similar calculation under the Guidelines, but because he had pleaded guilty to a misdemeanor, the court sentenced him to 12 months in prison and a fine of \$10,000.¹⁵⁸

Cases involving internet piracy can be more complicated. For instance, in *United States v. Bridi*, the defendant was a member of the Sparks piracy release group and fraudulently ordered pre-release DVDs and Blu-rays from wholesale distributors in the New York City area.¹⁵⁹ He then arranged for them to be sent to other members of the group, who then “ripped” them and made them available on pirate sites.¹⁶⁰ The government asserted that Sparks reproduced and disseminated at least 1,400 pre-release movies and television shows, and that Bridi bought about 600 pre-release DVDs and Blu-rays from wholesalers.¹⁶¹ The defendant pleaded guilty to conspiracy to commit copyright infringement, signing a plea

¹⁵² Sentencing Memorandum, *United States v. Rodgers*, No. 18-cr-4117 (W.D. Mo. Feb. 1, 2023), Dkt. No. 109; *United States v. Rodgers*, No. 18-CR-4117-RK, 2026 WL 370325 (W.D. Mo. Feb. 10, 2026); Indictment, *United States v. Rodgers*, No. 18-04117-01/02-CR-C-RK (W.D. Mo. Oct. 25, 2018), Dkt. No. 1.

¹⁵³ Press Release, U.S. Att’y’s Off., W.D. Mo., Columbia Couple Sentenced for Selling Counterfeit Disney Movies on eBay (Feb. 8, 2023).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Sentencing Memorandum, note 152, at 1–2.

¹⁵⁷ Press Release, W.D. Mo., note 153.

¹⁵⁸ *Id.*

¹⁵⁹ Press Release, U.S. Att’y’s Off., S.D.N.Y., Acting U.S. Att’y Announces Fed. Charges & Int’l Operation to Dismantle Online Piracy Grp. (Aug. 26, 2020).

¹⁶⁰ *Id.*

¹⁶¹ Government Sentencing Letter at 1, 3, *United States v. Bridi*, No. 1:20-cr-18 (S.D.N.Y. Jan. 27, 2022), Dkt. No. 71.

agreement admitting the infringement amount was more than \$95,000 and less than \$150,000; the offense involved pre-release and uploading; the defendant was a manager or supervisor and the criminal activity involved five or more participants; and the crime was not committed for commercial advantage or private financial gain.¹⁶² The court sentenced Bridi to 22 months in prison and \$120,000 in restitution.¹⁶³

The development of new technologies such as streaming and Internet Protocol television (IPTV)—a digital service that delivers live television programs or on-demand video content over the internet—poses additional difficulties. For example, in *United States v. Carrasquillo*, the defendant and others ran an internet-based television and movie streaming service for more than 100,000 paid subscribers, generating over \$30 million.¹⁶⁴ Carrasquillo pleaded guilty to many counts, including criminal copyright infringement.¹⁶⁵ The court applied the U.S.S.G. section with the highest applicable Guidelines range, namely, section 2B5.3.¹⁶⁶ The government argued for an infringement amount of approximately \$167 million, based on an estimate of the number of months Carrasquillo’s customers had subscribed to the illicit service, multiplied by the average price consumers paid for legitimate cable television service during the relevant period.¹⁶⁷ Several enhancements also applied as the offense involved uploading: Carrasquillo was an organizer, leader, manager, or supervisor in the criminal activity and he committed obstruction of justice.¹⁶⁸

Calculating the infringement amount in this case was complicated because the offense conduct involved relatively few identifiable infringing “copies,” and instead encompassed a conspiracy to fraudulently obtain and then illegally decode, copy, and retransmit cable programming that was broadcast on hundreds of channels, each airing different programs 24 hours a day, 7 days a week. The government urged the court to use the method described in the section 2B5.3 application notes for offenses involving 18 U.S.C. § 2511 and 17 U.S.C. § 1201—use the amount a

¹⁶² See Press Release, U.S. Att’y’s Off., S.D.N.Y., Member Int’l Movie Piracy Ring Pleads Guilty (Nov. 18, 2021).

¹⁶³ Jonathan Stempel, *British Man Gets 22 Months in Prison over Global Movie Piracy—U.S. Judge*, EURONEWS (Feb. 8, 2022), <https://www.euronews.com/2022/02/08/us-usa-piracy-sparks-group-bridi>.

¹⁶⁴ Press Release, U.S. Att’y’s Off., E.D. Pa., Leader Illegal Copyright Infringement Scheme Sentenced to 5 ½ Years’ Imprisonment (Mar. 8, 2023).

¹⁶⁵ Second Amended Judgment as to Bill Omar Carrasquillo at 1, *United States v. Carrasquillo*, No. 21-cr-367 (E.D. Penn. May 1, 2023), Dkt. No. 191.

¹⁶⁶ U.S.S.G. § 2B5.3.

¹⁶⁷ Government’s Sentencing Memorandum at 12–13, *United States v. Carrasquillo*, No. 21-cr-367-HB (E.D. Pa. Feb. 27, 2023), Dkt. No. 158.

¹⁶⁸ *Id.* at 14–15.

consumer would have had to pay to obtain access to the infringed content legitimately, which in this case meant multiplying the estimated total of subscriber months (based on a partial customer database seized from the defendant) by the average monthly bill of a subscriber to a legitimate cable television service.¹⁶⁹ In sentencing Carrasquillo to 66 months in prison, the court effectively adopted an offense level equal to the amount Carrasquillo had profited from the scheme—approximately \$35 million.¹⁷⁰ The court also ordered more than \$30 million in forfeiture and more than \$15 million in restitution.¹⁷¹

In copyright cases, prosecutors should focus on estimating the number of infringing works and the retail price of those works during the investigation. This can sometimes be a challenge, however, especially in internet-piracy cases. Given that courts can make a reasonable estimate of the infringement amount using any relevant information, prosecutors should examine the evidence for any financial records, databases, customer lists, price lists, invoices, or other information that will help determine the number of infringing works.¹⁷² Courts can also estimate the infringement amount based on samples of the evidence—a useful technique where, for example, the evidence includes thousands or millions of copies of suspected infringing works, all or groups of which share similarities (for example, large numbers of copies of U.S. prime-time television series, blockbuster movies, Nintendo Switch video games, or bestselling eBooks). In this situation, prosecutors can determine the infringement amount for a few infringing works, and apply those values to the larger, representative groups.¹⁷³ Moreover, prosecutors should reach out to copyright owners or industry associations to ensure that agents only count infringing works, confirm copyrights, and obtain information about the retail price of those works. And prosecutors should scrutinize seized items and other evidence to determine if any of the works are pre-release and decide if the defendant should receive adjustments for a leadership role in the operation or obstruction.

¹⁶⁹ See U.S.S.G. § 2B5.3 cmt. n.2(A)(iv), (viii); 18 U.S.C. § 2511; 17 U.S.C. § 1201.

¹⁷⁰ Government's Sentencing Memorandum, note 167, at 17.

¹⁷¹ Press Release, note 164; Press Release, U.S. Dep't of Just., Multiple Defendants Indicted Alleged Intell. Prop. Theft Scheme (Sep. 22, 2021).

¹⁷² See, e.g., Sentencing Memorandum at 15–31, United States v. Dallmann, No. 22-cr-30-RFB-DJA (D. Nev. Oct. 11, 2024), Dkt. No. 570.

¹⁷³ *Id.*

3. Trade secret theft and economic espionage

Section 2B1.1 of the Guidelines applies to convictions under 18 U.S.C. §§ 1831–1832.¹⁷⁴

As a threshold matter, prosecutors should concentrate on proving the loss amount under section 2B1.1. In a trade secrets case, the general rule is that loss is the “greater of actual or intended loss.”¹⁷⁵ “Actual loss” means the reasonable foreseeable pecuniary harm that resulted from the offense, and “intended loss” means the pecuniary harm that the defendant sought to inflict and includes intended pecuniary harm that would have been impossible or unlikely to occur.¹⁷⁶ For trade secrets, the court can make a reasonable estimate of the loss based on available information: (1) the fair market value of the property unlawfully taken, copied, or destroyed (or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property); and (2) the cost of developing the trade secret or the reduction in the value of that information resulting from the offense.¹⁷⁷ In other words, the Guidelines pull from the standard civil damages framework of actual loss and unjust enrichment and also expressly allow research and development costs. The Guidelines also provide that if there is a loss but it cannot be reasonably determined, the court shall use the gain that resulted from the offense.¹⁷⁸

Besides calculating the loss amount, prosecutors should also determine whether other sentencing enhancements apply. These commonly include whether the defendant did the following: (1) stole a trade secret knowing or intending that it would be transported or transmitted out of the United States or that the offense would benefit a foreign government, foreign instrumentality, or foreign agent; (2) relocated a fraudulent scheme to another jurisdiction to evade law enforcement; (3) committed a substantial part of the fraudulent scheme outside the United States; and (4) used sophisticated means in connection with the offense.¹⁷⁹ Other common adjustments are for the defendant abusing a position of trust, acting in a leadership role in the offense, and obstructing justice.

A recent case involving some of these enhancements is *United States v. Decker*.¹⁸⁰ In this case, Decker worked for Oil States Industries, Inc., an

¹⁷⁴ U.S.S.G. § 2B1.1; 18 U.S.C. §§ 1831–1832.

¹⁷⁵ U.S.S.G. § 2B1.1 cmt. n.3(A).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 2B1.1 cmt. n.3(C).

¹⁷⁸ *Id.* § 2B1.1 cmt. n.3(B).

¹⁷⁹ *Id.* § 2B1.1(b)(14), (b)(10).

¹⁸⁰ Indictment, *United States v. Decker*, No. 20-cr-332-SLP (W.D. Okla. Dec. 15, 2020), Dkt. No. 1.

oil and gas company that served customers engaged in drilling and production.¹⁸¹ While still employed at Oil States, Decker started a competing company and stole many trade secrets from Oil States, including technical drawings, material specifications, manufacturing instructions, and financial information.¹⁸² Decker admitted that he and others planned to use the information at the competing company.¹⁸³ Decker pleaded guilty to conspiracy to steal trade secrets.¹⁸⁴

The government argued the estimated loss was in the \$9.5–\$25 million loss amount range based on the fact that the victim valued the trade secret at \$26–\$34 million, the victim company had a market value of \$282 million, and the defendant expressed one of the goals of his scheme was to “take Oil States down.”¹⁸⁵ The government also argued for numerous other enhancements because the offense included submitting false or misleading information in bankruptcy proceedings and violating multiple court orders; sophisticated means; abuse of trust; Decker’s leadership of a conspiracy involving five or more people; and obstruction of justice by Decker perjuring himself in a deposition, making misrepresentations to bankruptcy court, and instructing multiple people involved in the conspiracy to delete text messages and emails concerning the offense.¹⁸⁶ The court adopted the government’s sentencing recommendation and sentenced Decker to 60 months in prison and ordered him to pay the victim company over \$1.1 million in restitution.¹⁸⁷

In focusing on sentencing, prosecutors should look particularly for evidence to help the court understand the true loss amount—focusing on the defendant’s intended loss to the victim company, the victim’s actual loss, and the defendant’s gain. That came into play in *United States v. Xue*, where the parties were over \$500 million apart in their loss calculations and the court adopted a sentence between the parties’ positions.¹⁸⁸ In that case, defendant Gongda Xue worked as a scientist at an institute in Switzerland affiliated with Novartis, and his sister, defendant Yu Xue,

¹⁸¹ *Id.* at 1.

¹⁸² *Id.* at 2–14.

¹⁸³ Plea Agreement at 2, *United States v. Decker*, No. 20-cr-332-SLP (W.D. Okla. June 2, 2021), Dkt. No. 37.

¹⁸⁴ *Id.*; Raju Chaduvula, *5-Year Prison Sentence for Oklahoma Man Convicted of Trade Secrets Conspiracy*, 2022 WESTLAW TODAY WHITE COLLAR CRIME BRIEFING 205 (2022).

¹⁸⁵ *United States’ Sentencing Memorandum* at 9, 12–13, *United States v. Decker*, No. 20-cr-332-SLP (W.D. Okla. Sep. 27, 2022), Dkt. No. 51.

¹⁸⁶ *Id.* at 15–20.

¹⁸⁷ Judgment at 2, 7, *United States v. Decker*, No. 20-cr-332-SLP (W.D. Okla. Nov. 14, 2022), Dkt. No. 59; Chaduvula, note 184.

¹⁸⁸ No. 16-cr-22, 2020 WL 5645765, at *1, *10 (E.D. Pa. Sep. 22, 2020).

worked as a scientist at GlaxoSmithKline (GSK) in Pennsylvania.¹⁸⁹ Both conducted cancer research, which their employers considered sensitive and confidential. To develop their own biopharmaceutical anti-cancer products, Gongda Xue started a company in Switzerland called Abba, and Yu Xue—with funding and support from the government of China—founded one in China called Renopharma.¹⁹⁰ Gongda Xue stole research into anti-cancer products at his institute and sent it to Yu Xue.¹⁹¹ In turn, Yu Xue stole GSK research into anti-cancer and sent it to Gongda Xue.¹⁹² Yu Xue also provided hundreds of GSK documents to others at Renopharma.¹⁹³ Renopharma then tried to re-brand GSK products under development as Renopharma products and sell them for billions of dollars.¹⁹⁴ Yu Xue pleaded guilty to conspiracy to steal trade secrets; another defendant at GSK, Lucy Xi, pleaded guilty to theft of trade secrets; and Yu's sister, Tian Xue, pleaded guilty to conspiracy to commit money laundering for agreeing to launder illegal proceeds that Renopharma expected to receive.¹⁹⁵ One of the directors of Renopharma, Tao Li, also pleaded guilty to conspiring to steal GSK trade secrets.¹⁹⁶

In a three-day hearing, the government argued the loss amount was over \$550 million, and defendants argued it was \$0.¹⁹⁷ The court issued a 45-page opinion, finding that the government only tried to prove the development cost of the stolen information and its fair market value and thus failed to show the loss the defendants intended GSK to suffer.¹⁹⁸ According to the court, there was no actual loss to GSK, there was no actual gain to the defendants, and the government did not show intended loss.¹⁹⁹ As a result, the court agreed with the defendants that the loss amount was \$0. For Yu Xue's sentencing, the government argued the following: (1) the offense involved misappropriation of a trade secret; (2) she knew or intended that it would be transmitted out of the United States; (3) she was the leader of criminal activity involving five or more

¹⁸⁹ Press Release, U.S. Att'y's Off., E.D. Pa., Swiss Scientist Convicted by Fed. Jury Conspiracy to Steal Trade Secrets Belonging to GlaxoSmithKline (May 2, 2022).

¹⁹⁰ Press Release, U.S. Att'y's Off., E.D. Pa., Former GlaxoSmithKline Scientist Pleads Guilty to Stealing Trade Secrets to Benefit Chinese Pharm. Co. (Aug. 31, 2018).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Press Release, note 189.

¹⁹⁶ *Id.*

¹⁹⁷ *Xue*, 2020 WL 5645765, at *1, *10.

¹⁹⁸ *Id.* at *1–2.

¹⁹⁹ *Id.*

participants; (4) she abused a position of trust; and (5) she used a special skill in committing the offense.²⁰⁰ The court sentenced Yu Xue to 8 months in prison and a \$20,000 fine, balancing the seriousness of the theft of valuable trade secrets and the need for general deterrence with Xue's post-charging volunteering, lack of pre-theft criminal history, and character witness testimony.²⁰¹ For similar reasons, the court sentenced Gonda Xue to time served, which was approximately 10 months in prison.²⁰² The court also sentenced Tao Li to time served, which was about 2 months in prison and a \$15,000 fine.²⁰³ The court sentenced Tian Xue to 5 years of probation and a \$9,500 fine.²⁰⁴ Xi was sentenced to 5 years of probation and a \$1,000 fine.²⁰⁵

Prosecutors should try to establish how much the defendant gained from the offense, especially if loss is unclear. For example, in *United States v. Jordanov*, the defendants worked for Genentech.²⁰⁶ They started a biopharmaceutical startup in Taiwan called JHL Biotech.²⁰⁷ While at Genentech and afterward, Jordanov stole trade secret information from Genentech and used it to accelerate the time for and to reduce the costs of JHL Biotech's development and production of Genentech biosimilars and enhance JHL Biotech's ability to meet various regulatory requirements for those biosimilars.²⁰⁸ Relying in part on the stolen trade secrets and concealing that theft, the defendants convinced Sanofi to agree to invest \$101 million in JHL Biotech.²⁰⁹ Both Jordanov and Lin pleaded guilty to conspiracy to commit theft of trade secrets and wire fraud.²¹⁰

In *Jordanov*, the government used the defendant's gain as an alterna-

²⁰⁰ Transcript of Sentencing Hearing at 15–58, *United States v. Xue*, No. 2:16-cr-22-JHS (E.D. Pa. June 24, 2021), Dkt. No. 359.

²⁰¹ *Id.* at 165–75.

²⁰² Judgment as to Gonda Xue at 3, *United States v. Xue*, No. 18-cr-122-JHS (E.D. Pa. Aug. 18, 2022), Dkt. No. 192; Sentencing Hearing at 18–23, *United States v. Xue*, No. 18-cr-122-JHS (E.D. Pa. Sep. 22, 2022), Dkt. No. 197.

²⁰³ Judgment as to Tao Li at 2, 6, *United States v. Li*, No. 16-cr-22-HJS (E.D. Pa. June 11, 2021), Dkt. No. 356.

²⁰⁴ Judgment as to Tian Xue at 2, 5, *United States v. Xue*, No. 16-cr-22-JHS (E.D. Pa. June 28, 2021), Dkt. No. 369.

²⁰⁵ Judgment as to Lucy Xi at 2, 5, *United States v. Xi*, No. 16-cr-22-JHS (E.D. Pa. Apr. 12, 2022), Dkt. No. 433.

²⁰⁶ Press Release, U.S. Att'y's Off., N.D. Cal., Former CEO & COO JHL Biotech Sentenced for Conspiring to Steal Trade Secrets & Commit Wire Fraud Exceeding \$101 Million (Mar. 15, 2022).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

tive measure of loss, estimating the loss as greater than \$9.5 million.²¹¹ The government argued for additional enhancements for both defendants, including that the trade secret was transported outside the United States to evade law enforcement and that a substantial part of the fraudulent scheme was committed outside the United States.²¹² The government also asserted that Jordanov obstructed justice.²¹³ Specifically, at one point, Jordanov asked a JHL Biotech employee to delete incriminating evidence during the scheme.²¹⁴ Citing the need to deter others from committing trade secret theft on this scale and noting that neither defendant would reoffend, the court sentenced both defendants to one year and one day in prison and a \$5,000 fine.²¹⁵

In sum, in a trade secret case, prosecutors should think early in the investigation about how they will be able to establish a loss amount at sentencing. They should try to establish the fair market value of the trade secret, how much it would cost the victim to replace the trade secret, the research and development that went into the trade secret, the reasonably foreseeable pecuniary harm that occurred to the victim from the theft, the pecuniary harm the defendant sought to inflict on the victim company, and the gain that resulted to the defendant from the theft. Much of this information will come from the victim company, but prosecutors remain free to retain and consult experts in the industry and conduct open-source research. That loss amount will be, by far, the largest factor at sentencing. Prosecutors should also look at whether the defendant moved the trade secret overseas and, if so, how. Further, prosecutors should consider if part of the scheme was committed in another country, if the offense benefited a foreign instrumentality, and if the defendant used sophisticated means, abused a position of trust, acted in a leadership role, or obstructed justice.

4. Circumvention of copyright protection systems

Section 2B5.3 of the Guidelines covers charges under 17 U.S.C. § 1201, which are not common.²¹⁶

As with trademark and copyright cases, the primary driver of the of-

²¹¹ United States’ Sentencing Memorandum at 6–7, *United States v. Jordanov*, No. 21-cr-227-WHA (N.D. Cal. Mar. 8, 2022), Dkt. No. 39.

²¹² *Id.* at 4–5.

²¹³ *Id.*

²¹⁴ *Id.* at 3–4.

²¹⁵ Hearing Transcript at 46–54, *United States v. Jordanov*, No. 21-cr-227-WHA (N.D. Cal. Apr. 24, 2022), Dkt. No. 52; Judgment as to Raco Ivanov Jordanov, *United States v. Jordanov*, No. 21-cr-227-WHA (N.D. Cal. Apr. 4, 2022), Dkt. No. 46; Judgment as to Rose Lin, *United States v. Jordanov*, No. 21-cr-227-WHA (N.D. Cal. Apr. 4, 2022), Dkt. No. 48.

²¹⁶ 17 U.S.C. § 1201; U.S.S.G. § 2B5.3.

fense level is the infringement amount. When the defendant “used a circumvention device” in the offense, the infringement amount is the amount the defendant would have had to pay to access the relevant works lawfully.²¹⁷ In other words, it would be the number of accessed works multiplied by the price the user would have had to pay to legally access those copyrighted works.²¹⁸ For a typical case involving trafficking of circumvention devices, the government would determine the infringement amount simply by making this calculation. In addition, the government can seek an enhancement under the Guidelines where the defendant was convicted under section 1201 for trafficking in circumvention devices or if the defendant manufactured or imported infringing items.²¹⁹

A recent example of a circumvention sentencing is *United States v. Bowser*.²²⁰ In this case, Bowser was a leader of a group that hacked leading gaming consoles and developed, manufactured, marketed, and sold a variety of circumvention devices that allowed their customers to play pirated versions of copyrighted video games, commonly referred to as “ROMs.”²²¹ The operation targeted popular consoles such as Nintendo Switch, Sony PlayStation, and Microsoft Xbox.²²² Bowser pleaded guilty to conspiring to circumvent technological measures and traffic in circumvention devices and to trafficking in circumvention devices.²²³ The government and Bowser agreed that the infringement amount was more than \$65 million and less than \$150 million.²²⁴ The government also argued for enhancements because the offense involved the manufacture of infringing items and because the defendant was convicted under 17 U.S.C. § 1201 for trafficking in circumvention devices.²²⁵ The government recommended a 60-month sentence.²²⁶ Placing significant emphasis on the

²¹⁷ *Id.* § 2B5.3 cmt. n.2(A)(viii).

²¹⁸ *Id.*

²¹⁹ *Id.* § 2B5.3(b)(3).

²²⁰ Press Release, U.S. Att’y’s Off., W.D. Wash., Pub. Voice & Principal Salesperson for Notorious Videogame Piracy Grp. Sentenced to 3+ Years Prison for Conspiracy (Feb. 10, 2022).

²²¹ Joseph Knoop, *Nintendo Hacker Gary Bowser Pleads Guilty on Piracy Charges*, IGN (Nov. 2, 2021), <https://www.ign.com/articles/gary-bowser-nintendo-hacker-lawsuit>; Sarah Coble, *Bowser to Pay Nintendo \$4.5M Restitution*, INFOSECURITY MAG. (Nov. 4, 2021), <https://www.infosecurity-magazine.com/news/bowser-to-pay-nintendo-45m/>.

²²² Coble, note 221; Press Release, note 220.

²²³ Knoop, note 221.

²²⁴ Plea Agreement at 12, *United States v. Bowser*, No. 20-cr-127 (W.D. Wash. Oct. 28, 2021), Dkt. No. 40.

²²⁵ Sentencing Memorandum of the United States, *United States v. Bowser*, No. 20-cr-127-RSL (W.D. Wash. Feb. 3, 2022), Dkt. No. 47. *See* 17 U.S.C. § 1201.

²²⁶ Hearing Transcript at 35–38, *United States v. Bowser*, No. 20-cr-127-RSL (W.D.

state of Bowser's health, the Covid-19 situation, and the need for general deterrence, the court sentenced Bowser to 40 months in prison and ordered him to pay \$4.5 million in restitution.²²⁷

In conclusion, in a circumvention case, prosecutors should focus on determining the infringement amount—which is the amount the defendant would pay to lawfully access the relevant works—and determine if the defendant manufactured or imported infringing items.

5. Trafficking in counterfeit or illicit labels

Charges under 18 U.S.C. § 2318, which are rare, come under section 2B5.3 of the Guidelines.²²⁸

The most common enhancement at sentencing would be for importing or manufacturing infringing labels, documentation, or packaging, and the sentence would mostly be increased by the infringement amount. Prosecutors should look at the number of counterfeit or illicit items, the retail price, and whether the defendant was importing or manufacturing the labels, documentation, or packaging.

United States v. Simakha offers an example of a section 2318 sentencing.²²⁹ Simakha was one of several defendants indicted for conspiracy to traffic in counterfeit labels, copyright infringement, and trafficking in counterfeit goods.²³⁰ Simakha was captured on a pole camera picking up a total of 441 boxes and 7 bags and was found with 6,399 counterfeit DVD movies and 11,100 counterfeit music CDs.²³¹ Based on an estimate of the number of discs and their retail price, the government estimated the infringement amount was \$769,728.²³² The government also argued for enhancements based on pre-release as well as obstruction of justice, given that Simakha fled the United States after his guilty plea, was arrested years later in Morocco, and then extradited to the United States for sentencing.²³³ Although the court sentenced Simakha to 60 months in prison and ordered him to pay almost \$71,000 in restitution, the court stated that it would have applied a higher Guidelines range based on the obstruction and offense conduct but believed that the sentence should be

Wash. Mar. 4, 2022), Dkt. No. 57.

²²⁷ *Id.*

²²⁸ 18 U.S.C. § 2318; U.S.S.G. § 2B5.3.

²²⁹ Judgment as to Mamadou Aliou Simakha, *United States v. Simakha*, No. 09-cr-241-WSD-ECS (N.D. Ga. Mar. 23, 2017), Dkt. No. 672.

²³⁰ Press Release, U.S. Att'y's Off., N.D. Ga., Member CD & DVD Counterfeiting Ring Atlanta Sentenced to Five Years Prison (Mar. 22, 2017).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

capped at 60 months by the plea agreement.²³⁴

In sum, in a section 2318 case, the infringement amount will be the most important factor in the sentence, along with aggravating adjustments for the person's role in the operation or obstruction.

6. Intellectual property cases charged under other statutes

Some IP crimes may not fit squarely under the regular IP statutes given that they involve new technologies not anticipated by older laws or because the conduct does not fall easily within one type of IP violation. There also is relatively little caselaw involving IP crime sentencings, so some issues are still unlitigated and uncertain.

As a result, if appropriately based on the evidence, prosecutors may prosecute IP cases under other statutes, such as mail and wire fraud, interstate transportation of stolen goods, access device fraud, computer fraud and abuse, smuggling goods into the United States, entry of goods by means of false statements, tax evasion, and money laundering.

Mail and wire fraud, interstate transportation of stolen goods, access device fraud, and many computer fraud and abuse charges generally would use section 2B1.1 for Guidelines calculations.²³⁵ Money laundering charges would be covered by section 2S1.1 of the Guidelines.²³⁶ Smuggling and false entry charges would fall under Guidelines section 2T3.1, and tax evasion would be covered by section 2T1.1.²³⁷

Mail or wire fraud often applies to IP offenses, and these charges can increase a defendant's sentencing exposure.²³⁸ In *United States v. Pearce*, the defendants conducted an operation to sell pirated business software licenses, which were used to unlock features of a popular telephone system used by thousands of companies around the globe.²³⁹ They pleaded guilty to conspiracy to commit wire fraud, which has a statutory maximum of 20 years compared to 5 years (for a first offense) for copyright infringement.²⁴⁰ Moreover, defendants Brad and Dusti Pearce agreed to a loss

²³⁴ *Id.*; Sentencing Hearing Transcript at 30, 32, 35–40, *United States v. Simakha*, No. 09-cr-241-TWT-ECS (N.D. Ga. June 8, 2017), Dkt. No. 684.

²³⁵ U.S.S.G. § 2B1.1.

²³⁶ *Id.* § 2S1.1. *See also* 18 U.S.C. §§ 1956–1957 (explaining the definitions and baseline sentencing requirement for money laundering and false entry charges).

²³⁷ U.S.S.G. §§ 2T3.1, 2T1.1.

²³⁸ 18 U.S.C. §§ 1341, 1343.

²³⁹ Press Release, U.S. Dep't of Just., Three Individuals Sentenced for Massive \$88M Bus. Tel. Sys. Software License Piracy Scheme (July 26, 2024).

²⁴⁰ *Id.*; Press Release, U.S. Dep't of Just., Comput. Sys. Admin. & Spouse Plead Guilty Massive Scheme to Sell Pirated Bus. Tel. Sys. Software Licenses (Sep. 19, 2023); Press Release, U.S. Dep't of Just., Bus. Owner Pleads Guilty Massive Int'l Scheme to

amount greater than \$9.5 million but not more than \$25 million, and defendant Hines agreed to a loss amount of over \$5 million.²⁴¹ Because mail and wire fraud use the same provisions of the Guidelines as IP crimes, the court agreed with the government and probation and calculated the Guidelines range under section 2B1.1, increasing the offense level to account for the loss amount and applying enhancements for sophisticated means and special skill for Brad Pearce and Hines.²⁴² The court then sentenced Brad Pearce to 48 months in prison, \$17 million restitution, and \$4 million forfeiture; Dusti Pearce to 12 months and a day in prison, \$10 million restitution, and \$4 million forfeiture; and Hines to 18 months in prison and 18 months home confinement, over \$5 million restitution, and \$2 million forfeiture.²⁴³

Cases involving software product keys may sometimes be prosecuted as access device fraud, since the keys can be considered access credentials.²⁴⁴ If the defendant is also passing those product keys off with counterfeit labels and packaging, prosecutors can add that charge as well. For instance, in *United States v. Liu*, the defendant obtained and sold counterfeit, illicit, or unauthorized Microsoft software, software products, and related components, including unauthorized product key codes and counterfeit product key cards.²⁴⁵ Liu pleaded guilty to conspiracy to commit unauthorized solicitation of access devices under 18 U.S.C. § 1029(a)(6) and trafficking in counterfeit labels and packaging under 18 U.S.C. § 2320(a).²⁴⁶ The government estimated that the loss amount was approximately \$80 million—based on the recovery of 318,213 Microsoft product keys from Liu’s computer that were connected to known thefts from Microsoft’s supply chain—and used an estimated retail price of \$250 per item, which “fairly approximate[d] the median price” of the software and “represents half of the proscribed loss amount in the Sen-

Sell Pirated Bus. Tel. Sys. Software Licenses (July 28, 2023). *See also* 18 U.S.C. §§ 1343, 2319 (explaining the definitions and sentencing requirements for wire fraud and copyright infringement).

²⁴¹ Press Release, note 239.

²⁴² Plea Agreement at 10, *United States v. Pearce*, No. 22-cr-258-G (W.D. Okla. Sep. 19, 2023), Dkt. No. 84; *United States’ Sentencing Memorandum* at 3–9, *United States v. Pearce*, No. 22-cr-258-G (W.D. Okla. Apr. 26, 2024), Dkt. No. 118; Minute Entry for Sentencing, *United States v. Pearce*, No. 22-cr-258-G (W.D. Okla. July 25, 2024), Dkt. No. 151; Transcript of Sentencing Hearing at 6–27, *United States v. Hines*, No. 22-cr-258-G (W.D. Okla. July 24, 2024), Dkt. No. 146.

²⁴³ Press Release, note 239.

²⁴⁴ 18 U.S.C. § 1029.

²⁴⁵ Press Release, U.S. Att’y’s Off., W.D. Mo., Chinese Nat’l Pleads Guilty to Software Piracy Scheme (Sep. 19, 2017).

²⁴⁶ Plea Agreement, *United States v. Liu*, No. 16-cr-207-DGK (W.D. Mo. Sep. 19, 2017), Dkt. No. 38; 18 U.S.C. §§ 1029(a)(6), 2320(a).

tencing Guidelines for losses accrued from an access device.”²⁴⁷ While the parties had agreed to a loss amount approaching \$80 million, the court did not agree with the government’s below-Guidelines recommendation of 72 months in prison,²⁴⁸ and instead adopted Liu’s request for a downward variance.²⁴⁹ The court therefore sentenced the defendant, a detained Chinese citizen arrested in Texas, to time served, which was almost 24 months.²⁵⁰

Cases involving trade secret theft often include charges for interstate transportation of stolen goods.²⁵¹ In such cases, however, there needs to be some physical, tangible item transported across state lines.²⁵² Such charges are easy to present to a jury and often straightforward to prove. Moreover, the maximum possible sentences for trade secret theft and interstate transportation of stolen goods are similar.²⁵³

Another potential charge for some IP cases is computer fraud and abuse, which criminalizes unauthorized access to certain computers.²⁵⁴ The maximum sentence for such a charge varies depending on the type of access, the defendant’s intent and knowledge, and harm.²⁵⁵ In some cases, pursuing this charge can increase the range of penalties from which the court can draw.

²⁴⁷ Sentencing Memorandum of the United States as to Wen Tao Liu at 12–13, *United States v. Liu*, No. 16-cr-207-DGK (May 23, 2018), Dkt. No. 50.

²⁴⁸ *Id.*

²⁴⁹ Defendant’s Sentencing Memorandum, *United States v. Liu*, No. 16-cr-207-DGK (W.D. Mo. May 15, 2018), Dkt. No. 49.

²⁵⁰ Judgment as to Wen Tao Liu, *United States v. Liu*, No. 4:16-cr-207-DGK (W.D. Mo. May 30, 2018), Dkt. No. 53.

²⁵¹ See 18 U.S.C. § 2314. See also, e.g., Government’s Sentencing Memorandum at 1–20, *United States v. Basaldua*, No. 19-cr-69-WTM-CLR (S.D. Ga. Feb. 16, 2022), Dkt. No. 354; Judgment at 1–2, *United States v. Basaldua*, No. 19-cr-69-WTM-CLR (S.D. Ga. Oct. 24, 2022), Dkt. No. 373 (after government argued for loss amount of \$150 to \$250 million and an enhancement for abuse of trust, Defendant, who pleaded guilty to conspiracy to steal trade secrets and interstate transportation of stolen property, was sentenced to 80 months in prison).

²⁵² See *Dowling v. United States*, 473 U.S. 207, 216 (1985); *United States v. Brown*, 925 F.2d 1301, 1307 (10th Cir. 1991).

²⁵³ See 18 U.S.C. §§ 1832, 2314.

²⁵⁴ See *id.* § 1030. See also, e.g., Government’s Sentencing Memorandum at 1–6, *United States v. Streit*, No. 22-cr-350-ALC (S.D.N.Y. Mar. 9, 2023), Dkt. No. 28; Press Release, U.S. Att’y’s Off., S.D.N.Y., Minn. Man Sentenced to Three Years Prison for Scheme to Commit Comput. Intrusion & to Illegally Stream Content from Four Major Prof. Sports Leagues (Mar. 16, 2023) (defendant, who pleaded guilty in illegal professional sports livestreaming case to felony unauthorized access to a computer and obtaining information and also admitted to extortion, was sentenced to 36 months in prison and ordered to forfeit \$500,000 and pay almost \$3 million in restitution).

²⁵⁵ See 18 U.S.C. § 1030(a).

Moreover, for individuals focused on importing counterfeit goods, smuggling may be an appropriate charge since it brings an increased statutory maximum of 20 years.²⁵⁶

Along those lines, charging entry of goods by false statement is unusual but may be suitable in some cases since it does not necessarily require proof of the use of a counterfeit mark.²⁵⁷ For instance, in *United States v. Cohn*, during the COVID-19 pandemic, the defendant sold 26,190 3M N95 masks for \$320,027 to a company that supplied the Veterans Health Care System.²⁵⁸ Cohn then approved the purchase of these masks from China for \$93,312, with each shipment's contents mislabeled and valued at less than \$800 to avoid domestic duty and tariffs.²⁵⁹ Cohn pleaded guilty to entry of goods by means of false statements.²⁶⁰ The court sentenced him to one year of probation and ordered him to pay \$8,028 in unpaid taxes and tariffs.²⁶¹ Cohn also agreed in a separate civil settlement to pay his customer \$282,250 in restitution.²⁶²

Because IP infringement is such a lucrative crime, prosecutors often include money laundering charges, the maximum penalties of which generally are higher than those for the underlying infringement.²⁶³ Along a similar vein, infringers often fail to pay taxes on their illegal earnings, so prosecutors may consider adding tax evasion charges, particularly where

²⁵⁶ See *id.* § 545. See, e.g., Letter to Court re Sentencing at 1–2, *United States v. Ling*, No. 17-cr-541-CBA (E.D.N.Y. June 29, 2018), Dkt. No. 31; Judgment at 1–6, *United States v. Ling*, No. 17-cr-541-CBA (E.D.N.Y. Nov. 15, 2018), Dkt. No. 35 (defendant, who pleaded guilty to smuggling and conspiracy to traffic in counterfeit goods with an estimated retail value of around \$297 million, was sentenced to 30 months in prison and restitution of \$12,905).

²⁵⁷ See 18 U.S.C. § 542. Cf. *id.* § 2320 (describing the various behaviors that qualify as trafficking in counterfeit goods or services, all of which require use of a counterfeit mark).

²⁵⁸ Plea Agreement at 6–8, *United States v. Cohn*, No. 22-cr-1308-DGC (D. Ariz. Dec. 21, 2022), Dkt. No. 22; Press Release, U.S. Att'y's Off., D. Ariz., Phx. Man Sentenced for Importing Counterfeit N95 Masks from Asia (Dec. 30, 2022).

²⁵⁹ Plea Agreement, note 258, at 6–8.

²⁶⁰ *Id.* at 1.

²⁶¹ *Id.* at 8.

²⁶² *Id.*

²⁶³ See 18 U.S.C. §§ 1956, 1957. See also, e.g., Statement of Facts at 1–13, *United States v. Polo*, No. 19-cr-253-MSN (E.D. Va. Dec. 12, 2019), Dkt. No. 133; Press Release, U.S. Dep't of Just., Comput. Programmer Convicted for Helping Run One Biggest Illegal Television Show Streaming Servs. U.S. (Nov. 15, 2024) (defendant, who operated two illegal streaming sites, pleaded guilty to copyright and money laundering charges, agreed to an infringement amount between \$250,000 and \$550,000, and admitted that he made over \$1 million from his piracy operations, was sentenced to 57 months in prison).

it might be difficult to prove the underlying IP violation.²⁶⁴

Sometimes cases involving counterfeit food, drugs, biological products, medical devices, cosmetics, agricultural products, or consumer products can be charged under other statutes such as 21 U.S.C. §§ 331 and 333 as interstate commerce “misbranding” offenses.²⁶⁵ Other cases may involve counterfeit prescription drugs, including those that are controlled substances, opening up charges under 21 U.S.C. §§ 841 and 846.²⁶⁶ The court calculates sentences for such charges under section 2D1.1 of the Guidelines, which applies to narcotics trafficking.²⁶⁷ Section 2D1.1’s base offense levels are multiples higher than those normally found for IP offenses, drastically increasing sentencing exposure for defendants.²⁶⁸

²⁶⁴ See 26 U.S.C. § 7201. See also, e.g., Government’s Sentencing Memorandum at 1, 6, *United States v. White*, No. 19-cr-504-AA (D. Or. July 1, 2021), Dkt. No. 34; Press Release, U.S. Att’y’s Off., D. Or., Newport Man Sentenced to Fed. Prison for Creating Illegal Video Streaming & Downloading Websites (July 9, 2021) (defendant, who ran illegal subscription streaming and downloading site and underreported his \$8 million income by \$4.4 million was sentenced to 12 months and a day in prison and ordered to forfeit almost \$5 million in cash and cryptocurrency and pay more than \$4.3 million in restitution).

²⁶⁵ See 21 U.S.C. §§ 331, 333. See also, e.g., Press Release, U.S. Dep’t of Just., Owner Major Online Colored Contact Lens Bus. Sentenced to 46 Months Prison Largest-Ever Scheme to Import & Sell Counterfeit & Misbranded Contact Lenses Prosecuted U.S. (Jan. 18, 2017) (defendant sold counterfeit contact lenses from Asia, pleaded guilty to conspiracy to traffic counterfeit goods and to introduce into interstate commerce misbranded medical devices, admitted the offense involved the conscious or reckless risk of death or serious bodily injury, was sentenced to 46 months in prison, and ordered to pay \$200,000 in restitution).

²⁶⁶ See 21 U.S.C. §§ 841, 846. See also, e.g., Press Release, U.S. Att’y’s Off., D. Utah, Shamo Sentenced to Life Prison After Conviction for Org., Directing Drug Trafficking Org. (Oct. 15, 2020) (defendant, who organized and directed drug trafficking operation that imported fentanyl and alprazolam from China and used the drugs to manufacture counterfeit Oxycodone and Xanax tablets, was sentenced to life in prison); Superseding Indictment at 1–6, *United States v. Benjamin*, No. 17-cr-80203-WPD (S.D. Fla. Mar. 6, 2018), Dkt. No. 41; Transcript of Sentencing Hearing at 44, *United States v. Benjamin*, No. 17-cr-80203-WPD (S.D. Fla. Sep. 26, 2018), Dkt. No. 198 (defendant, who was an orthopedic surgeon who manufactured and distributed counterfeit oxycodone pills with furanyl fentanyl—an extremely powerful synthetic opioid—causing the death of a woman and was convicted at trial of multiple drug counts, was sentenced to life in prison).

²⁶⁷ See U.S.S.G. § 2D1.1. See also, e.g., Sentencing Memorandum at 7–8, *United States v. Pasek*, No. 18-cr-72 (C.D. Cal. Aug. 5, 2019), Dkt. No. 136; Press Release, U.S. Att’y’s Off., C.D. Cal., Orange Cnty. Man Sentenced to 17½ Years Fed. Prison for Selling Counterfeit Opioid Pills Laced with Fentanyl (Aug. 26, 2019) (defendant, who manufactured and sold counterfeit Oxycodone pills with fentanyl and other synthetic opioids, had a guidelines range of 235–293 months in prison under section 2D1.1).

²⁶⁸ U.S.S.G. § 2D1.1.

In short, IP cases may not always neatly fit under the core IP statutes, especially if they involve new technologies or novel facts, and prosecutors should consider charging under other statutes. The Guidelines also include applicable sentencing enhancements and adjustments that prosecutors can use to adjust the Guidelines calculation to better reflect the conduct.

B. Section 3553

After calculating the sentencing range, the district court then weighs the factors under 18 U.S.C. § 3553(a) in determining whether a variance is appropriate.²⁶⁹ Under section 3553(a), the court must impose a sentence sufficient, but not greater than necessary.²⁷⁰ The court shall consider the following: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; and (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Several of these factors arise regularly in IP cases, where the sentence calculated using the Guidelines may appear to the court to be disproportionate to the offense conduct and harm.

1. History and characteristics of the defendant

Courts have latitude to decrease or increase a sentence based on the personal characteristics of the defendant, including substance use, family upbringing, military or job history, mental disorders, age, and post-charge conduct.²⁷¹

This can come into play in IP cases where the court considers the defendant's motive in participating in the criminal operation and the defendant's commitment to the criminal activity. For example, many trademark and copyright cases involve a criminal "pyramid" based on an illegal supply chain and a distribution of work among various members of a criminal group. For trademark cases, defendants at the top of pyramid run the operations, manufacturing goods from raw materials provided by others or importing infringing goods from countries such as China. They then sometimes repackage the goods or just resell them to other resellers

²⁶⁹ See 18 U.S.C. § 3553(a). See also *Rita v. United States*, 551 U.S. 338, 351 (2007) (discussing the role of section 3553(a) in determining a sentence); U.S.S.G. § 1B1.1 (explaining the order in which the factors discussed in section 3553(a) should be weighed).

²⁷⁰ 18 U.S.C. § 3553(a).

²⁷¹ U.S. SENT'G COMM'N, PRIMER ON DEPARTURES AND VARIANCES 36–37 (2024).

or to end users. Defendants leading these operations are business owners or executives who wanted to make more money by exploiting the huge profit margins that exist for selling cheap, substandard counterfeits as more expensive genuine items. Others lower down in the pyramid who are employees, distributors, resellers, and other types of intermediaries often assist the defendants. The organizers or leaders of the illegal operation typically cause the most harm and make the most money and are thus often the most culpable.

Some copyright schemes follow a similar model, especially those involved in physical copyrighted goods, digital codes or licenses, streaming, or IPTV services. Other copyright cases—such as those regarding peer-to-peer or torrent pirate sites or pirate release groups that post newly released works to such sites—involve defendants more like cybercriminals in hacking or similar cases. Defendants in these cases often live in different countries, know each other by monikers, and communicate through secure channels. They also play different roles in the scheme, with varied levels of responsibility and culpability. Defendants running these sites, even if free, can make large sums of money through advertising, “premium” memberships, and financial contributions through cryptocurrencies or other means. Many lower-level defendants, however, seem to participate mainly for the thrill and better access to free infringing content. In contrast, trade secret cases often involve insiders who leave their company but harm their former employer or directly profit from the work they did. These could also be employees who are working for or wish to benefit a foreign country.

As a result, trademark cases and copyright cases against higher-level defendants involve defendants motivated by greed. Defendants in trade secret theft cases often have this purpose as well, although some may be motivated by revenge, a wish to hurt the victim company, or the desire to benefit another nation.

2. Seriousness of the offense

Criminal IP cases may have high Guidelines ranges, especially if the defendant engages in trafficking or distributing large quantities of counterfeit or pirated goods or steals a high-value trade secret. As a result, some defendants may ask for a lower sentence or variance by arguing that the Guidelines overstate the true seriousness of the offense and that the infringement or loss amount produces an offense level that is not consistent with gravity of the defendant’s crimes.²⁷²

In trademark cases, prosecutors should first always try to identify

²⁷² 18 U.S.C. § 3553(a).

the full scope of the defendant's crime and ensure—to the extent possible—that scope is reflected in the infringement amount. Second, they should try to identify all victims, even those who may not have been the initial purchasers of the items. For example, a company might buy a counterfeit integrated circuit from a defendant and then resell to the U.S. Navy, where it is installed on a nuclear submarine. Prosecutors should look at the downstream supply chain for the product to see not just who bought from the defendant, but where those goods ended up. Third, prosecutors should determine if the counterfeit goods are dangerous or of such poor quality that use could lead to large losses to the end user. Fourth, prosecutors should emphasize the harm caused by counterfeit goods not only to the trademark owner but also to the consumer and others, including monetary and medical harms.²⁷³ They should also emphasize that counterfeit goods are lower in quality than genuine goods and may contain toxic ingredients. These are particularly important in cases involving counterfeit handbags, purses, wallets, accessories, clothes, and footwear, given many consumers purchase such goods. One 2021 survey by an IP management company found 46% of U.S. consumers admitted to purchasing counterfeit goods and 30% admitted to purchasing such items more than once.²⁷⁴ Fifth, prosecutors should emphasize that trafficking in counterfeit goods is a profitable crime that hurts the economy. For example, in fiscal year 2024, U.S. Customs and Border Protection seized 32.3 million goods for IP rights violations, with a retail value of \$5.4 billion—only a small fraction of the counterfeit goods available in the United States—and counterfeit products are estimated to cost the global economy over \$500 billion a year.²⁷⁵

In copyright cases, to emphasize the seriousness of the case, prosecutors should first focus on determining the infringement amount, which, as discussed earlier, may be difficult to do in some internet-piracy cases, particularly those involving IPTV or streaming.²⁷⁶

²⁷³ See *Fashion Industry Study Reveals Dangerous Chemicals, Heavy Metals in Counterfeit Products*, note 110 (finding that 17 of 47 tested products “contained dangerous levels of arsenic, cadmium, phthalates, lead, and more that have been shown to cause adverse health outcomes”).

²⁷⁴ Jayne Durden, *Anaqua Consumer Survey: The State of Counterfeit Goods*, ANAQUA (Aug. 26, 2021), <https://www.anaqua.com/resource/anaqua-consumer-survey-the-state-of-counterfeit-goods-blog/>.

²⁷⁵ See U.S. CUSTOMS & BORDER PROT., INTELLECTUAL PROPERTY RIGHTS SEIZURE STATISTICS 2 (2024). See also ORG. FOR ECON. COOP. & DEV., EUR. UNION INTELL. PROP. OFF., GLOBAL TRADE IN FAKES: A WORRYING THREAT 9 (2021) (presenting an analysis of the scope and magnitude of world trade in counterfeit and pirated products).

²⁷⁶ See subsection III.A.1.

Second, prosecutors should look to see if the defendant caused especially severe damage to copyright owners. For example, they should consider whether the works were pre-release and distributed before the copyright owners sold the product lawfully to the public. Pre-release piracy causes much more harm than regular post-release piracy.²⁷⁷

Third, prosecutors should emphasize that copyright infringement is not a victimless crime and seriously harms not only copyright owners but also the U.S. economy and economies around the world. For example, an industry trade-group study found the U.S. film and television industry alone supports 2.4 million jobs, pays \$186 billion in total wages, and comprises more than 122,000 businesses in all 50 states (92% of which employed fewer than 10 people).²⁷⁸ Another recent report by the U.S. Chamber of Commerce estimates global online theft of copyrighted movies and television shows costs the U.S. economy over \$29 billion in lost revenue each year and between 230,000 and 560,000 jobs in just 1 year.²⁷⁹

Fourth, prosecutors should emphasize the scale of the crime, how the defendant monetized the crime, the organized character of the offense, and the amount of money made by the defendant. Such factors distinguish the defendant charged from individuals who might occasionally stream or download pirated material at home.²⁸⁰ One researcher found 18% of respondents in the United States admitted using or acquiring any kind of content or digital products or services through illegal means, with 11% claiming not to know or remember and 8% preferring not to say.²⁸¹

In a trade secret theft case, prosecutors will concentrate on proving the loss amount under section 2B1.1.²⁸² For trade secrets, the court can make a reasonable estimate of the loss based on available information.

²⁷⁷ See, e.g., The United States' Position Regarding Presentence Report at 9, *United States v. Hale*, No. 25-cr-20027-SHL (W.D. Tenn. Aug. 26, 2025), Dkt. No. 43 (citing research showing that pre-release piracy causes an additional almost 20% loss in revenue compared to post-release piracy).

²⁷⁸ See MOTION PICTURE ASS'N, *THE AMERICAN MOTION PICTURE AND TELEVISION INDUSTRY: CREATING JOBS, TRADING AROUND THE WORLD* (2023).

²⁷⁹ See U.S. CHAMBER OF COM., *IMPACTS OF DIGITAL PIRACY ON THE U.S. ECONOMY* (2019).

²⁸⁰ See Lesley Simeon, *Why We Pirate—The Extent and Motivations of Illegal Content Consumption*, YOUGov (Sep. 10, 2024), <https://business.yougov.com/content/50475-why-we-pirate-the-extent-and-motivations-of-illegal-content-consumption>.

²⁸¹ *Share of Adults Who Have Ever Used or Acquired Content or Digital Products and Services via Illegal Means Worldwide as of May 2024, by Country*, STATISTA, <https://www.statista.com/statistics/1491574/content-digital-product-consumption-illegal-means-worldwide/#:~:text=As%20of%20May%202024%2C%20more%20than%20a,of%20German%20respondents%20said%20they%20have%20not> (last visited Aug. 5, 2026).

²⁸² U.S.S.G. § 2B1.1 cmt. n.3(C)(i)–(ii).

This may be difficult to show, however, and will rely on information from the victim company including, for example, the true value of the trade secret, how much it would cost to replace it, how much time and how many resources were spent developing the trade secrets, how much lost profit resulted from the theft, or how much the theft reduced the value of the trade secret. Using outside experts or open-source research if needed, prosecutors may need to push back if the victim company's loss number is disproportionately large or covers conduct or information not involved in the case. Companies can rarely pinpoint a loss amount based on one or multiple trade secrets. Instead, loss usually is calculated based on products or services not sold, where those products or services incorporate the stolen trade secrets and other, unrelated IP. Prosecutors will need to rely on the victim company and experts to estimate sales lost due to the theft of the trade secrets.

Regardless of the type of IP crime, if the offense level substantially understates the seriousness of the offense, prosecutors should consider asking for an upward variance.²⁸³ The previous version of the Guidelines listed some non-exhaustive factors for the court to consider in determining whether an upward departure may be warranted, including substantial harm to the reputation of the copyright or trademark owner or that the offense involved organized crime or resulted in death or serious bodily injury.²⁸⁴ Since the Commission eliminated departures in the current version of the Guidelines, any facts supporting upward departures can now be considered by the court to justify upward variances.²⁸⁵

3. Deterrence to criminal conduct

IP cases frequently lend themselves to arguments about deterrence, particularly the need to deter others from participating in similar acts of IP theft. First, the overall scope and scale of IP crime is staggering. The U.S. Chamber of Commerce estimates that global trade in counterfeit goods amounts to around \$500 billion.²⁸⁶ The best way to make a dent in this crime is to focus on the people profiting most from it—manufacturers, distributors, importers, and other top-level criminals—and punish them appropriately to deter others from engaging in similar crimes.

²⁸³ U.S.S.G. ch. 1, pt. A, introductory cmt; 18 U.S.C. § 3553.

²⁸⁴ U.S.S.G. § 2B5.3 cmt. n.5(A)–(D) (2024).

²⁸⁵ *Id.* ch. 1, pt. A, introductory cmt.

²⁸⁶ *Back-to-School: Business and Law Enforcement Team Up to Protect Students, Parents, and Teachers from Counterfeit Goods*, U.S. CHAMBER OF COM. (Aug. 11, 2022), <https://www.uschamber.com/intellectual-property/back-to-school-business-and-law-enforcement-team-up-to-protect-students-parents-and-teachers-from-counterfeit-goods>. See MAPPING GLOBAL TRADE IN FAKES, note 3, at 8.

Second, criminals consider IP crime to involve relatively low risk and comparatively high profit.²⁸⁷ As a result, the government can deter infringement by prosecuting IP cases and by publicizing the results. In a domestic survey by the National Crime Prevention Council, for example, most respondents stated if IP theft was a serious problem, they would see more people being arrested or additional stories about it in the news media.²⁸⁸ The best ways to deter IP criminals are punishing appropriately those who do get prosecuted, forfeiting illegal proceeds and assets, and providing full restitution to victims to ensure the offenders do not profit from their crimes.

Third, many IP criminal operations are just businesses seeking to maximize profits through illegal means. For example, rather than legally importing and reselling authentic goods, a defendant may choose to illegally import counterfeit goods at a fraction of the cost and resell them for just under the price of the authentic goods—thereby quickly making huge profits. If a criminal case results in an overly lenient sentence and does not take away the unlawful proceeds of the crime through seizure, forfeiture, and restitution, the defendant may see the prosecution and sentence as just a “cost of doing business.” This is especially true if the defendant has hidden resources or concealed cash or assets abroad.

Prosecutors should strive in every IP case to ensure a deterrent sentence—the sentence must remove the incentive to commit the crime. Thus, particularly in IP cases, the need for specific and general deterrence may weigh in favor of a significant sentence.

C. Restitution

Federal law makes clear that trademark, copyright, and trade secret crimes are offenses against property and requires a court order that defendants pay restitution to victims of the offense.²⁸⁹ Normally, in an IP case, the court must reimburse victims for lost income and expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.²⁹⁰ Victims mean identifiable persons directly and proximately harmed as a result of the commission of an offense, which can include government agencies.²⁹¹ For example, if the case involves tax charges, the defendant may be required

²⁸⁷ *About IP Crime*, INT’L IP CRIME INVESTIGATORS COLL. <https://www.iipic.org/aboutIPCrime.php> (last visited Mar. 30, 2026).

²⁸⁸ *Intellectual Property Theft Research*, NAT’L CRIME PREVENTION COUNCIL, <https://www.ncpc.org/resources/ip-theft/ncpc-research/> (last visited Aug. 5, 2026).

²⁸⁹ 18 U.S.C. §§ 2323(c), 3556, 3663A, 3664.

²⁹⁰ *Id.* § 3663A(b)(4).

²⁹¹ *Id.* § 3663A(a)(2); U.S.S.G. § 5E1.1.

to pay restitution to the IRS.²⁹² In any case where the United States is a victim, however, all other victims will receive full restitution before the United States receives any.²⁹³ Restitution is mandatory, although in some cases a court may decline to order restitution if it finds that determining it in the case is too complex or onerous.²⁹⁴ Moreover, the court calculates the amount of restitution for each victim in the full amount of each victim's losses, without consideration of the defendant's economic circumstances.²⁹⁵ The clerk of the district court where the defendant is sentenced disburses payments to victims, dividing up the amounts based on the victims' losses. As part of restitution, the defendant may agree to return stolen IP to the victim.²⁹⁶

Because IP cases involve damage to intangible rights, measuring the victim's actual loss may be difficult. The government bears the burden of showing the amount of the victim's loss by a preponderance of the evidence.²⁹⁷ As long as the government provides sufficient proof to allow the court to make a reasonable estimate of the victim's loss, the court can and should order restitution. In a trademark or copyright case, because the focus is on the victim's actual loss, the court will generally look to diverted sales or subscriptions—the victim's lost profits from sales or subscriptions that would otherwise have been made. To establish this, the government should offer evidence that the defendant's customers would have paid for legitimate goods or services if they had not purchased or otherwise acquired the infringing goods or services.²⁹⁸ Prosecutors should be able to establish this in trademark cases, at least where the counterfeit products seem to be identical with the fake ones and have similar prices to the genuine ones. However, this can be harder to show where the goods vary significantly in quality and price. And in copyright cases, it may be difficult to demonstrate that the consumers of the infringing works would have paid for the authorized works or subscribed to the relevant licensed streaming services.

Restitution is also mandatory in trade secrets cases since such a crime

²⁹² 18 U.S.C. §§ 3563(b)(2), 3583(d), 3663(a)(3), 3663A.

²⁹³ *Id.* § 3664(i).

²⁹⁴ *Id.* § 3663A(c)(3)(B).

²⁹⁵ *Id.* § 3664(f)(1)(A).

²⁹⁶ Press Release, U.S. Dep't of Just., Emp. Multinational DVD Co. Sentenced to Over Four Years Prison for Stealing, Selling Pre-Release Com. DVDs for Blockbuster Films (Sept. 11, 2025).

²⁹⁷ 18 U.S.C. § 3664(e).

²⁹⁸ *See, e.g., United States v. Dove*, 585 F. Supp. 2d 865, 873 (W.D. Va. 2008) (holding that the government and victims failed to show actual loss for restitution because they did not show that the illegal downloads at issue diverted profits from legitimate sales that the copyright holders would have otherwise made).

is an offense against property under Title 18.²⁹⁹ Because the driving principle of restitution is to make the victim whole, the defendant must not only reimburse the victim company for its actual losses, but also frequently return the trade secret—in whatever form it was taken—to its rightful owner.³⁰⁰ If the victim suffered no actual loss, restitution might not be appropriate.³⁰¹ In certain cases when actual losses exist but are too difficult to ascertain, prosecutors may use unjust enrichment and the defendant's profits as the measure for restitution.³⁰²

Restitution is not mandatory for cases solely involving DMCA circumvention or trafficking violations.³⁰³ Restitution, however, can still be ordered by the court in its discretion as part of a sentence and should be sought by the government for all IP violations.³⁰⁴ In such cases, restitution must have a connection to the circumvention or trafficking offense. For instance, if the circumvention of a technological measure enabled a defendant to distribute 100 “ripped” copies of a copyrighted work, the victim would be able to seek restitution for the retail value of those 100 works.

In short, prosecutors should carefully review evidence and work with IP owners to determine their actual losses, ensuring they can support victims' loss estimates in court, especially if the infringed goods are digital and thus easily reproducible with almost no cost or effort. So long as prosecutors employ a conservative and reasonable approach, courts should adopt victims' calculations of actual loss.

D. Forfeiture

Administrative forfeiture, which occurs when a law-enforcement agency forfeits property in a nonjudicial matter, is an option for all IP crimes.³⁰⁵ Such forfeiture is quick and does not involve the court. Once the agency seizes property and publishes notice of the property seizure, the property is effectively forfeited unless someone files a claim of ownership and contests the forfeiture—which rarely happens when stolen IP is involved.

Title 18, U.S. Code, Section 2323 covers civil and criminal forfeiture

²⁹⁹ 18 U.S.C. §§ 1834, 2323(c).

³⁰⁰ *Id.* §§ 3663(a)(1)(B)(i)(I), 3663A(b), 3664(a); U.S.S.G. § 5E1.1(a).

³⁰¹ *See, e.g., United States v. Hudson*, 483 F.3d 707, 710–11 (10th Cir. 2007) (reversing restitution order because no evidence that victim company suffered lost sales as result of defendant's conduct).

³⁰² *United States v. Foote*, No. CR 20091-01-KVH, 2003 WL 22466158, at *7 (D. Kan. July 31, 2003).

³⁰³ 18 U.S.C. § 3663A (excluding non-Title 18 offenses).

³⁰⁴ *Id.* §§ 3563(b)(2), 3583(d); PROSECUTING INTELLECTUAL PROPERTY CRIMES, note 85, at 347.

³⁰⁵ 19 U.S.C. §§ 1607–1609; 18 U.S.C. § 981(d).

for most IP offenses, including trafficking in counterfeit goods, copyright infringement, trade secret theft, economic espionage, and trafficking in counterfeit or illicit labels.³⁰⁶ Both civil and criminal forfeiture apply to any items the making or trafficking of which are prohibited under these statutes; property intended to be used in any matter or part to commit or facilitate the commission of any offenses covered by those statutes; and any property constituting or derived from any proceeds obtained from committing the offenses.³⁰⁷ For example, in a trademark, copyright, or counterfeit label case, the government could forfeit infringing items, equipment and raw materials used to manufacture or market those goods, and proceeds and assets that could be traced to the crime.³⁰⁸ In a trade secrets-theft case, the government could forfeit facilitating property such as a flash drive to exfiltrate trade secrets or a personal computer to store them; IP such as patents or trademarks created using the stolen trade secrets; and money, earnings, or other financial benefits derived from the theft, including products from products or services made using the stolen trade secrets.³⁰⁹

Unlike administrative forfeiture, civil and criminal forfeiture are judicial actions that require the involvement of the court.³¹⁰ Civil forfeiture is an *in rem* action against the property and often used to seize domain names of sites engaged in IP infringement.³¹¹ The burden of proof is preponderance of the evidence and requires no criminal conviction.³¹² Civil forfeiture in IP cases can be used to seize a wide variety of assets, even ones located overseas, as long as they are traceable to some part of the defendants' alleged crimes in the district.³¹³ Criminal forfeiture is an *in*

³⁰⁶ 18 U.S.C. § 2323(a), (b).

³⁰⁷ *Id.* §§ 981(a)(1)(C), 1834, 2323, 2318(e).

³⁰⁸ *See, e.g.*, Press Release, U.S. Att'y's Off., N.D. Cal., Remaining Two Defendants Sentenced Largest CD & DVD Mfg. Piracy & Counterfeiting Scheme Prosecuted U.S. to Date (Aug. 6, 2007) (forfeiture of manufacturing equipment and tools, including stampers and replication machines, that could be used to reproduce more than 300 million infringing copies of copyrighted CDs and DVDs).

³⁰⁹ *See, e.g.*, Order of Forfeiture, *United States v. Liew*, No. 11-cr-573-JSW (N.D. Cal. July 11, 2014), Dkt. No. 892 (ordering forfeiture of \$27.8 million, the amount of illegal proceeds obtained directly and indirectly from the trade secret theft).

³¹⁰ *Types of Federal Forfeiture*, DEP'T OF JUST., <https://www.justice.gov/afp/types-federal-forfeiture> (last visited Aug. 5, 2026).

³¹¹ *Id.* *See also* Press Release, U.S. Dep't of Just., U.S. L. Enf. Assists Bulgarian L. Enf. in Taking Down Three Largest Piracy Sites Eur. Union (Jan. 30, 2026) (describing seizure of the domain names of piracy websites by United States government).

³¹² *Types of Federal Forfeiture*, note 310.

³¹³ *See, e.g.*, Attachment A, *United States v. All Assets Listed in Attachment A, and All Interest, Benefits, and Assets Traceable Thereto*, No. 14-cv-969-LO-TRJ (E.D. Va. July 29, 2014), Dkt. No. 1-1 (forfeiture of two houses, multiple luxury vehicles, and

personam proceeding that is incorporated into a defendant's sentence, and is used more frequently for IP crimes to divest the defendant of property used to commit the offense or proceeds gained through the offense.³¹⁴ It therefore requires a conviction and is limited to property belonging to the defendant that was involved in the offense of conviction.³¹⁵ For instance, criminal forfeiture can be used to confiscate a hard drive used to steal trade secrets; counterfeit products such as fake contact lenses; or houses, luxury cars, motorcycles, and jewelry purchased with the gains from operating a digital piracy site.³¹⁶

Forfeiture is not available for convictions solely based on DMCA circumvention or trafficking violations. However, in cases involving many related crimes including money laundering, mail or wire fraud, smuggling, and tax evasion, prosecutors may pursue forfeiture. In these situations, prosecutors may be able to forfeit seized circumvention devices that the defendant trafficked.

E. Fines

In some cases—particularly where the defendant has resources but the government may have difficulty estimating restitution or tracing forfeitable assets to the crimes—the government should ask the court to impose a fine. The Guidelines provide that the court should impose a fine in all cases, except where the defendant shows the inability to pay now or in the future.³¹⁷ The Guidelines have a chart showing minimum and maximum fines for different offense levels and a list of factors the court should consider in determining the amount of the fine.³¹⁸

All defendants found guilty of a crime may be sentenced to pay a fine, and some IP statutes provide for particular fines which, for trademark infringement and trade secret theft, are particularly large.³¹⁹ In addition, if a defendant derives pecuniary gain from a crime or the offense results in pecuniary loss to another person, the court may fine the defendant

bank accounts); *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016).

³¹⁴ *Types of Federal Forfeiture*, note 310.

³¹⁵ *Id.*

³¹⁶ Final Order of Forfeiture at 3, *United States v. You*, No. 19-cr-14-JRG-CRW (E.D. Tenn. Feb. 19, 2025), Dkt. No. 524; Press Release, U.S. Dep't of Just., Owner Major Online Colored Contact Lens Bus. Sentenced to 46 Months Prison Largest-Ever Scheme to Import & Sell Counterfeit & Misbranded Contact Lenses Prosecuted U.S. (Jan. 18, 2017); Judgment and Partial Final Order of Forfeiture at 1–13, *United States v. Carrasquillo*, No. 21-cr-367-HB (E.D. Pa. Sep. 26, 2023), Dkt. No. 201.

³¹⁷ U.S.S.G. § 5E1.2(a), (e).

³¹⁸ *Id.* § 5E1.2(c)(3), (d).

³¹⁹ *Id.* § 5E1.2(a).

the greater of twice the gross gain or twice the gross loss, so long as this does not unduly complicate or prolong the sentencing process.³²⁰ If the court orders the defendant to make restitution and to pay a fine, it must order any money paid by the defendant be applied first to restitution.³²¹ The government, however, must account for the defendant's financial resources when asking for a fine, and the defendant pays that sum to the government, not the victim.³²²

F. Injunctive relief

As part of a trade-secrets-theft sentence, a court can order the defendant to perform several acts to remedy the harm. For instance, the court can order the defendant to return any trade secret materials stolen. The court can also require the defendant to destroy physical materials embodying trade secrets. In extreme cases, sentences could even include special conditions of supervision for defendants' supervised release after release from prison or for a term of probation including forbidding access to certain technologies or exclusion from locations where trade secret materials exist.

In a typical trade secret case, through discovery and during litigation up to and including sentencing, defense counsel will have received and reviewed copies of trade secrets materials, which generally are governed by court-entered protective orders.³²³ Pursuant to such protective orders, defense counsel must return or destroy any trade secret materials they received.

G. Destruction of infringing goods

Under 18 U.S.C. § 2323, at the end of civil or criminal forfeiture proceedings, the court—unless otherwise requested by the government—must order forfeited infringing and related property to be destroyed or otherwise disposed of according to law; that includes counterfeit goods, pirated works, and other illegal items.³²⁴

IV. Conclusion

Although IP crimes can vary considerably and have evolved with advances in new technology, certain issues and factors repeatedly arise. A central issue for prosecutors during the investigation and prosecution is

³²⁰ 18 U.S.C. § 3571(d).

³²¹ U.S.S.G. § 5E1.1(c).

³²² *Id.* § 5E1.2(a).

³²³ 18 U.S.C. § 1835(a).

³²⁴ *Id.* §§ 2323(a)(2), (b)(2)(B).

how to determine the infringement amount, loss amount, value of laundered funds, or tax loss. That factor will often have the biggest impact on the resolution of the case and will primarily influence the ultimate sentence the defendant receives. In addition, prosecutors should emphasize to the court the seriousness of this crime—its impact on victims and the U.S. economy—as well as the need for strong deterrent sentences to achieve success.

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Fake and Lethal: Sentencing Strategies for Prosecuting Fake Pill Cases in the Fentanyl Era

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I. Introduction

In February 2024, a federal judge in Corpus Christi sentenced two brothers to 35 years in prison for manufacturing tens of thousands of fake hydrocodone pills laced with fentanyl.¹ Chad and Jamie Wesevich had acquired industrial pill presses from China capable of producing 9,000 pills per hour, along with dies, binders, and other equipment to create pills stamped “Watson 853”—indistinguishable from legitimate pharmaceuticals.² The pills they manufactured were linked to multiple fatal overdoses.³

Wesevich v. United States illustrates the lethal convergence of industrial-scale manufacturing capability with synthetic opioids.⁴ This combination has transformed fake pills into one of the deadliest drug threats facing federal prosecutors today. As said poignantly by Judge David S. Morales, who presided over the *Wesevich* sentencing: “We can’t get those people back.”⁵

Indeed, the scope of the fake pill crisis is staggering. In 2024, the Drug Enforcement Administration (DEA) seized 61.1 million fake pills.⁶ Laboratory analysis revealed that approximately half contained at least two milligrams of fentanyl, a potentially lethal dose.⁷ More recent DEA data

¹ *Wesevich v. United States*, No. 2:22-CR-327-1, 2025 WL 2531504, at *1 (S.D. Tex. Sep. 3, 2025); Press Release, U.S. Att’y’s Off., S.D. Tex., Bros. Get Significant Sentences for Mfg. Deadly Fentanyl-Laced Pills Disguised as Pain Meds (Feb. 7, 2024).

² Press Release, U.S. Att’y’s Off., S.D. Tex., note 1.

³ *Id.*

⁴ *Wesevich*, 2025 WL 2531504.

⁵ Press Release, U.S. Att’y’s Off., S.D. Tex., note 1.

⁶ DRUG ENF’T ADMIN., U.S. DEP’T OF JUST., NATIONAL DRUG THREAT ASSESSMENT 21 (2025).

⁷ *Id.* at 22.

reflects a meaningful decline in this proportion: Laboratory testing of pills seized during fiscal year 2025 showed that 29% contained a potentially lethal dose, down from 76% in fiscal year 2023.⁸ Fentanyl powder purity also decreased from 19.5% to 10.3% over the same period.⁹ Moreover, final 2024 data from the Centers for Disease Control and Prevention reflect 54,743 overdose deaths involving opioids, down from 83,140 in 2023, with synthetic opioids other than methadone accounting for the largest share.¹⁰ The age-adjusted death rate for synthetic opioid overdoses fell 35.6% between 2023 and 2024, the largest single-year decline in the period since 2014.¹¹ Notwithstanding these encouraging trends, overdose remains the leading cause of death for Americans aged 18 to 44, and synthetic opioids continue to drive the majority of those deaths attributed to synthetic opioids.¹²

Federal courts have responded with severe sentences. The U.S. Sentencing Commission's comprehensive study of 1,340 overdose cases sentenced between fiscal years 2019 and 2023 found that fentanyl and fentanyl analogues were involved in nearly 80% of federal drug-trafficking cases that resulted in an overdose.¹³ Almost two-thirds of the 2,112 overdose victims in these cases died.¹⁴ The average sentence in overdose cases was 149 months, which was nearly double the 76-month average for drug-trafficking cases without an overdose.¹⁵ Likewise, overdose cases increased 44% from fiscal year 2019 to fiscal year 2023, rising from 252 to 364 cases annually.¹⁶

Prosecuting fake pill cases presents unique challenges that differ markedly from traditional powder fentanyl or heroin prosecutions. This article addresses five core issues: (1) drug quantity calculations, where the mixture rule means total pill weight, not fentanyl content, drives the offense

⁸ Press Release, U.S. Drug Enf't Admin., DEA Launches Fentanyl Free Am. Initiative to Combat Synthetic Drug Crisis (Dec. 3, 2025).

⁹ *Id.*

¹⁰ MATTHEW F. GARNETT & ARIALDI M. MINIÑO, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, DRUG OVERDOSE DEATHS IN THE UNITED STATES, 2023–2024 (2026); *SUDORS Dashboard: Fatal Drug Overdose Data*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (May 28, 2026), <https://www.cdc.gov/overdose-prevention/data-research/facts-stats/sudors-dashboard-fatal-overdose-data.html> (“SUDORS” stands for State Unintentional Drug Overdose Reporting System).

¹¹ GARNETT & MINIÑO, note 10, at 1.

¹² *Id.* at 2.

¹³ U.S. SENT'G COMM'N, OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES 2, 15 (2025).

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 11.

level; (2) fentanyl analogue identification and charging; (3) the misrepresentation enhancement and its evidentiary requirements; (4) mandatory minimum thresholds and relief provisions, including the interplay between section 851 enhancements, safety-valve eligibility, and substantial assistance; and (5) death-resulting cases, where but-for causation and constitutional requirements create distinct litigation challenges.

II. Understanding the threat: fake pills in the current drug landscape

A. The fake pill market

“Fake pills” are illicitly manufactured tablets designed to mimic legitimate pharmaceutical products.¹⁷ The most prevalent are fake oxycodone pills, commonly known as “M30s” or “blues” after the markings on genuine 30-milligram oxycodone tablets manufactured by Mallinckrodt Pharmaceuticals.¹⁸ These fake pills typically contain fentanyl rather than oxycodone, though they are visually indistinguishable from their legitimate counterparts.¹⁹ Other common fake pills include fake Xanax containing fentanyl or novel benzodiazepines, fake Adderall containing methamphetamine, and fake Percocet or Vicodin tablets.²⁰ The proliferation of these fakes has created what law enforcement describes as a “one pill can kill” environment, where a single tablet may contain a fatal dose.²¹

Mexican transnational criminal organizations—primarily the Sinaloa Cartel and Jalisco New Generation Cartel, both designated as Foreign Terrorist Organizations in February 2025—operate clandestine laboratories that “produce millions of illicit fentanyl pills and thousands of pounds of illicit fentanyl powder every year.”²² The DEA has observed that “[m]uch of the fentanyl is pressed into pills resembling legitimate medication and sold to customers in the United States through social media platforms and messaging applications.”²³ These organizations have increasingly employed social media to promote drug products, recruit and train couriers and dealers, advertise sales, communicate with customers, and plan transactions, creating new investigative opportunities for federal

¹⁷ DRUG ENF’T ADMIN., DEP’T OF JUST., DRUG FACT SHEET (2021).

¹⁸ NATIONAL DRUG THREAT ASSESSMENT, note 6, at 20.

¹⁹ *Id.* at 5.

²⁰ DRUG ENF’T ADMIN., DEP’T OF JUST., FAKE PILLS FACT SHEET (2024).

²¹ *Id.*

²² NATIONAL DRUG THREAT ASSESSMENT, note 6, at 8.

²³ *Id.* at 1.

prosecutors.

According to the DEA's Fentanyl Profiling Program, the average fake pill seized in 2024 contained 1.94 milligrams of fentanyl.²⁴ Moreover, approximately half of all seized pills contained at least two milligrams, which is considered a potentially lethal dose for individuals without a history of opioid use.²⁵ The fentanyl content in individual pills varies dramatically, ranging from 1.58 milligrams to a high of 2.18 milligrams.²⁶ This variability is attributable to clandestine manufacturing processes that lack the quality controls of legitimate pharmaceutical production. As a result, even users who have previously taken fake pills without incident face an unpredictable risk with each subsequent use, as a single pill from the same batch may contain a dose several times higher than the previous one.

Drug mixing can amplify the problem. DEA laboratory analysis found that one in four cocaine submissions and one in eight methamphetamine submissions also contained fentanyl.²⁷ Users who believe they are taking cocaine or methamphetamine may unknowingly ingest fentanyl, with potentially fatal results. In known polydrug mixtures, fentanyl was the primary substance 75% of the time.²⁸

B. The knowledge gap: what sellers and buyers know

One of the most significant findings from the Commission's overdose study concerns what sellers and buyers know about the drugs involved in overdose transactions. According to the Commission, "[m]ost people selling drugs in this study and most of those who overdosed on these drugs did not know the exact drugs involved in the transaction."²⁹ Only 4.8% of individuals sentenced in overdose cases "knowingly misrepresented" the drugs they were selling.³⁰ Yet the victims' ignorance was far more widespread: Only 20.7% of victims who overdosed on fentanyl knew they were taking fentanyl.³¹ Nearly one-third (32.1%) believed they were taking heroin, and another 15.4% thought they were taking oxycodone.³² For fentanyl analogue overdoses, the knowledge gap was even wider: Only 8%

²⁴ *Id.* at 22.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 26.

²⁸ *Id.* at 27.

²⁹ OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 2.

³⁰ *Id.* at 22.

³¹ *Id.*

³² *Id.*

of victims knew the actual substance, while 48.9% believed they were taking heroin.³³

This knowledge gap has direct sentencing consequences.³⁴ The misrepresentation enhancement under section 2D1.1(b)(13) of the United States Sentencing Guidelines requires proof that the defendant “knowingly misrepresented” the drug or “knowingly marketed” it as another substance.³⁵ The fake pills enhancement at section 2D1.1(b)(13) is tiered.³⁶ The four-level enhancement at section 2D1.1(b)(13)(A) requires “knowingly misrepresented or knowingly marketed.”³⁷ The two-level enhancement requires representing or marketing a substance as legitimate that contained fentanyl or a fentanyl analogue with “reckless disregard” that it was not legitimate.³⁸ Reckless disregard was added in 2025.³⁹ The Commission’s finding that most sellers did not know the identity of the exact drugs they were selling explains why this enhancement has proven difficult to apply in practice and underscores the importance of developing strong evidence of defendant knowledge in cases where the enhancement is sought.

The Commission also found that more than half (57.7%) of defendants in overdose cases were themselves using the same type of drug as their victims.⁴⁰ This overlap between seller and user populations reflects that many fake pill distributors are themselves drug users operating at the street level, not sophisticated traffickers with full knowledge of their supply chain. These findings have direct implications for the misrepresentation enhancement under section 2D1.1(b)(13).⁴¹

Indeed, 55.2% of defendants in overdose cases were classified as “street-level dealers,” while only 4.5% were organizers or leaders.⁴² This profile may inform both charging decisions and sentencing advocacy. Prosecutors should be prepared to address arguments that low-level distributors lack

³³ *Id.*

³⁴ *See* subsection IV.A.

³⁵ U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(13) (U.S. SENT’G COMM’N 2025).

³⁶ *Id.*

³⁷ *Id.* § 2D1.1(b)(13)(A).

³⁸ *Id.*

³⁹ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 12, 16 (2025). *See also* Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., U.S. Dep’t of Just. to The Honorable Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (Mar. 3, 2025) (the Department’s position on that amendment). The overdose report was issued before the Commission voted to amend the fake pills enhancement and thus before it went into effect on November 1, 2025. *See* OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13.

⁴⁰ OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 14.

⁴¹ U.S.S.G. § 2D1.1(b)(13). *See* section V.

⁴² OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 16.

the culpability associated with traditional drug-trafficking organizations, while emphasizing the lethal consequences regardless of the defendant's position in the distribution chain. In 2025, the Commission added a special instruction expanding application of mitigating role in drug cases in section 2D1.1(e)(2).⁴³ Prosecutors should be prepared to address the appropriateness of defense arguments that the defendant is a lower-level dealer, unaware of the contents, and therefore deserving of further reductions.

With this landscape in mind, we turn to the legal framework governing fake pill prosecutions, beginning with drug quantity calculations under the mixture rule.

III. The mixture weight rule and its application to fake pills

A. *Chapman v. United States*: the foundational rule

The Controlled Substances Act establishes penalties based on “a mixture or substance containing a detectable amount” of a controlled substance.⁴⁴ In *Chapman v. United States*, the Supreme Court held that this language unambiguously requires courts to consider the total weight of the mixture, not just the weight of the pure controlled substance.⁴⁵ “So long as it contains a detectable amount,” the Supreme Court explained, “the entire mixture or substance is to be weighed when calculating the sentence.”⁴⁶

The defendant in *Chapman* had distributed lysergic acid diethylamide (LSD) on blotter paper.⁴⁷ The pure LSD weighed only 50 milligrams, but the combined weight of the LSD and blotter paper was 5.7 grams, enough to trigger a mandatory minimum sentence.⁴⁸ The defendant argued that only the pure LSD weight should count, but the Supreme Court disagreed.⁴⁹ Congress, the Supreme Court reasoned, had adopted a “market-oriented” approach to drug sentencing, “under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.”⁵⁰

⁴³ U.S.S.G. § 2D1.1(e)(2).

⁴⁴ 21 U.S.C. § 841.

⁴⁵ 500 U.S. 453, 459 (1991).

⁴⁶ *Id.*

⁴⁷ *Id.* at 453.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 461.

The Supreme Court distinguished carrier media from mere packaging: “The term does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a ‘container.’ The drug is clearly not mixed with a glass vial or automobile.”⁵¹ Blotter paper, however, was different. The LSD was “commingled” with the paper, retained its separate existence, and was consumed along with the carrier.⁵² The carrier medium, the Supreme Court concluded, “is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool.”⁵³

B. *United States v. Dinh*: application to fake pills

In *United States v. Dinh*, the Fifth Circuit applied *Chapman* directly to fake pills.⁵⁴ Dinh sold pills “advertised as Hydrocodone and Oxycodone” that contained fentanyl analogues.⁵⁵ Authorities seized 2,498 pills weighing 838.9 grams.⁵⁶ The defendant challenged the use of total pill weight, making “the same absurdity and disproportionality arguments” that the *Chapman* defendant had raised.⁵⁷ The Fifth Circuit rejected the challenge: “[T]he Supreme Court has already held that mixture weight calculations do not violate Due Process when, as here, the drug cannot be easily separated from the mixture and is intended for sale and consumption in the mixture.”⁵⁸

Dinh also addressed a practical challenge: how to determine the quantity of drugs when laboratories test only a sample of seized pills.⁵⁹ In that case, authorities tested only 85 pills, or approximately 3.4% of the 2,498 total pills.⁶⁰ All 85 tested pills contained fentanyl analogues.⁶¹ The Fifth Circuit affirmed the extrapolation, holding that district courts “may extrapolate the quantity [of drugs] from any information that has sufficient indicia of reliability to support its probable accuracy.”⁶² The court explained that “two different labs tested samples from three separate batches of pills.”⁶³ From those samples, 100% of the pills that were tested

⁵¹ *Id.* at 462–63.

⁵² *Id.* at 462.

⁵³ *Id.* at 466.

⁵⁴ 920 F.3d 307, 311 (5th Cir. 2019).

⁵⁵ *Id.* at 309.

⁵⁶ *Id.* at 310.

⁵⁷ *Id.* at 311.

⁵⁸ *Id.*

⁵⁹ *Id.* at 310.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 313.

⁶³ *Id.*

contained fentanyl analogues.⁶⁴ “That alone is adequate for establishing a sufficiently reliable evidentiary basis”⁶⁵ Under standard statistical methodology, testing 85 pills from a batch of 2,498 with 100% positive results provides 95% confidence that at least 90% of the untested pills also contain the controlled substance.⁶⁶

Of note, the *Dinh* court also confirmed that the Confrontation Clause does not apply at sentencing: “[I]t has long been established by the Supreme Court that defendants do not have a constitutional right of confrontation or cross-examination at the sentencing phase.”⁶⁷ Lab reports are “presumptively reliable” at sentencing, and defendants who wish to challenge them must offer affirmative rebuttal evidence.⁶⁸ “[M]ere objections do not suffice”⁶⁹ This holding is significant for fake pill prosecutions, where lab analysis of pill contents is essential, but calling the analyst to testify for every batch would impose substantial burdens on prosecution resources.

IV. Fentanyl analogues: quantity calculation, charging, and sentencing considerations

A. The Drug Quantity Table: fentanyl and analogues

Under 21 U.S.C. § 802(32)(A), a “controlled substance analogue” means a substance: (1) with a chemical structure substantially similar to a Schedule I or II controlled substance; (2) with a central nervous system effect substantially similar to or greater than such a substance; or (3) that the person represents or intends to have such an effect.⁷⁰ Section 813 provides that an analogue “shall, to the extent intended for human consumption, be treated” as a Schedule I controlled substance.⁷¹ This framework allows prosecutors to charge distribution of novel synthetic opioids that have not yet been scheduled, but it requires proof of specific knowledge elements.

The 2025 Guidelines’ Drug Quantity Table establishes base offense levels tied to drug quantities.⁷² For fentanyl and fentanyl analogues, the

⁶⁴ *Id.*

⁶⁵ *Id.* at 310.

⁶⁶ *Id.*

⁶⁷ *Id.* at 312 (citing *Williams v. Oklahoma*, 358 U.S. 576, 584, (1959); *Williams v. New York*, 337 U.S. 241, 246–51 (1949)).

⁶⁸ *Dinh* at 313.

⁶⁹ *Id.*

⁷⁰ 21 U.S.C. § 802(32)(A).

⁷¹ *Id.* § 813(a).

⁷² U.S.S.G. § 2D1.1(c).

thresholds are set in a 4:1 ratio, meaning fentanyl analogues are sentenced four times more harshly per gram than fentanyl itself.⁷³ The rationale is that many fentanyl analogues are more potent than fentanyl; carfentanil, for example, is approximately 100 times more potent.⁷⁴ Table 1 shows the critical thresholds.⁷⁵

Base Offense Level	Fentanyl	Fentanyl Analogue or Fentanyl-Related Substance	Mandatory Minimum
38	36 kg or more	9 kg or more	—
36	12 kg–36 kg	3 kg–9 kg	—
34	4 kg–12 kg	1 kg–3 kg	—
32	1.2 kg–4 kg	300 g–1 kg	—
30	400 g–1.2 kg	100 g–300 g	10 years
28	280 g–400 g	70 g–100 g	—
26	160 g–280 g	40 g–70 g	—
24	40 g–160 g	10 g–40 g	5 years

Table 1: Fentanyl, fentanyl analogue, and fentanyl-related substance sentencing thresholds, reconstructed

The practical effect is substantial. Consider a defendant found with 1,000 fake M30 pills. If each pill weighs 120 milligrams on average, the total weight of the mixture is 120 grams. Under the mixture rule, the base offense level is determined by this 120-gram weight, not by the 2 grams of actual fentanyl the pills might contain. If the pills contain a fentanyl analogue rather than fentanyl itself, 120 grams corresponds to Base Offense Level 30 (versus Level 24 for fentanyl), and the defendant is also above the 100-gram threshold for the 10-year mandatory minimum under section 841(b)(1)(A)(vi).⁷⁶

B. Amendment 807 and the Guidelines framework

In 2018, the Commission promulgated Amendment 807, which established a comprehensive framework for sentencing fentanyl analogue offenses.⁷⁷ The amendment added “fentanyl analogue” as a separately listed substance in the Drug Quantity Table with thresholds set at one-quarter

⁷³ *Id.*
⁷⁴ *Carfentanil: A Synthetic Opioid Unlike Any Other*, U.S. DRUG ENF’T ADMIN. (May 14, 2025), <https://www.dea.gov/stories/2025/2025-05/2025-05-14/carfentanil-synthetic-opioid-unlike-any-other>.
⁷⁵ U.S.S.G. § 2D1.1(c) (kg = kilograms, g = grams).
⁷⁶ *See* 21 U.S.C. § 841(b)(1)(A)(vi).
⁷⁷ U.S.S.G. amend. 807 (effective Nov. 1, 2018).

of the corresponding fentanyl amounts, creating the 4:1 ratio discussed above.⁷⁸

Note (J) to section 2D1.1(c) provides a simplified definition: “Fentanyl analogue” means “any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).”⁷⁹ This definition is broader than the statutory analogue definition in section 802(32) in several respects.⁸⁰ It does not require proof of pharmacological similarity or substantially similar central nervous system effects. The definition does not require proof of intent for human consumption, and it explicitly includes already controlled substances. The simplified definition facilitates consistent application across districts and avoids litigation over whether particular fentanyl analogues meet the more complex statutory analogue criteria.

C. The *McFadden* knowledge requirement

In *McFadden v. United States*, the Supreme Court clarified the knowledge requirement for analogue prosecutions.⁸¹ The defendant had distributed “bath salts” containing synthetic cathinones, which he marketed as “Alpha,” “No Speed,” “Speed,” “Up,” and “The New Up,” comparing the products to cocaine and methamphetamine.⁸² The Supreme Court held that the government must prove the defendant knew he was dealing with “a controlled substance,” which can be established in two ways.⁸³

First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance.⁸⁴

This path requires proof that the defendant knew the substance was illegal, without requiring knowledge of its specific chemical identity.

Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. ... [A] defendant who

⁷⁸ U.S.S.G. § 2D1.1(c) n.(J). *See also* subsection IV.A (discussing 4:1 ratio).

⁷⁹ U.S.S.G. § 2D1.1(c) n.(J).

⁸⁰ 21 U.S.C. § 802(32)(A).

⁸¹ 576 U.S. 186 (2015).

⁸² *Id.* at 189.

⁸³ *Id.* at 194.

⁸⁴ *Id.*

possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal.⁸⁵

This path requires proof that the defendant knew the substance's chemical characteristics, including its structural similarity to a controlled substance and its psychoactive effects, even if the defendant did not realize those characteristics made the substance illegal.

The Supreme Court noted that knowledge can be proven through circumstantial evidence, including “a defendant’s concealment of his activities, evasive behavior with respect to law enforcement, knowledge that a particular substance produces a ‘high’ similar to that produced by controlled substances, and knowledge that a particular substance is subject to seizure at customs.”⁸⁶ For fake pill prosecutions, this means that evidence of the defendant’s awareness that pills produce opioid-like effects, combined with efforts to conceal the distribution activity, may suffice to establish the required knowledge, even without direct evidence that the defendant knew the specific chemical compound involved.

The Eighth Circuit’s decision in *United States v. Sullivan* appears to have anticipated *McFadden*’s framework.⁸⁷ Sullivan was convicted of possession with intent to distribute mephedrone, a synthetic cathinone sold as “bath salts.”⁸⁸ The key evidence was the defendant’s own statement: When asked by an officer whether his vehicle contained anything illegal, Sullivan responded that it contained “bath powder.”⁸⁹ The court reasoned that at the time of arrest, mephedrone was illegal only as an analogue under federal law, as it had not yet been scheduled.⁹⁰ “Sullivan indicating the bath powder was illegal supports a reasonable inference he knew the powder contained a controlled substance analogue.”⁹¹

This knowledge-loop reasoning, where a defendant’s acknowledgment of illegality establishes awareness of the substance’s controlled nature, aligns with *McFadden*’s first path for proving scienter and applies equally to defendants who acknowledge selling fake pills containing fentanyl.

⁸⁵ *Id.* at 194–95.

⁸⁶ *Id.* at 192 n.1 (citing *United States v. Ali*, 735 F.3d 176, 188–89 (4th Cir. 2013)).

⁸⁷ 714 F.3d 1104 (8th Cir. 2013).

⁸⁸ *Id.* at 1106.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1107.

D. *McCray*, *Williams*, and *Larson*: “Analogue of fentanyl”

A critical question for fake pill prosecutions is whether scheduled fentanyl analogues—substances like butyryl fentanyl or furanyl fentanyl that have already been placed on Schedule I—can still qualify as analogues of fentanyl for purposes of the enhanced mandatory minimum thresholds in section 841(b)(1)(A)(vi) and (b)(1)(B)(vi).⁹² These provisions impose 10-year and 5-year mandatory minimums, respectively, for offenses involving specified quantities of “fentanyl” or “any analogue of fentanyl.”⁹³

In *United States v. McCray*, the Second Circuit rejected the argument that “analogue of fentanyl” means the same thing as “controlled substance analogue” under section 802(32).⁹⁴ The defendant, who had distributed fentanyl resulting in a fatal overdose, argued that scheduled substances are excluded from the section 802(32) definition and therefore cannot be “analogues.”⁹⁵ The court disagreed, applying ordinary principles of statutory interpretation: “Webster’s New Collegiate Dictionary defines ‘analogue’ in the relevant chemistry context as ‘a chemical compound structurally similar to another but differing often by a single element of the same valence and group of the periodic table as the element it replaces.’”⁹⁶ Because Congress used the specialized term “controlled substance analogue” elsewhere in the statute but used plain “analogue” in the penalty provision, “we have no reason to apply [the] specialized definition” from section 802(32).⁹⁷ The court held that butyryl fentanyl, already a Schedule I substance, was nonetheless an “analogue of fentanyl” because it is “structurally similar” to fentanyl in the ordinary sense.⁹⁸

The Seventh Circuit followed *McCray* in *United States v. Williams*,

⁹² 21 U.S.C. § 841(b)(1)(A)(vi), (b)(1)(B)(vi). The statutory penalty provisions refer to fentanyl by its chemical name, “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]propanamide,” and to “any analogue” of that substance. Congress used this construction to ensure the penalty provisions reach the chemical compound regardless of trade or street name. *See also* U.S.S.G. § 2D1.1(c), n.(J) (where the Commission adopted parallel language).

⁹³ 21 U.S.C. § 841(b)(1)(A)(viii).

⁹⁴ *Compare United States v. McCray*, 7 F.4th 40, 46 (2d Cir. 2021) (defense arguing that “under this definition, butyryl fentanyl is not an ‘analogue’ of fentanyl because butyryl fentanyl is listed as a controlled substance and section 802(32) excludes controlled substances from the definition of ‘controlled substance analogue’”), *with* 21 U.S.C. § 802(32) (defining “controlled substance analogue” as “similar to the chemical structure of a controlled substance” but not including “a controlled substance”).

⁹⁵ *McCray*, 7 F.4th at 44.

⁹⁶ *Id.* at 46 (quoting WEBSTER’S NEW COLLEGIATE DICTIONARY (9th ed. 1985)).

⁹⁷ *Id.*

⁹⁸ *Id.*

involving furanyl fentanyl.⁹⁹ Williams, while detained in a Georgia jail on narcotics charges, orchestrated a shipment of more than 100 grams or more of furanyl fentanyl to Chicago through intercepted phone calls.¹⁰⁰ The court rejected his argument that furanyl fentanyl could not be an “analogue of fentanyl” because it was already a Schedule I substance: “No circuit court has held otherwise. In fact, the only other court of appeals to consider whether ‘analogue of fentanyl’ differs from ‘controlled substance analogue’ agrees with us.”¹⁰¹ The court also rejected Williams’s vagueness challenge, noting that furanyl fentanyl “is among the four most common fentanyl analogues” and that the DEA had explicitly described it as a “fentanyl analogue” when scheduling it in 2016.¹⁰²

The Fourth Circuit addressed vagueness concerns more directly in *United States v. Larson*, upholding a life sentence for distributing furanyl fentanyl resulting in death.¹⁰³ The defendant argued that the Analogue Act was unconstitutionally vague following *Johnson v. United States*, which struck down the Armed Career Criminal Act’s residual clause for requiring courts to imagine an “ordinary case” of a crime.¹⁰⁴ The Fourth Circuit distinguished the two statutes: While the Armed Career Criminal Act required judges to engage in a “judicially imagined” exercise about how crimes are “ordinarily committed,” the Analogue Act “requires a fact finder to apply a qualitative analysis to the real-world chemical structures of alleged analogues and identified controlled substances.”¹⁰⁵ Moreover, *McFadden*’s scienter requirement “alleviates vagueness concerns, narrows the scope of the [Act’s] prohibition, and limits prosecutorial discretion.”¹⁰⁶

⁹⁹ 106 F.4th 639 (7th Cir. 2024).

¹⁰⁰ *Id.* at 644.

¹⁰¹ *Id.* at 649.

¹⁰² *Id.* at 652 (citing U.S. SENT’G COMM’N, FENTANYL AND FENTANYL ANALOGUES: FEDERAL TRENDS AND TRAFFICKING PATTERNS 22 (2021); Vivek Velagapudi & Roopa Sethi, *Illicit Non-Pharmaceutical Fentanyl and its Analogues: A Short Review of Literature*, 16 KANS. J. MED. 25–27 (2023)).

¹⁰³ 747 F. App’x 927 (4th Cir. 2018) (unpublished).

¹⁰⁴ *Id.* at 929. *See Johnson v. United States*, 576 U.S. 591, 606 (2015). *See also* 21 U.S.C. §§ 802(32)(A), 813 (Analogue Act); 18 U.S.C. § 924(e)(2)(B)(ii) (Armed Career Criminal Act).

¹⁰⁵ *Larson*, 747 F. App’x at 930 (comparing the Armed Career Criminal Act—requiring judges to engage in a “judicially imagined” exercise about how crimes are “ordinarily committed”—with the Analogue Act—requiring “a fact finder to apply a qualitative analysis to the real-world chemical structures of alleged analogues and identified controlled substances”). *See* 18 U.S.C. § 924(e)(2)(B)(ii); 21 U.S.C. §§ 802(32)(A), 813.

¹⁰⁶ *Larson*, 747 F. App’x at 930 (citing *McFadden v. United States*, 574 U.S. 186, 197 (2015)).

E. The Halt All Lethal Trafficking of Fentanyl Act and fentanyl-related substances

On July 16, 2025, Congress enacted the Halt All Lethal Trafficking of Fentanyl Act (HALT Fentanyl Act), which fundamentally restructured the federal treatment of synthetic fentanyl analogues.¹⁰⁷ The Act made three changes directly relevant to fake pill prosecutions. First, Section 2 permanently scheduled “fentanyl-related substances” (FRS) as a class in Schedule I, codified at 21 U.S.C. § 812(c), Schedule I(e).¹⁰⁸ The class is defined by reference to a series of structural modifications to the fentanyl molecule, and substances individually scheduled elsewhere are excluded.¹⁰⁹ The permanent scheduling resolved years of uncertainty under the temporary scheduling orders that had been extended repeatedly since 2018.¹¹⁰ Second, Section 6 amended 21 U.S.C. § 841(b)(1)(A)(vi) and (B)(vi)—and the parallel import and export provisions of 21 U.S.C. § 960—to insert “or a fentanyl-related substance” after “any analogue of [fentanyl].”¹¹¹ The result is that FRS offenses trigger the same enhanced mandatory minimum thresholds—10 years for 100 grams or more and 5 years for 40 grams or more—as offenses involving fentanyl analogues.¹¹² Third, Section 4 expressly endorsed the interpretive approach of the decision in *United States v. McCray*, which held that a scheduled substance can constitute an “analogue of fentanyl” notwithstanding 21 U.S.C. § 802(32)(A)’s exclusion of controlled substances from the “controlled substance analogue” definition.¹¹³ This congressional endorsement reinforces the position adopted by the Second Circuit in *McCray* and the Seventh Circuit in *Williams*.¹¹⁴

For prosecutors, the practical significance of the Act is that FRS prosecutions no longer require the structural-similarity and pharmacological-similarity proof that section 802(32)(A) demands for “controlled substance analogues,” nor the *McFadden* knowledge showing tied to that

¹⁰⁷ Halt All Lethal Trafficking of Fentanyl Act, Pub. L. No. 119-26, 139 Stat. 410 (2025) [HALT Fentanyl Act].

¹⁰⁸ *Id.* at 410–411. See 21 U.S.C. § 812(c).

¹⁰⁹ HALT Fentanyl Act, 139 Stat. at 410–411.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 417. See 21 U.S.C. § 841(b)(1)(A)(vi), (b)(1)(B)(vi); 21 U.S.C. § 960.

¹¹² HALT Fentanyl Act, 139 Stat. at 417; 21 U.S.C. § 960(b)(1)(F), (b)(2)(F).

¹¹³ *Id.* at 416–417; 346 F. Supp. 3d 363, 366 (W.D.N.Y. 2018), *aff’d*, 7 F.4th 40 (2d Cir. 2021); 21 U.S.C. § 802(32)(A).

¹¹⁴ HALT Fentanyl Act, 139 Stat. at 416–417; *McCray*, 7 F.4th at 45–46; *United States v. Williams*, 106 F.4th 639, 644 (7th Cir. 2024). See also subsection IV.D (discussing the position adopted by *McCray* and *Williams*).

definition.¹¹⁵ An FRS is, by statute, a Schedule I controlled substance, and the government need only prove that the defendant knew the substance was a controlled substance—not that the defendant knew its specific identity or its qualifying chemical features.¹¹⁶ The categories accordingly overlap but are not identical: a “fentanyl analogue” under section 2D1.1(c), footnote (J) is defined by chemical similarity to fentanyl regardless of scheduling status; a “fentanyl-related substance” is a statutorily defined class of Schedule I substances with structural relationships specified by Congress; and a “controlled substance analogue” under 21 U.S.C. § 802(32)(A) requires both structural and pharmacological similarity and excludes already-scheduled substances.¹¹⁷

On April 16, 2026, the Commission voted to promulgate amendments to section 2D1.1 implementing the HALT Fentanyl Act, with an effective date of November 1, 2026.¹¹⁸ The amendments add “Fentanyl-Related Substance” as a separately listed substance throughout the Drug Quantity Table at section 2D1.1(c), with quantity thresholds and base offense levels identical with those for fentanyl analogues.¹¹⁹ The Drug Equivalency Tables at Application Note 8(D) are likewise amended to provide that 1 gram of a FRS equals 10 kilograms of converted drug weight, the same ratio applicable to fentanyl analogues.¹²⁰ The result is statutory and Guidelines parity: An FRS offense is sentenced at the same offense level, and triggers the same mandatory minimums under 21 U.S.C. § 841(b)(1)(A)(vi) and (b)(1)(B)(vi), as a fentanyl analogue offense involving the same quantity.¹²¹

The amendments also add a new Note (K) to the Drug Quantity Table that defines “Fentanyl-Related Substance” by reference to 21 U.S.C. § 812(e) and establishes a rebuttable presumption that the base offense level specified in the Drug Quantity Table applies.¹²² The presumption may be overcome if the defendant establishes that the FRS either functions to block, diminish, or counteract the effect produced by fentanyl or a fentanyl analogue, or is significantly less potent than fentanyl.¹²³ In either case, the court instead determines the base offense level using the

¹¹⁵ See HALT Fentanyl Act, 139 Stat. at 416–417; *McFadden v. United States*, 574 U.S. 186, 197 (2015); 21 U.S.C. § 802(32)(A).

¹¹⁶ HALT Fentanyl Act, 139 Stat. at 410–11; 21 U.S.C. § 812.

¹¹⁷ U.S.S.G. § 2D1.1(c) n.(J); 21 U.S.C. § 802(32)(A).

¹¹⁸ U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY) 1 (2026).

¹¹⁹ *Id.* at 1.

¹²⁰ *Id.* at 29.

¹²¹ *Id.* at 1.

¹²² *Id.* at 3.

¹²³ *Id.* at 9.

converted drug weight of the most closely related controlled substance referenced in section 2D1.1, consistent with Application Note 6.¹²⁴

The Note (K) carveout responds to concerns that the structural definition of FRS in 21 U.S.C. § 812(e) is broad and could capture substances—such as fentanyl antagonists or substantially less potent analogues—whose pharmacological profile does not justify treatment at parity with fentanyl analogues.¹²⁵ For fake pill prosecutions, the carveout is not likely to be implicated: The substances pressed into counterfeit M30s and similar tablets are agonists selected precisely for their potency, and laboratory testing of seized pills will typically establish that the substance is at least as potent as fentanyl.¹²⁶ Prosecutors should nonetheless anticipate defense expert testimony invoking Note (K) in cases involving novel or less common FRS and be prepared to rebut such testimony with DEA Special Testing and Research Laboratory or other qualified expert opinion on relative potency.¹²⁷

V. The misrepresentation enhancement, mandatory minimums, and relief provisions

A. The misrepresentation enhancement: a circuit court survey

Section 2D1.1(b)(13) provides two tiers of enhancement for defendants who misrepresent fentanyl, a fentanyl analogue, or an FRS as another substance.¹²⁸ Subsection (A) provides a four-level increase where the defendant “knowingly misrepresented or knowingly marketed” the substance as another substance.¹²⁹ Subsection (B), as amended effective November 1, 2025, provides a two-level increase where the defendant represented or marketed the substance as a legitimately manufactured drug “with reckless disregard” that it was not.¹³⁰ Effective November 1, 2026, both sub-

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 2, 9.

¹²⁷ *See id.*

¹²⁸ *Id.* at 2.

¹²⁹ *Id.*

¹³⁰ U.S.S.G. § 2D1.1(b)(13)(B). *See* U.S.S.G. amend. 833 (effective Nov. 1, 2025). Before the 2025 amendment, subsection (B) required “willful blindness or conscious avoidance of knowledge.” *Id.* The Commission revised the *mens rea* after public comment that the prior formulation was being applied inconsistently and was, in many circuits, treated as legally equivalent to actual knowledge—collapsing the distinction

sections were further amended to include FRS within their scope, subject to a proviso discussed below. Circuit courts have developed a substantial body of caselaw interpreting these provisions, all of which arose under the pre-2026 text addressing fentanyl and fentanyl analogues. That caselaw remains directly applicable to the amended provisions.

1. *Matthews*: defining the standard

The Sixth Circuit provided the most comprehensive interpretation in *United States v. Matthews*.¹³¹ *Matthews* was part of a drug-trafficking enterprise in Lexington, Kentucky, that distributed fentanyl pills “pressed to look like oxycodone pills—they had similar size, shape, and color.”¹³² A co-defendant, Livingston, sold substantial quantities—50, 100, and 1,000 pills on three occasions.¹³³ A cooperating witness testified that *Matthews* “always represented” the pills as “Percocet 30 milligram pills.”¹³⁴ The court adopted clear definitions for both prongs of the enhancement:

A person “knowingly misrepresents” fentanyl as another substance when he, being aware that the substance he distributes contains fentanyl, asserts or communicates to the person to whom he distributes that it does not. If the distributor is unaware that the substance contains fentanyl, then he has not acted knowingly. And without a false or misleading assertion—through written or spoken words—about the contents of the substance, there can be no misrepresentation.¹³⁵

“A person ‘knowingly markets’ fentanyl as another substance when he sells or advertises it as something else despite his awareness that the substance contains fentanyl.”¹³⁶ The court applied this definition to Livingston, who sold pills “marked to look just like Oxycodone 30s ... small, blue, and contained the marking of a pharmaceutical grade Oxycodone 30 pill.”¹³⁷

Critically, *Matthews* held that the enhancement applies even if the

between subsections (A) and (B). The Department supported the change. *See* Letter from Scott Meisler, Deputy Chief, App. Section, Crim. Div., U.S. Dep’t of Just. to The Honorable Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (Mar. 3, 2025). Because the Commission’s 2025 Overdose Report analyzed cases sentenced FY 2019–2023, its application data necessarily reflects the prior standard. *See* OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 31.

¹³¹ *United States v. Matthews*, 155 F.4th 845 (6th Cir. 2025).

¹³² *Id.* at 849.

¹³³ *Id.* at 852.

¹³⁴ *Id.* at 851–52.

¹³⁵ *Id.* at 851.

¹³⁶ *Id.*

¹³⁷ *Id.* at 852.

defendant's immediate buyer knows the truth.¹³⁸ The court reasoned that “the sheer number of pills being trafficked meant that [the defendant] knew the buyer was going to turn around and sell those pills to someone else. Those downstream buyers, who would not know the pills contained fentanyl, are the folks at great risk.”¹³⁹ The court cited the Commission's reasoning that “the risk to potential buyers who would be unaware they were buying pills with fentanyl was a key reason behind the Commission's adoption of the marketing enhancement.”¹⁴⁰

2. *Wiley*: social media evidence and prior overdose

The Eighth Circuit reached similar conclusions in *United States v. Wiley*, a tragic case involving an 18-month-old baby who ingested fentanyl pills and suffered respiratory depression and cardiac arrest, requiring multiple doses of Narcan.¹⁴¹ Wiley obtained a “golf-ball-sized bag” of pills that he intended to “flip” for rent money.¹⁴² Wiley had advertised pills as “perks,” “perk 30s,” and “perk 30” on Facebook.¹⁴³ The baby ingested the tablets within an hour after Wiley met with the dealer.¹⁴⁴

The court held: “By advertising the pills as ‘perks,’ the accepted name for prescription Percocet, with the knowledge that they were not, Wiley knowingly marketed a substance containing fentanyl as another substance.”¹⁴⁵ Significantly, the court noted that Wiley's own prior overdose on similar pills established his knowledge: “After overdosing himself on similar pills, Wiley knew the pills contained fentanyl.”¹⁴⁶ This evidentiary point—that a defendant's own overdose history proves knowledge—is powerful for prosecutors, and investigators should determine whether defendants or their associates have previously overdosed when developing fake pill cases.

3. *Salinas*: the prior willful-blindness standard

Although the Commission amended subsection (B) in 2025 to substitute “reckless disregard” for the prior “willful blindness or conscious avoidance of knowledge” standard, the pre-amendment caselaw remains instructive both for cases involving conduct before November 1, 2025, and

¹³⁸ *Id.* at 851–52.

¹³⁹ *Id.* at 853 (cleaned up).

¹⁴⁰ *Id.*

¹⁴¹ 122 F.4th 725 (8th Cir. 2024).

¹⁴² *Id.* at 731.

¹⁴³ *Id.* at 729.

¹⁴⁴ *Id.* at 731.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

as a useful contrast for understanding what the new standard is—and is not.¹⁴⁷ For the willful-blindness standard under subsection (B), the Eighth Circuit’s decision in *United States v. Salinas* is instructive.¹⁴⁸ Salinas was found with 49,607 M-30 pills and 1,490.96 grams of fentanyl powder, with a street value exceeding \$2 million.¹⁴⁹ The pills were marked “M-30” and “made to look like the most popular generic oxycodone 30 milligrams sold in the United States.”¹⁵⁰ According to testimony, “[t]he disguised fentanyl led customers to believe that the drugs were ‘safe’ because they were made in the United States and made by a pharmaceutical [company]. ... [It was] a way to sell to ... younger customers because they think they’re taking medicine and not a street drug.”¹⁵¹

The court applied *Global-Tech Appliances, Inc. v. SEB S.A.*’s two-part test for willful blindness: “(1) The defendant must subjectively believe that there is a high probability that a fact exists[;] and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence.”¹⁵² The evidence, including Salinas’s sole custody of the backpack containing the pills, his connections to a drug-trafficking organization, his “constant contact” with known drug traffickers, and his role as a trusted distributor transporting 16 pounds of fentanyl unlocked, supported the finding that he was willfully blind to the pills’ actual contents.¹⁵³ Notably, the court observed that Salinas “was not a ‘typical mule’ who merely picked up a vehicle filled with drugs without knowing the source of the drugs and then dropped the vehicle off at a remote location for someone else to pick up.”¹⁵⁴

4. “Reckless disregard”: the post-2025 standard

The 2025 amendment substantially lowers the government’s evidentiary burden under subsection (B). “Reckless disregard” is a less demanding *mens rea* than “willful blindness,” which the Seventh Circuit in *United States v. Ihediwa* described as a “demanding” standard for

¹⁴⁷ U.S.S.G. app. C, amend. 833 (effective Nov. 1, 2025). *See also* Sentencing Guidelines for United States Courts, 90 Fed. Reg. 19,798 (May 9, 2025) (detailing policy updates and amendments submitted to Congress regarding drug offense roles, firearm threat definitions, and supervised release frameworks).

¹⁴⁸ 132 F.4th 1083 (8th Cir. 2025).

¹⁴⁹ *Id.* at 1086.

¹⁵⁰ *Id.* at 1091 (cleaned up).

¹⁵¹ *Id.* (cleaned up).

¹⁵² *Id.* at 1090 (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)).

¹⁵³ *Id.* at 1091.

¹⁵⁴ *Id.* at 1086.

which “negligence or recklessness will not suffice.”¹⁵⁵ Under the new standard, the inverse is true: Ordinary recklessness—conscious disregard of a substantial and unjustifiable risk—now suffices for the two-level enhancement, even where it would not have established willful blindness. The Commission explained that the change responds to “the continuing dangers associated with representing or marketing fentanyl or a fentanyl analogue as a legitimately manufactured drug” and to evidence that the prior *mens rea* was “vague” and being applied inconsistently across districts.¹⁵⁶ Prosecutors handling conduct occurring on or after November 1, 2025, should expect *Salinas*-style facts to support subsection (B) enhancement more readily, and should also expect that conduct previously falling short of subsection (B) under *Ihediwa*—for example, evidence of unusually low pricing, brittle pill texture, and discussions of overdose without proof the defendant knew the specific compound—may now satisfy the reckless-disregard standard.¹⁵⁷

5. The 2026 FRS proviso

The November 1, 2026 amendment to section 2D1.1(b)(13) added a proviso: The enhancement applies in a case involving an FRS only if the court applies the offense level specified in the Drug Quantity Table for fentanyl, a fentanyl analogue, or an FRS.¹⁵⁸ The proviso operates in tandem with the Note (K) rebuttable presumption discussed in Part III.¹⁵⁹ If a defendant successfully establishes that the FRS at issue functions to block, diminish, or counteract fentanyl’s effects, or is significantly less potent than fentanyl, and the court accordingly applies the converted drug weight of a less-potent substance under Note (K), the misrepresentation enhancement is categorically unavailable.¹⁶⁰ The proviso reflects a calibrated judgment by the Commission: Where the underlying offense level has been reduced to reflect lower pharmacological potency, the additional culpability captured by the marketing or misrepresentation enhancement no longer applies. Prosecutors should account for this interaction when developing the sentencing record. In particular, where the case involves a less common FRS and the defendant’s conduct otherwise supports the misrepresentation enhancement, the government’s interest in defeating

¹⁵⁵ 66 F.4th 1079 (7th Cir. 2023).

¹⁵⁶ U.S.S.G. amend. 833 (effective Nov. 1, 2025).

¹⁵⁷ 66 F.4th 1079 (7th Cir. 2023).

¹⁵⁸ AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY), note 113, at 1. See also U.S.S.G. § 2D1.1(c) (Drug Quantity Table).

¹⁵⁹ AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY), note 113, at 1.

¹⁶⁰ *Id.* at 2.

any Note (K) potency challenge is correspondingly heightened.

6. *Ihediwa*: the limits of circumstantial evidence

The Seventh Circuit’s decision in *United States v. Ihediwa* illustrates the outer limits of the knowledge requirement.¹⁶¹ The defendant sold “Percocet” pills that were actually fakes containing fentanyl.¹⁶² A high school student died after obtaining pills from the defendant’s supply chain.¹⁶³ The government presented circumstantial evidence: the pills were “brittle, chalky, and easily breakable,” they sold for less than the street value of authentic Percocet, and text messages discussed an overdose being “straight fentanyl.”¹⁶⁴ But the court observed that “even if these facts demonstrate knowledge that the pills were not real Percocet, they fall short of showing that the pills contained fentanyl, as opposed to other substances, let alone that Ihediwa knew their exact composition.”¹⁶⁵

The court found potential error in the district court’s application of a negligence-like “reasonable person” standard rather than the required deliberate avoidance standard.¹⁶⁶ The district court had made “numerous references to ‘a reasonable person’ and ‘notice,’” characterizing the defendant as having an “ostrich with the head in the sand approach.”¹⁶⁷ But the Seventh Circuit emphasized a previous circuit holding: “For purposes of criminal liability, deliberately avoiding knowledge of a criminal activity is the same thing as having actual knowledge of that activity. ... This standard is a demanding one; negligence or recklessness will not suffice.”¹⁶⁸

B. Safety-valve relief: *Pulsifer* and the death and serious bodily injury bar

In *Pulsifer v. United States*, the Supreme Court resolved a circuit split over the interpretation of the First Step Act’s expanded safety-valve provision.¹⁶⁹ Pulsifer had pleaded guilty to distributing at least 50 grams of methamphetamine and faced a mandatory minimum of 15 years unless

¹⁶¹ 66 F.4th 1079 (7th Cir. 2023).

¹⁶² *Id.* at 1080.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1081.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1081–82.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1082 (quoting *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006)) (citing *United States v. Tantchev*, 916 F.3d 645, 653 (7th Cir. 2019)).

¹⁶⁹ *Pulsifer v. United States*, 601 U.S. 124 (2024).

he qualified for safety-valve relief.¹⁷⁰ Pulsifer had two prior three-point offenses totaling six criminal history points, but he lacked a two-point violent offense.¹⁷¹ He argued he was eligible for safety valve because he did not have all three disqualifying characteristics.¹⁷²

The Supreme Court rejected this argument, holding that “A defendant is eligible for safety-valve relief under [18 U.S.C. § 3553](f)(1) only if he ‘does not have’ all three of the items listed,” meaning defendants are ineligible if they have any one of the disqualifying criminal history features (more than four criminal history points excluding one-point offenses, a prior three-point offense, or a prior two-point violent offense).¹⁷³ The Supreme Court reasoned that *Pulsifer*’s broader reading would render one of the statutory conditions superfluous: Anyone with both a three-point offense and a two-point violent offense would automatically have more than four points.¹⁷⁴

But for fake pill cases resulting in death or serious bodily injury, *Pulsifer*’s holding is often academic. Section 3553(f)(3) provides that safety-valve relief is available only if “the offense did not result in death or serious bodily injury to any person.”¹⁷⁵ This criterion makes safety-valve relief categorically unavailable in fatal overdose cases regardless of the defendant’s criminal history.

The Commission’s data confirms the practical impact: In overdose cases, only 1.7% of defendants received safety-valve relief, compared to 32.5% in non-overdose drug-trafficking cases.¹⁷⁶ The result is stark: For defendants in death-resulting cases, substantial assistance under 18 U.S.C. § 3553(e) is the only mechanism for obtaining a sentence below the mandatory minimum.¹⁷⁷

C. Section 851 recidivist enhancements

For defendants with prior drug felony convictions, 21 U.S.C. § 851 provides for enhanced mandatory minimum penalties.¹⁷⁸ When a defendant has a prior conviction for a “serious drug felony” or “serious violent felony,” and the present offense involves quantities that trigger the 5-year or 10-year mandatory minimum thresholds, the minimums double to 10

¹⁷⁰ *Id.* at 132.

¹⁷¹ *Id.*

¹⁷² *Id.* at 130.

¹⁷³ *Id.* at 132.

¹⁷⁴ *Id.* at 141.

¹⁷⁵ 18 U.S.C. § 3553(f)(3).

¹⁷⁶ OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 31.

¹⁷⁷ *Id.* See 18 U.S.C. § 3553(e).

¹⁷⁸ 21 U.S.C. § 851.

and 20 years, respectively.¹⁷⁹ If death or serious bodily injury results and the defendant has a prior qualifying conviction, the mandatory sentence is life imprisonment.¹⁸⁰

The Commission's 2018 study of section 851 revealed significant sentencing disparities and patterns in filings.¹⁸¹ Of all drug-trafficking offenders sentenced in fiscal year 2016, 31.5% were eligible for section 851 enhancement based on their prior convictions.¹⁸² Yet prosecutors filed section 851 Informations against only 12.3% of eligible offenders, and 22.5% of filed Informations were later withdrawn.¹⁸³ The result was that only 3.9% of eligible offenders remained subject to enhanced mandatory minimums at sentencing.¹⁸⁴

The sentencing impact of section 851 was substantial. Offenders subject to enhanced mandatory minimums received average sentences of 225 months—nearly 10 years longer than the 107-month average for similarly situated offenders who received relief from the enhancement.¹⁸⁵ The disparity reflects both the higher statutory floors and the limited availability of relief mechanisms for defendants facing enhanced penalties.

The section 851 enhancement also creates powerful incentives for cooperation. Defendants facing enhanced mandatory minimums provided substantial assistance at nearly double the baseline rate: 42.3% compared to 22.1% for all drug-trafficking offenders.¹⁸⁶ The trial rate was also dramatically higher: 23.9% of defendants facing enhanced minimums proceeded to trial, compared to only 2.7% of all federal offenders.¹⁸⁷ These disparities reflect the high stakes created by enhanced mandatory minimums: Defendants cooperate to obtain relief or exercise their trial rights, knowing that a conviction will result in decades of imprisonment.

The Commission also found that prosecutors' section 851 filing practices varied significantly by district. Filing rates ranged from 74.6% in the Central District of Illinois to 0% in 19 districts.¹⁸⁸ Withdrawal rates ranged from 0 to 86.4%.¹⁸⁹ This variation suggests that similarly situated

¹⁷⁹ *Id.* § 841(b)(1)(A)(viii), (b)(1)(B)(viii).

¹⁸⁰ *Id.*

¹⁸¹ U.S. SENT'G COMM'N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS (2018).

¹⁸² *Id.* at 18.

¹⁸³ *Id.* at 6.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 30–31.

¹⁸⁶ *Id.* at 28–30.

¹⁸⁷ *Id.* at 27–28.

¹⁸⁸ *Id.* at 22. *See also id.* at 21 (Figure 4: Percentage of Eligible Offenders Against Whom 851 Information Was Filed).

¹⁸⁹ *Id.* at 22. *See also id.* at 23 (Tables 2 and 3: Districts with Highest and Lowest

defendants may face dramatically different sentencing exposure depending on the district in which they are prosecuted—a concern that has informed Department of Justice guidance on charging practices.

VI. Death-resulting cases: enhanced penalties and causation

A. The *Burrage* causation standard

When a drug-trafficking offense results in death, the penalty structure changes dramatically. Under 21 U.S.C. § 841(b)(1)(C), distribution of any amount of a Schedule I or II controlled substance carries a twenty-year mandatory minimum and a maximum of life imprisonment “if death or serious bodily injury results from the use of such substance.”¹⁹⁰ If the defendant has a prior qualifying conviction and death results, the mandatory penalty is life imprisonment.¹⁹¹ The Commission found that one-third of overdose cases (33%) carried 20-year sentences to life sentences or compulsory life sentences, compared to only 0.2% of non-overdose cases.¹⁹²

In *Burrage v. United States*, the Supreme Court addressed the causation standard for the death-resulting enhancement.¹⁹³ The victim, Joshua Banka, had purchased heroin from the defendant and used it along with oxycodone, alprazolam, and clonazepam.¹⁹⁴ Two medical experts testified that the heroin was a “contributing factor” in Banka’s death, but neither could say Banka would have died from the heroin alone.¹⁹⁵ The Supreme Court held that

at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.¹⁹⁶

The Supreme Court rejected the government’s “contributing cause” standard.¹⁹⁷ “The language Congress enacted requires death to ‘result from’ use of the unlawfully distributed drug, not from a combination of

Percentages of Offenders for Whom 851 Information was Withdrawn in Fiscal Year 2016).

¹⁹⁰ 21 U.S.C. § 841(b)(1)(C).

¹⁹¹ *Id.* § 841(b)(1)(A)(viii), (b)(1)(B)(viii).

¹⁹² OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 29.

¹⁹³ *Burrage v. United States*, 571 U.S. 204 (2014).

¹⁹⁴ *Id.* at 206.

¹⁹⁵ *Id.* at 204.

¹⁹⁶ *Id.* at 218–19.

¹⁹⁷ *Id.* at 218.

factors to which drug use merely contributed.”¹⁹⁸ But the Supreme Court also clarified that but-for causation does not require the drug to be the sole cause.¹⁹⁹ Using a memorable illustration, the Supreme Court explained: “if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.”²⁰⁰

This “straw that broke the camel’s back” principle is significant in cases involving fake pills. Fentanyl’s extreme potency—up to 50 times stronger than heroin—means that even in polydrug cases, the fentanyl may be the critical factor that pushed the victim from impairment to death.²⁰¹

B. Applying causation: *McCray* and *Wiley*

The Second Circuit’s *United States v. McCray* decision illustrates how courts connect drug sales to fatal overdoses, even when the death occurs months after the charged transaction.²⁰² McCray sold fentanyl and fentanyl analogues through controlled buys in 2017, but a customer had fatally overdosed on fentanyl purchased from McCray six months earlier, in November 2016.²⁰³ Although McCray was not charged with the death-resulting offense, the district court found the November sale was part of the “same course of conduct” as the charged 2017 sales and imposed a 30-month upward departure under section 5K2.1.²⁰⁴ The Second Circuit affirmed that “the standard of proof for the district court’s factual findings at sentencing, including when considering a departure under section 5K2.1 based on uncharged conduct, is a preponderance of the evidence” at sentencing.²⁰⁵ The six-month gap between the sale and the death did not undermine the causal connection.²⁰⁶

United States v. Wiley expanded the scope of “use” under section 841(b)(1)(C).²⁰⁷ There, the defendant argued he never intended to distribute pills to the baby, and the baby’s ingestion was accidental.²⁰⁸ The

¹⁹⁸ *Id.* at 216.

¹⁹⁹ *Id.* at 211.

²⁰⁰ *Id.*

²⁰¹ *Fentanyl Facts*, U.S. CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 2, 2024), <https://www.cdc.gov/stop-overdose/caring/fentanyl-facts.html>.

²⁰² 7 F.4th 40 (2d Cir. 2021).

²⁰³ *Id.* at 44.

²⁰⁴ *Id.* at 49. *See* U.S.S.G. § 5K2.1 (deleted).

²⁰⁵ *McCray*, 7 F.4th at 49.

²⁰⁶ *Id.*

²⁰⁷ 122 F.4th 725, 730 (8th Cir. 2024). *See* 21 U.S.C. § 841(b)(1)(C).

²⁰⁸ *Wiley*, 122 F.4th at 730.

court rejected this argument: “The ‘use’ is broad, capturing *any* use of the substance that results in serious bodily injury, including the baby’s accidental ingestion of Wiley’s fentanyl pills.”²⁰⁹ The court cited Fourth Circuit precedent holding that “nothing in [21 U.S.C. § 841(b)(1)(c)] requires a jury to find that the defendant actually delivered the drug to the victim in order for the increased penalty to apply.”²¹⁰ Importantly, the jury instruction required only that “some or all” of the drugs in Wiley’s possession be intended for distribution, not that the specific pills the baby ingested be part of the distribution quantity.²¹¹ This “some or all” standard means that even if some drugs were for personal use, the enhancement applies if any were intended for distribution.

C. Sentencing outcomes in overdose cases

The Commission’s data reveals the sentencing consequences of overdose involvement. The average sentence in overdose cases was 149 months, compared to 76 months in non-overdose drug-trafficking cases.²¹² As Table 2 shows, sentences varied significantly based on the number of victims and the defendant’s conduct.²¹³

Scenario	Average Sentence
Single non-fatal overdose	125 months
Single fatal overdose	143 months
Multiple overdoses (at least one fatal)	177 months
Failed to render aid (death occurred)	210 months
Further harm to the victim (death occurred)	216 months

Table 2: Average sentences by overdose scenario

The data also showed that nearly two-thirds (64.1%) of defendants in overdose cases received no relief from applicable mandatory minimums, compared to 42.5% in non-overdose cases.²¹⁴ Substantial assistance was the primary relief mechanism, used by 33.8% of overdose defendants versus 15.4% of non-overdose defendants.²¹⁵ The disparity reflects both the unavailability of safety-valve relief in death-resulting cases and the enhanced cooperation incentives created by lengthy mandatory sentences.

²⁰⁹ *Id.*

²¹⁰ *United States v. Wysinger*, 64 F.4th 207, 216 (4th Cir. 2023). *See* 21 U.S.C. § 841(b)(1)(c).

²¹¹ *Wiley*, 122 F.4th at 730.

²¹² OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 24–25.

²¹³ *Id.* at 25.

²¹⁴ *Id.* at 31.

²¹⁵ *Id.*

VII. Practical guidance for fake pill prosecutions

A. Evidence development for the misrepresentation enhancement

The circuit court decisions surveyed above reveal a spectrum of evidence, ranging from insufficient to sufficient, to establish knowledge for misrepresentation enhancement. With an eye toward sentencing, prosecutors should develop evidence along the following: communications evidence, prior overdose history, cooperator testimony, physical characteristics, and supply chain evidence.

1. Communications evidence

Text messages and social media communications are often decisive. Prosecutors should seek search warrants for defendants' phones early in the investigation and analyze communications for: (1) references to pills as "oxy," "percs," "roxies," "blues," "30s," or other slang terms for prescription pharmaceuticals, as well as emoji substitutes commonly used on social media platforms to refer to such drugs; (2) acknowledgments that pills are "fake," "pressed," or contain fentanyl; (3) pricing consistent with prescription drug markets rather than street fentanyl prices; (4) discussions of prior overdoses; and (5) requests to suppliers for "fentanyl" pills combined with advertisements to customers using pharmaceutical names.²¹⁶

2. Prior overdose history

As *Wiley* demonstrates, a defendant's prior overdose on similar pills is robust evidence of knowledge.²¹⁷ Investigators should determine whether the defendant or the defendant's associates have previously overdosed and, if so, whether the defendant continued distributing pills afterward. Hospital records, emergency medical services reports, and Narcan administration records may establish prior overdose events. Social media posts discussing overdoses in the defendant's network are also probative.

²¹⁶ Common slang terms for pills include "oxy," "percs," "roxies," "blues," and "30s." The DEA maintains a public reference guide identifying drug-related emoji codes commonly used on social media platforms. *See* U.S. DRUG ENF'T ADMIN., EMOJI DRUG CODE | DECODED (2022).

²¹⁷ *Wiley*, 122 F.4th at 729.

3. Cooperator testimony

As *Matthews* illustrates, cooperator testimony that the defendant “always represented” pills as a legitimate pharmaceutical is direct evidence of misrepresentation.²¹⁸ Prosecutors should debrief cooperating witnesses specifically about how the defendant described the pills and whether the defendant acknowledged that the pills contained fentanyl.

4. Physical characteristics

As *Ihediwa* cautions, physical characteristics alone, such as brittle texture, chalky appearance, below-market pricing, may prove the pills are fake, but not that the defendant knew the pills contained fentanyl specifically.²¹⁹ This evidence should be combined with other indicia of knowledge. For example, evidence that pills were professionally packaged in blister packs or pharmacy bottles, combined with pharmaceutical pricing, may support an inference that the defendant knew the pills were being passed off as legitimate medications.

5. Supply chain evidence

Evidence connecting the defendant to known fentanyl trafficking networks, such as those seen in *Salinas*, supports willful-blindness findings.²²⁰ Investigators should document the defendant’s communications with suppliers, the number of pills involved, and any indicators that the defendant held a trusted position within the distribution network.

B. Death-resulting case investigation

Prosecutors should work with investigators to treat overdose scenes as potential homicide investigations from the outset. Key investigative steps include the following: victim’s phone, autopsy and toxicology, scene evidence, expert testimony preparation, and coordination challenges.

1. Victim’s phone

Secure the victim’s phone immediately to preserve text messages, social media communications, and call records that may identify the drug source. These communications often reveal the nature of the transaction, how a party described the drugs, and when and where the purchase occurred.

²¹⁸ *United States v. Matthews*, 155 F.4th 845, 851–52 (6th Cir. 2025).

²¹⁹ *United States v. Ihediwa*, 66 F.4th 1079, 1081 (7th Cir. 2023).

²²⁰ *United States v. Salinas*, 132 F.4th 1083, 1090 (8th Cir. 2025).

2. Autopsy and toxicology

Obtain a complete autopsy and comprehensive toxicology panel. The toxicology should test for fentanyl, fentanyl analogues (specify the most common ones if the laboratory requires direction), and other substances. The presence of norfentanyl—fentanyl’s primary metabolite—can establish that the victim was alive long enough to metabolize the drug, supporting the inference that fentanyl was active in the victim’s system at the time of death.

3. Scene evidence

Identify and collect any remaining drugs found at the scene. Laboratory analysis can confirm whether the remaining pills match the substance found in the victim’s system and connect to the defendant’s supply through forensic comparison or witness testimony.

4. Expert testimony preparation

At trial or sentencing, prosecutors should be prepared to present expert testimony on causation that directly addresses *Burrage*’s but-for standard. Medical examiners can testify about the cause and manner of death, the role of fentanyl in the fatal overdose, and the significance of toxicology findings. The key question is this: Would the victim have survived without the fentanyl? In polydrug cases, experts should be prepared to explain why fentanyl was the “straw that broke the camel’s back,” the critical factor that pushed the victim from impairment to death, even if other substances were also present.

5. Coordination challenges

Prosecutors should also consider the coordination challenges inherent in death-resulting cases. Local law enforcement typically responds to overdose scenes before contemplating any federal investigation. Early outreach to state and local partners, including medical examiner offices, local police, and emergency medical services, can help ensure the preservation of evidence and that federal investigators receive timely notification of potential cases. Where a pattern of overdoses suggests a common source, establishing a protocol for rapid evidence preservation can make the difference between a viable death-resulting prosecution and a case that loses critical evidence.

C. Charging decisions

Charging decisions in cases involving fake pills require careful attention to several factors inherent to sentencing. First, prosecutors should

determine whether the substance is fentanyl, a FRS, or a controlled substance analogue. Under *McCray* and *Williams*, scheduled fentanyl analogues still qualify for the enhanced 10g/100g thresholds under sections 841(b)(1)(A)(vi) and (b)(1)(B)(vi), and the Guidelines' 4:1 ratio means analogue charges can result in significantly higher base offense levels for the same quantity.²²¹ Following the Commission's November 1, 2026, amendments, FRS prosecutions also carry a Drug Quantity Table presumption that may be rebutted under Note (K) where the defendant establishes that the substance is significantly less potent than fentanyl or functions to counteract its effects. Charging an FRS offense in a case involving a clearly potent agonist such as the substances commonly pressed into counterfeit pharmaceutical tablets thus secures both the statutory parity established by HALT and a Guidelines presumption that places the burden of disproving potency-equivalence on the defendant.

Second, where a fatal overdose has occurred, prosecutors should evaluate whether the evidence satisfies *Burrage*'s but-for causation standard.²²² If experts cannot testify that the victim would have survived but for the fentanyl, the death-resulting enhancement may be unavailable.

Third, prosecutors should consider section 851 enhancements where the defendant has qualifying prior convictions. The Commission's data shows that section 851 filings dramatically increase cooperation rates since 42.3% of defendants facing enhanced minimums provided substantial assistance.²²³ But prosecutors should be mindful of Department guidance and the potential for geographic disparity in filing practices. The decision to file section 851 Information should be based on the defendant's role in the offense, criminal history, and the interests of justice, not simply on the availability of a qualifying prior conviction.

D. Sentencing advocacy

At sentencing, prosecutors should be sure to address all applicable enhancements in the presentence report (PSR). The misrepresentation enhancement at section 2D1.1(b)(13) can be overlooked; prosecutors should proactively present evidence supporting its application and request that the probation officer address it in the PSR. Even where the four-level enhancement under subsection (A) is unavailable, the two-level reckless-disregard enhancement under subsection (B), as amended in 2025, may apply on facts substantially less demanding than those required under

²²¹ See *United States v. McCray*, 7 F.4th 40, 47 n.4 (2d Cir. 2021); *United States v. Williams*, 106 F.4th 639, 648 (7th Cir. 2024); U.S.S.G. § 2D1.1(b).

²²² *Burrage v. United States*, 571 U.S. 204, 206 (2014).

²²³ APPLICATION AND IMPACT OF 21 U.S.C. § 851, note 176, at 30.

the pre-amendment willful-blindness standard exemplified by *Salinas*.²²⁴ Where the case resolves by guilty plea, prosecutors should also consider whether to incorporate facts supporting the misrepresentation enhancement into the written statement of facts accompanying the plea agreement, locking in admissions that may be difficult to dispute at sentencing and giving the probation officer a clear factual record on which to recommend application of the enhancement in the PSR.

In death-resulting cases, prosecutors should present victim impact evidence and emphasize the defendant's role in causing irreversible harm. The Commission found that defendants who failed to render aid to dying victims received sentences averaging 210 months, 67% longer than the 125-month average for cases involving a single non-fatal overdose.²²⁵ Conversely, defendants who were present and rendered aid may warrant consideration of that mitigating conduct. Section 3553(a) factors permit courts to consider the full circumstances of the offense, including the defendant's response to the overdose.

VIII. Conclusion

The fake pill crisis has transformed federal drug enforcement. Industrial-scale manufacturing capability, combined with the extraordinary potency of fentanyl and its analogues, has created a drug market where a single fake pill can kill. Federal prosecutors are increasingly called on to investigate, charge, and seek appropriate sentences in cases that present distinct challenges at every stage of the criminal justice process.

Many Americans die every day from synthetic opioid poisoning. The fake pills that contribute to those deaths continue to present complex prosecutorial challenges. Federal prosecutors must come to the case with the tools to meet those challenges to seek justice for the victims of this ongoing crisis. Looking ahead, prosecutors should monitor several developing areas: (1) implementation of the Commission's November 1, 2026 fentanyl-related-substance amendments, including early caselaw addressing the Note (K) rebuttable presumption and Note (K)'s "significantly less potent" and "block, diminish, or counteract" exceptions; (2) potential circuit litigation over the scope of the marketing prong of the misrepresentation enhancement; and (3) the increasing use of social media platforms, and their evolving cooperation with law enforcement, as both distribution channels and evidence sources.

²²⁴ *United States v. Salinas*, 132 F.4th 1083, 1090 (8th Cir. 2025).

²²⁵ OVERDOSES IN FEDERAL DRUG TRAFFICKING CRIMES, note 13, at 33.

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The Role and Responsibilities of the Department of Justice's Ex Officio Sentencing Commissioner

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Although no longer binding on district courts, the United States Sentencing Guidelines remain a significant part of every federal sentencing. Prosecutors who walk into the sentencing hearing with the applicable edition of the Guidelines under their arms will generally know that the Guidelines are promulgated by the United States Sentencing Commission, a government agency whose voting members are nominated by the President and confirmed by the Senate. Fewer may be aware, though, that the Department of Justice also plays a statutorily assigned role on the Commission. In fact, since the Commission's inception, the Attorney General (AG)—or the AG's designee—has served as “an ex officio, nonvoting member of the Commission.”¹

The Department's ex officio representative plays one evident role on the Commission: At the Commission's public sessions, the ex officio sits on the dais alongside voting Commissioners and, like them, may question testifying witnesses or make a public statement concerning a Commission vote. But many of the ex officio's duties are not public-facing, and little has been written about what the role entails. This article, which reflects insights gained in my two years of service as the Department's representative on the Commission, aims to fill that gap by describing at a high level the role that the ex officio plays. To do so, it starts with background on the statutes that assign the Department its role on, and require the provision of certain information to, the Commission. The article then describes how the ex officio helps the Department satisfy its statutory responsibilities, the role that the ex officio plays in the Commission's annual cycle for promulgating guideline amendments, and miscellaneous functions the ex officio can perform. The article concludes with brief observations about

¹ 28 U.S.C. § 991(a).

the challenges inherent in the ex officio role.

I. Background on the Sentencing Reform Act

Congress enacted the Sentencing Reform Act of 1984 to address the “significant sentencing disparities among similarly situated offenders” that had arisen under the discretionary sentencing system previously in place.² The Act eliminated parole in the federal system, created the Commission, and directed the Commission “to promulgate uniform guidelines that would be binding on federal courts at sentencing.”³

The Guidelines remained binding on courts from their initial promulgation in 1987 until 2005, when the Supreme Court held in *United States v. Booker* that mandatory Guidelines violated the Sixth Amendment right to a jury trial.⁴ The Supreme Court severed and excised the provisions of the Act that made the Guidelines binding, rendering the Guidelines instead “effectively advisory.”⁵ Under the system in place since 2005, district courts must correctly calculate the Guidelines range and take that range into account at every sentencing, but the judge may then impose a sentence outside of the range after considering the factors in 18 U.S.C. § 3553(a).⁶

The Act also addressed in detail the composition of the Commission that would promulgate the Guidelines. The Act established the Commission as an independent body “in the judicial branch of the United States.”⁷ The Commission has up to seven voting members, one of whom is the Chair, and all of whom are “appointed by the President ‘by and with the advice and consent of the Senate.’”⁸ “At least [three] of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States.”⁹ No more than four members of the Commission can be members of the same political party.¹⁰

In addition to the voting members, and as relevant here, the Act pro-

² *Peugh v. United States*, 569 U.S. 530, 535 (2011). See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. § 3551).

³ *Id.*

⁴ *United States v. Booker*, 543 U.S. 220, 232 (2005).

⁵ *Id.* at 245.

⁶ See *Peugh*, 569 U.S. at 536–37; *Gall v. United States*, 552 U.S. 38, 49–50 (2007); 18 U.S.C. § 3553(a).

⁷ 28 U.S.C. § 991(a).

⁸ *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (quoting 28 U.S.C. § 991(a)).

⁹ *Id.* (quoting 28 U.S.C. § 991(a)).

¹⁰ *Id.*

vided that the Commission would have one permanent, nonvoting member.¹¹ Specifically, it provided that “[t]he Attorney General, or the Attorney General’s designee, shall be an ex officio, nonvoting member of the Commission.”¹² The Act did not further describe the role that this nonvoting member from the Department would play on the Commission. Nor did the Act say anything about who could or should serve as an ex officio member by virtue of being the AG’s “designee.” But as explained further below, Congress assigned specific duties arising under the Act to the Criminal Division.¹³ And as a practical matter, the Department’s ex officio member has—with limited exceptions—been a Criminal Division attorney for most of the last 25 years.¹⁴

II. Ex officio’s role in fulfilling the Department’s statutory duties

The Act requires that, in exercising its powers and performing its duties, the Commission “consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.”¹⁵ The Act then names certain of those authorities and representatives, including “the Criminal Division of the United States Department of Justice,” and requires that they engage with the Commission.¹⁶ Specifically, the Act provides that the Criminal Division and the other listed entities shall:

submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report

¹¹ 28 U.S.C. § 991(a). In addition to making the AG or the AG’s designee a permanent nonvoting member, Congress also provided that the Chair of the U.S. Parole Commission would temporarily be a second ex officio member of the Commission. Act of October 12, 1984, Pub. L. No. 98-473, § 235(b)(5), 98 Stat. 1837, 2033. Although it was understood that this position was time limited because the Parole Commission was supposed to wind down, Congress has repeatedly extended the life of the Parole Commission over the years. *See id.*; Consolidated Appropriations Act, Pub. L. No. 119-75, § 5011, 140 Stat. 173, 630 (2026) (extending Parole Commission through January 30, 2031, and with it the Chair of the Parole Commission’s ex officio spot on the Commission).

¹² 28 U.S.C. § 991(a).

¹³ *Id.* § 994(o).

¹⁴ *See, e.g.*, U.S. SENT’G COMM’N, TRANSCRIPT OF PUBLIC MEETING 4 (Aug. 17, 2017) (announcing a Counsel to the Deputy AG as the Department’s new ex officio commissioner).

¹⁵ 28 U.S.C. § 994(o).

¹⁶ *Id.*

commenting on the operation of the Commission’s guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission’s work.¹⁷

The Department has historically satisfied its obligation to “annually” submit “a written report” by sending a letter to the Commission through the Criminal Division each summer.¹⁸ The ex officio representative almost always plays a central role in preparing, and ultimately signing, the annual letter.¹⁹ To put together the letter, the ex officio—working with and through the Criminal Division’s Office of Policy and Legislation (OPL)—conducts outreach to Department components and other executive branch agencies to find out what changes in the Guidelines they think are needed. The drafters additionally compile potential gaps in the Guidelines that have been brought to the attention of OPL throughout the previous year, including circuit conflicts that might warrant resolution under the criteria that the Commission considers in deciding whether to resolve such conflicts.²⁰ The Department also might identify new laws passed by Congress that carry criminal penalties and that should be added to the Guidelines.²¹

The Department’s annual letter to the Commission necessarily reflects the policy priorities and positions of the presidential administration. To ensure that the letter reflects those priorities (and the considered views of Department leadership), the letter will go through a multi-step review and clearance process. (As explained further below, that drafting and vetting process is repeated whenever the Department submits public comments on proposed amendments to the Guidelines.)

The ex officio also assists when, in accordance with section 994(o), the Department seeks to provide periodic “comments ... pertinent to the work of the Commission” that it believes “would be useful.”²² Department leaders have exercised that authority by sending letters to the Commission highlighting individual policy priorities. When they do so, the ex officio

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See, e.g.*, Letter from Scott Meisler, Deputy Chief, App. Section, to Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 18, 2025) [2025 DOJ Annual Letter]; Letter from Jonathan J. Wroblewski, Dir., Off. of Policy and Legis., to Hon. Carlton W. Reeves, Chair (July 31, 2023); Letter from David Rybicki, Deputy Assistant Att’y Gen., to Hon. William H. Pryor, Jr., Acting Chair, U.S. Sent’g Comm’n (Aug. 10, 2018); Letter from Deborah Rhodes, Couns. to the Assistant Att’y Gen., to Hon. Ricardo H. Hinojosa, Chair, U.S. Sent’g Comm’n (Aug. 5, 2004).

²⁰ U.S. SENT’G COMM’N, RULES OF PRACTICE AND PROCEDURE 8–9 (2016) (Rule 5.2(c)) [RULES OF PRACTICE AND PROCEDURE].

²¹ *See, e.g.*, 2025 DOJ Annual Letter, note 19, at 19.

²² 28 U.S.C. § 994(o).

can advise on the content, format, and timing of the communication, and may ultimately transmit correspondence to the Commission.

Finally, the ex officio oversees statutory and non-statutory information exchanges that are important to the work of both the Department and the Commission. For example, “following entry of judgment in every criminal case,” courts in every judicial district are statutorily required to submit to the Commission an enumerated list of materials that provide information about the offender and the sentence imposed.²³ The Commission, in turn, must “make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information” that it receives from each judicial district.²⁴ In practice, the Commission satisfies this information-sharing duty by providing data periodically to OPL within the Criminal Division.

The ex officio plays a similar facilitator role when the Commission seeks data from the Department.²⁵ The Commission may, for example, seek information from the Federal Bureau of Prisons as part of its policymaking work.²⁶ When those requests are made, the ex officio—working with OPL—helps ensure that the information is provided when feasible and that any exchange accords with governing law and Department policy.

III. Ex officio’s role in the amendment process

Much of the ex officio’s work is driven by the Commission’s annual cycle for amending the Guidelines. That cycle generally operates as follows. Over the summer, the Commission publishes a list of proposed priorities to tackle during the ensuing amendment cycle.²⁷ The Commission receives public comment on those priorities, publishes its final priorities list at the end of the summer, and meets periodically over the fall and early win-

²³ *Id.* § 994(w)(1).

²⁴ *Id.* § 994(w)(4).

²⁵ *See id.* § 995(a)(8) (authorizing the Commission, by majority vote, to “request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law”). *See also id.* § 994(g) (providing that the Guidelines “shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission”).

²⁶ *Cf. id.* § 994(g) (providing that the Guidelines “shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission”).

²⁷ *See, e.g.,* PROPOSED PRIORITIES FOR AMENDMENT CYCLE, 90 Fed. Reg. 24710 (June 11, 2025).

ter to prepare possible guideline amendments reflecting those priorities.²⁸ The Commission publishes the draft amendments for public comment in the winter and holds public hearings in the winter and spring.²⁹ At those hearings, the Commission receives testimony from, among others, Department attorneys, the defense bar (including the Federal and Community Defenders), and representatives of the Commission's advisory groups.³⁰

The Commission votes on the proposed amendments in April and can promulgate those amendments only "by affirmative vote of at least four" of its members.³¹ If the amendments receive the requisite votes, then the Commission submits them to Congress "not later than May 1."³²

Absent congressional action, the amendments take effect 180 days later, meaning on November 1 of that year.³³ If the promulgated amendments have the effect of lowering guideline ranges, the Commission may additionally call for public comment on whether to make the amendments retroactive and then vote on retroactivity over the summer, thereby ensuring that Congress is aware of the retroactivity determination by the time it would need to vote on whether to disapprove of the Commission's amendments.³⁴

The ex officio plays a multi-faceted role in this amendment process. Internally, the ex officio helps to ensure that the Department's formal presentations to the Commission fully articulate the Department's positions and are well reasoned and scrupulously accurate. To that end, the ex officio works with the Criminal Division's OPL and the Executive Office of United States Attorneys (EOUSA) to identify subject-matter experts within the Department on the issues for which the Commission seeks public comment, and then to prepare draft comments with the identified experts. As is true of the Department's annual letter, drafts undergo extensive review to ensure they represent the views of internal stakeholders

²⁸ 28 U.S.C. § 993(a) (providing that the Commission shall meet on at least two occasions in each calendar quarter to conduct business); RULES OF PRACTICE AND PROCEDURE, note 20, at 3–4 (Rule 3.2). *See, e.g.*, FINAL PRIORITIES FOR AMENDMENT CYCLE, 90 Fed. Reg. 39263 (2025); U.S. SENT'G COMM'N, 2025–2026 AMENDMENT CYCLE: PUBLIC COMMENT ON PROPOSED PRIORITIES: 90 FR 24710 (2025).

²⁹ *See, e.g.*, *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N, <https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-12-13-2025> (last visited June 29, 2026).

³⁰ RULES OF PRACTICE AND PROCEDURE, note 20, at 4–5 (Rule 3.4); *Advisory Groups*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/who-we-are/advisory-groups> (last visited June 29, 2026) (listing the Commission's Standing Advisory Groups).

³¹ 28 U.S.C. § 994(a).

³² RULES OF PRACTICE AND PROCEDURE, note 20, at 5–6 (Rule 4.1).

³³ *Id.* (citing 28 U.S.C. § 994(p)).

³⁴ RULES OF PRACTICE AND PROCEDURE, note 20, at 6 (Rule 4.1A).

and reflect the policies of Department leadership. The ex officio will also assist in identifying witnesses to present the Department's position at the Commission's public hearings. Once the witness is approved to appear at the hearing, the ex officio works with OPL, EOUSA, and others to ensure that the selected witness is prepared to respond to Commissioner inquiries with precision and candor.

Externally, the ex officio represents the Department at the Commission's various sessions, including public hearings, public meetings, internal meetings, and—on occasion—roundtables dedicated to particular issues.³⁵ As mentioned at the outset, the public hearings on potential guideline amendments are the ex officio's most public-facing function. The ex officio sits alongside the voting Commissioners as they hear witness testimony concerning proposed amendments and may, as would a voting Commissioner, question the witnesses on the public record.³⁶ Likewise, at the separate public meetings where the Commissioners vote on possible amendments, the ex officio appears on the dais with the voting Commissioners and may make a statement addressing actions the Commission has taken (or failed to take).³⁷

Between these public sessions, the ex officio attends the Commission's internal meetings—both those where the Commission and its staff discuss possible amendments for publication and those where the Commissioners ultimately debate whether to promulgate amendments. This aspect of the ex officio's role is the one that has arguably generated the most controversy, with critics questioning the fairness of giving the Department a “seat at the table” that the defense bar lacks as a formal matter.³⁸ That debate is longstanding and largely beyond the scope of this short article. But two clarifying points are worth making.

The first is that the Commission has undertaken considerable efforts in recent years to ensure that it receives ample input from the defense bar,

³⁵ See, e.g., U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 1 (2026) (noting how in the Synopsis of Proposed Amendment, the Commission had held a roundtable “attended by a wide range of stakeholders” before publishing proposed amendment).

³⁶ See, e.g., U.S. SENT'G COMM'N, PUBLIC HEARING ON METHAMPHETAMINE 84, 180, 218 (Aug. 5, 2025); U.S. SENT'G COMM'N, PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES 93–96 (Mar. 7, 2023).

³⁷ U.S. SENT'G COMM'N, TRANSCRIPT OF PUBLIC MEETING 86–91 (APR. 5, 2023) (remarks of ex officio Commissioner Jonathan J. Wroblewski).

³⁸ See, e.g., William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 322 (2011); Abraham L. Clott, *Appointing a Federal Defender to the Sentencing Commission*, 8 FED. SENT'G R. 30 (1995).

including the Federal Public and Community Defenders. The Commission's internal rules authorize nonpublic meetings "[t]o receive information from, and participate in discussions with, ... interested parties within the judicial branch," among them "the Federal Public and Community Defenders."³⁹ The Commission has exercised that authority by regularly holding meetings with the Federal Defenders, both when the Commission sets its agenda for the cycle and when it is deciding which amendments to publish for comment.⁴⁰

The second point is that, apart from any "input" the ex officio provides during internal meetings, the ex officio's presence at the meetings helps facilitate the type of information exchange contemplated in the Act.⁴¹ For example, the Commissioners' consideration of public comments sometimes raises thorny or technical questions within the peculiar expertise of individuals at the Department or elsewhere in the executive branch. By participating in the meetings, the ex officio can promptly identify an appropriate expert and facilitate any needed discussions—either directly with the Commission staff or as part of a larger meeting alongside subject-matter experts identified by defense practitioners.

IV. Other miscellaneous functions

The ex officio's role in the amendment cycle can give rise to other duties, both internally within the Department and some that are outward facing.

Internally, the ex officio meets periodically with the Criminal Division's leadership and with Department working groups to update them on the Commission's agenda and solicit input. The ex officio may additionally provide input when the Department considers, proposes, or reviews sentencing-related legislation. In that function, the ex officio can share his or her sentencing policy expertise and bring to bear data analysis conducted by OPL or the Commission's Office of Research and Data. When Congress enacts sentencing or corrections legislation, the ex officio may work with various Department components to implement the new law.

³⁹ RULES OF PRACTICE AND PROCEDURE, note 20, at 4 (Rule 3.3(3)).

⁴⁰ The Commission also benefits from defense-bar perspectives through meetings with, and other input from, the Practitioners Advisory Group (PAG). PAG is a standing advisory group consisting of experienced defense attorneys; its purposes include providing "views on the Commission's activities and work" and "disseminat[ing] to defense attorneys, and to other professionals in the defense community, information regarding federal sentencing issues." U.S. SENT'G COMM'N, PRACTITIONER'S ADVISORY GROUP CHARTER §§ 1(b), 2(g) (2025).

⁴¹ U.S. SENT'G COMM'N, TRANSCRIPT OF PUBLIC MEETING 91 (Apr. 5, 2023) (statement of Chair Reeves).

The ex officio's internal role also includes an educational function. Working (again) with OPL, the ex officio summarizes Guidelines amendments for internal audiences when they are published for comment and when ultimately promulgated. The ex officio also may periodically address Commission actions with Department personnel in other settings, such as through meetings or classes at the National Advocacy Center.

The ex officio's educational role can be outward facing as well. The ex officio may join the voting Commissioners at conferences or training seminars where they present new amendments to participants in the sentencing process, such as the Commission's annual training seminar (attended by many federal probation officers) and its annual conference for federal judges. The ex officio can also participate in the Commission's periodic meetings with members of its standing advisory groups.

V. Conclusion

The Department's ex officio member on the Commission has a unique and challenging role. As the role has developed, the ex officio does substantial work internally to ensure that the Department's submissions to the Commission are principled, persuasive, and in line with the Department's interests. At the same time, the ex officio serves as a member of a Commission charged by statute with promoting sound sentencing policies, not all of which will necessarily align with the Department's positions in a given amendment cycle. Navigating the dual role therefore requires sensitivity to the dynamics of both the Department and the Commission; openness to differing perspectives; an ability to absorb and synthesize large amounts of information quickly; and sound judgment. Striking the right balance is an ever-present challenge.

About the Author

Scott Meisler is a Deputy Chief of the Appellate Section in the Criminal Division of the Department of Justice. Since May 2024, he has also served as the Department's ex officio member of the Commission. He joined the Department in 2009 after working at a law firm and clerking for two federal judges. He has served as a line attorney in the Appellate Section and in several other roles, including as an Assistant to the Solicitor General (2015–2016) and a member of the Criminal Division's National Cryptocurrency Enforcement Team (2022–2023).

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From Boston to Anchorage: Cyber-Fraud Sentencing Under the United States Sentencing Guidelines in the First and Ninth Circuits

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I. Introduction

Economic-crime sentencing under the United States Sentencing Guidelines has always been contentious, but cyber-enabled fraud and crypto-asset crime have exposed particular pressure points in U.S.S.G. § 2B1.1 and related provisions.¹ How should courts compute loss when the fraud involves credential dumps, botnets, or non-traditional “access devices”?² When do hundreds of data-breach victims count as “victims” or as having suffered “substantial financial hardship”?³ How do specialized enhancements, such as “authentication features,” “sophisticated means,” “special skill,” and “critical infrastructure” apply to conduct that occurs entirely in code?⁴

Amendments by the United States Sentencing Commission, in particular Amendment 827’s relocation of the loss rule into section 2B1.1(b)(1) and the acquitted-conduct limitation in section 1B1.3, have begun to stabilize some of this doctrine.⁵ Amendment 827 attempts to resolve the *Banks/Riccardi/Kirilyuk* split by defining “loss” as “the greater of actual loss or intended loss,” while Amendment 826 narrows the use of acquitted conduct as relevant conduct.⁶ The 2025 United States Sentencing Guide-

¹ U.S. SENT’G GUIDELINES MANUAL § 2B1.1 (U.S. SENT’G COMM’N 2025).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ U.S.S.G. app. C, amend. 827. *See id.* §§ 2B1.1(b)(1), 1B1.3.

⁶ U.S. SENT’G COMM’N, PRIMER ON LOSS CALCULATION UNDER §2B1.1, at 1 (2026) (quoting U.S.S.G. § 2B1.1(b)(1)(A)). *Compare* U.S.S.G. app. C, amend. 827 (defining loss), *with* U.S.S.G. app. C, amend. 826 (clarifying acquitted conduct). *See*

lines Manual incorporated those changes.⁷

This article descriptively surveys how the United States Courts of Appeals from coast to coast have applied section 2B1.1 and related provisions in cyber-fraud and crypto-asset cases (and close analogues), with emphasis on the following:

- loss calculation (including payment-card fraud (“carding”) and credential-theft cases);
- victim counting and “substantial financial hardship” under section 2B1.1(b)(2);⁸
- cyber-specific enhancements (authentication features, sophisticated means, special skill, and critical-infrastructure disruption); and
- the interaction of these provisions with the First Step Act and the 2024–2025 Guidelines amendments, as supplemented by the Commission’s 2026 inflationary and structural amendments.⁹

II. The post-2024 framework: section 2B1.1, victims, and relevant conduct

A. Loss after post-2024 framework

Post-2024, the basic structure of section 2B1.1(b)(1) loss enhancement became keyed to “the greater of actual loss or intended loss,” with “actual loss” defined as “the reasonably foreseeable pecuniary harm that resulted from the offense” and “intended loss” as “the pecuniary harm that the defendant purposely sought to inflict.”¹⁰ Intended loss expressly includes harm that would have been impossible or unlikely to occur (for example, sting operations or inflated insurance claims).¹¹

Before 2024, those definitions lived exclusively in Application Note 3(A) of section 2B1.1.¹² Amendment 827 moved them into the Guide-

United States v. Banks, 55 F.4th 246 (3d Cir. 2022); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Kirilyuk*, 29 F.4th 1128, (9th Cir. 2022).

⁷ U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2025).

⁸ U.S.S.G. § 2B1.1(b)(2).

⁹ See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C.). *E.g.*, U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES (2025); U.S. SENT’G COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES (2024); U.S. SENT’G COMM’N, 2026 AMENDMENTS IN BRIEF: INFLATIONARY ADJUSTMENT (2026).

¹⁰ LOSS CALCULATION UNDER §2B1.1, note 6, at 1, 3, 5.

¹¹ *Id.* at 9 (citing *United States v. Moss*, 34 F.4th 1176, 1192 (11th Cir. 2022) (“As we’ve said several times now, intended loss includes even loss and harm that is unlikely to occur.”)).

¹² U.S.S.G. § 2B1.1 cmt. n.3(A) (2023).

line text (via “Note A/C” cross-references to section 2B1.1(b)(1)) to resolve the circuit split triggered by *Kisor v. Wilkie*.¹³ The Third Circuit in *United States v. Banks* held that “loss” in section 2B1.1 unambiguously meant “actual loss,” so the commentary’s inclusion of intended loss impermissibly expanded the Guideline under *Kisor*.¹⁴ The Sixth Circuit in *United States v. Riccardi* took a similar approach to the \$500-per-access-device rule in Application Note 3(F)(i), concluding that the commentary’s minimum loss floor could not be squared with the text.¹⁵

Other circuits, including the Ninth, continued to treat the commentary as authoritative. In *United States v. Kirilyuk*, a credit-card and access-device case, the court held that the special \$500-per-card rule in Application Note 3(F)(i) “impermissibly expands” the Guideline’s loss text and therefore was not entitled to deference under *Kisor*, aligning the Ninth Circuit with *Riccardi* on this point even while other circuits continued to apply the rule.¹⁶

Amendment 827’s move of both loss and gain-as-proxy into a new Application Note to section 2B1.1(b)(1) is expressly framed as an effort “[t]o ensure consistent loss calculation across circuits” after *Banks* and *Riccardi*.¹⁷ Here are the key implications for cyber-fraud and crypto cases:

- “intended loss” is now text, eliminating *Banks*-style arguments that only actual loss counts;¹⁸
- *Kisor* attacks shift from “intended loss” itself to discrete special rules (for example, per-card or mailbox presumptions) that may still be vulnerable if they conflict with the new text;¹⁹ and
- gain-as-proxy is likewise textual but still limited to cases where loss “reasonably cannot be determined.”²⁰

As of November 1, 2024, section 2B1.1 no longer leaves the core “loss”

¹³ U.S.S.G. app. C, amend. 827. See U.S.S.G. § 2B1.1(b)(1)(A), (C); 588 U.S. 558 (2019).

¹⁴ LOSS CALCULATION UNDER §2B1.1, note 6, at 1; *United States v. Banks*, 55 F.4th 246, 255–59 (3d Cir. 2022). See U.S.S.G. § 2B1.1; *Kisor*, 588 U.S. at 558.

¹⁵ 989 F.3d 476, 483 (6th Cir. 2021); LOSS CALCULATION UNDER §2B1.1, note 6, at 16–17 n.115; U.S.S.G. § 2B1.1 cmt. n.3(F)(i) (2023).

¹⁶ 29 F.4th 1128, 1137 (9th Cir. 2022); LOSS CALCULATION UNDER §2B1.1, note 6, at 16–17 n.115; U.S.S.G. § 2B1.1 cmt. n.3(F)(i) (2023). See *Kisor*, 588 U.S. at 558; *Riccardi*, 989 F.3d at 476.

¹⁷ LOSS CALCULATION UNDER §2B1.1, note 6, at 1 (quoting U.S.S.G. app. C, amend. 827); U.S.S.G. § 2B1.1(b)(1) cmt. n.3(A); *Banks*, 55 F.4th at 258; *Riccardi*, 989 F.3d at 483.

¹⁸ *United States v. Banks*, 55 F.4th 246, 253 (3d Cir. 2022).

¹⁹ *Kisor v. Wilkie*, 588 U.S. 558, 610–20 (2019) (Roberts, J., concurring in part).

²⁰ U.S.S.G. § 2B1.1(b)(1)(B).

definition to commentary.²¹ The Guideline text itself now provides that “[l]oss is the greater of actual loss or intended loss,” and it carries forward the familiar definitions of “actual loss,” “intended loss,” “pecuniary harm,” and “reasonably foreseeable pecuniary harm” that previously appeared in Application Note 3(A).²² The same amendment also codifies the rule that courts may use “gain” as an alternative measure of loss only when there is a loss that “reasonably cannot be determined.”²³ The basic structure of economic-crime sentencing, anchored in a loss table that keys offense level to the greater of actual or intended loss, remains intact but now appears in the black-letter Guideline rather than in the notes.²⁴

In adopting Amendment 827, the Commission made explicit that it was responding to the post-*Kisor* circuit split that emerged after the Third Circuit’s decision in *Banks* and the Sixth Circuit’s decision in *Riccardi*.²⁵ The Commission explained that the “[l]oss amendment moves the general rule establishing loss from the commentary to the guideline itself” and that it “approved the amendment to resolve the circuit split and ensure consistent loss calculation across circuits.”²⁶ Public comment materials likewise describe the problem in concrete terms: After *Banks*, “loss calculations for individuals in the Third Circuit [were] now computed differently than elsewhere, where other circuit courts have uniformly applied the general rule in Application Note 3(A),” and Amendment 827 thus “moves the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes.”²⁷ The Commission’s 2025 *Primer on Loss Calculation Under §2B1.1* then summarizes the post-amendment regime in straightforward

²¹ *Id.* § 2B1.1(b)(1)(A), (C).

²² *Id.*

²³ *Id.* § 2B1.1(b)(1)(B); *id.* app. C, amend. 827.

²⁴ *Id.* § 2B1.1(b)(1). *See also* LOSS CALCULATION UNDER §2B1.1, note 6, at 3–10 (discussing actual and intended loss).

²⁵ U.S.S.G. app. C, amend. 827. *See also Kisor v. Wilkie*, 588 U.S. 558 (2019) (holding that “*Auer* deference to agencies’ reasonable readings of genuinely ambiguous regulations ... retains an important role in construing agency regulations,” and “agency constructions of genuinely ambiguous regulations do not receive greater deference under *Auer* than agency constructions of statutes”). *Compare United States v. Banks*, 55 F.4th 246 (3d Cir. 2022) (holding that “sentencing guideline providing graduated scale of increases based on monetary amount of loss applies only to actual loss”), *with United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021) (holding that “mandatory minimum for access devices was substantive legislative rule that belonged in sentencing guideline itself to have force”).

²⁶ U.S. SENT’G COMM’N, 2024 AMENDMENTS IN BRIEF: CIRCUIT CONFLICTS & MISCELLANEOUS 2 (2024).

²⁷ U.S. SENT’G COMM’N, PUBLIC COMMENT ON RETROACTIVITY FOR AMENDMENT 1, AMENDMENT 3 (PARTS A AND B), AND AMENDMENT 5 (PART D) 20 (2024).

terms: As a “general rule,” “loss” under section 2B1.1 is “the greater of actual loss or intended loss,” and that rule is now housed in the Guideline text itself.²⁸

Appellate courts have quickly confirmed both the content and the legal effect of Amendment 827. In *United States v. Horn*, the Eleventh Circuit held that even under the pre-2024 Guidelines, courts “must consider both ‘actual loss’ and ‘intended loss’” under section 2B1.1 because section 1B1.3 requires consideration of both actual and intended harm, and it concluded that the text of section 2B1.1(b)(1)(A) is “not ambiguous” on that point.²⁹ *Horn* further characterizes Amendment 827 as a “clarifying amendment” that “maintains the same longstanding approach for calculating loss” and therefore applies to cases pending on direct appeal.³⁰ In *United States v. Lezcano*, another Eleventh Circuit economic-crime case involving unauthorized-access-device fraud, the court described Amendment 827 in operational terms, moving the language that loss “is the greater of actual loss or intended loss” from Application Note 3(A) into the main text, and, relying on *Horn*, held that “loss” under section 2B1.1 “unambiguously” includes intended loss.³¹ A subsequent unpublished Eleventh Circuit decision, *United States v. Gonzalez*, applies the same reasoning and treats Amendment 827 as preserving, rather than altering, the Eleventh Circuit’s longstanding intended-loss jurisprudence.³²

The D.C. Circuit has taken a similar view in *United States v. Sun*, a counterfeit-iPhone fraud case.³³ The court held that even if one applied the pre-amendment version of the Guideline, D.C. Circuit precedent had already embraced the “general rule” that “loss is the greater of actual loss or intended loss,” citing *Bikundi* and earlier decisions.³⁴ *Sun* also expressly characterizes the Third Circuit’s *Banks* line as a “minority of one” among circuits that addressed whether to defer to the intended-loss commentary.³⁵ Together with *Horn* and *Lezcano*, *Sun* thus confirms that Amendment 827 has largely consolidated a national consensus: Outside the Third Circuit, courts treat the “greater of actual loss or intended loss”

²⁸ LOSS CALCULATION UNDER §2B1.1, note 6, at 1. See U.S.S.G. § 2B1.1(b)(1).

²⁹ 129 F.4th 1275, 1300, 1306 (11th Cir. 2025). See U.S.S.G. app. C, amend. 827; *id.* § 2B1.1(b)(1)(A); *id.* § 1B1.3.

³⁰ *Horn*, 129 F.4th at 1300–01. See U.S.S.G. app. C, amend. 827.

³¹ No. 23-10925, 2025 WL 2056037, at *2, (11th Cir. July 23, 2025).

³² No. 24-13320, 2926 WL 33218, at *1, (11th Cir. Jan. 6, 2026).

³³ No. 24-3129, 2026 WL 184351, at *3 (D.C. Cir. Jan. 23, 2026).

³⁴ *Id.* at *3–4 (citing *United States v. Bikundi*, 926 F.3d 761, 797 (D.C. Cir. 2019); *United States v. Studevent*, 116 F.3d 1559, 1561–64 (D.C. Cir. 1997)).

³⁵ *Id.* at *4, *3 n.* (describing the Third Circuit’s position in *United States v. Banks* as a “minority of one” and collecting contrary authority (citing *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022))).

formulation as both the pre-existing rule and the post-amendment text.³⁶

For cyber-enabled fraud and crypto-asset cases, two practical implications follow. First, defense arguments that “loss” must mean only actual, realized loss (for example, successfully cashed-out funds, rather than the face value of blocked transactions, expired credential dumps, or thwarted drainer campaigns) will face a steeper uphill climb in most circuits after Amendment 827.³⁷ The Guideline text now squarely instructs courts to look to the greater of actual and intended loss, and appellate courts treat that instruction as an unambiguous, clarifying codification rather than a new substantive rule.³⁸ Second, the action in cyber and crypto cases is therefore likely to shift from whether intended loss can be considered at all to how broadly “intended loss” and “reasonably foreseeable pecuniary harm” should be defined in fact-specific settings, such as credential-stuffing attacks, large bot-driven carding operations, and smart-contract exploits where protocol design or on-chain controls make certain harms impossible or highly unlikely.³⁹ The Commission’s current definitions, which explicitly include harm that would have been “impossible or unlikely to occur,” give courts considerable room to treat such scenarios as intended loss, but they also leave space for arguments about the scope of the defendant’s purpose, foreseeability, and the technological constraints of a particular scheme.⁴⁰

B. Victims and “substantial financial hardship” under section 2B1.1(b)(2)

The victim enhancement in section 2B1.1(b)(2) turns, post-2015, on two factors: (1) the number of victims; and (2) whether certain victims suffered “substantial financial hardship.”⁴¹ The Commission’s 2025 *Primer on Economic Crime Victims* emphasizes two core principles:

1. a “victim” is any person who sustained part of the actual loss included in the section 2B1.1(b)(1) calculation;⁴² and

³⁶ U.S.S.G. app. C, amend. 827. *See id.* § 2B1.1(b)(1)(A) (“Loss is the greater of actual loss or intended loss.”).

³⁷ U.S.S.G. app. C, amend. 827.

³⁸ *See Horn*, 129 F.4th at 1299–1301; *Lezcano*, 2025 WL 2056037, at *4–5; *Sun*, 2026 WL 184351, at *3–4.

³⁹ U.S.S.G. § 2B1.1(b)(1)(A), (C).

⁴⁰ *Id.* § 2B1.1(b)(1)(C)(ii); LOSS CALCULATION UNDER §2B1.1, note 6, at 5–6, 9.

⁴¹ U.S.S.G. § 2B1.1(b)(2).

⁴² U.S. SENT’G COMM’N, PRIMER ON ECONOMIC CRIME VICTIMS 2 (2025). *See* U.S.S.G. § 2B1.1 cmt. n.1.

2. “substantial financial hardship” is assessed individually and subjectively, what is ruinous to one victim may be a “minor hiccup” to another.⁴³

The Ninth Circuit’s *United States v. George*, crystallizes this approach.⁴⁴ There, distressed homeowners paid between \$1,000 and \$3,000 each to a fraudulent loan-modification program.⁴⁵ The court held that section 2B1.1(b)(2) “requires the sentencing court to determine whether the victims suffered a loss that was significant in light of their individual financial circumstances,” affirming the enhancement where those fees were “not an insubstantial sum” for financially distressed homeowners.⁴⁶

In *United States v. Iwuanyanwu*, the First Circuit adopted a similarly individualized approach, holding that the enhancement turns on whether the specific victim’s finances were substantially impacted, not on any per se dollar threshold.⁴⁷

Several circuits, including the Ninth in *United States v. Stewart*, have declined to read a separate “reasonable foreseeability” requirement into section 2B1.1(b)(2), distinguishing the victim enhancement from the causation standard embedded in “actual loss.”⁴⁸ *United States v. George* later clarified that proximate cause remains implicit: The government must still show that the offense proximately caused the hardship.⁴⁹

For cyber-fraud and credential-theft cases, the victim rules interact with special commentary provisions. Identity-theft victims may be counted even if reimbursed, because the time and effort to restore compromised accounts, as well as temporary deprivation of funds, constitute “pecuniary

⁴³ ECONOMIC CRIME VICTIMS, note 42, at 9; *United States v. George*, 949 F.3d 1181, 1184, 1186 (9th Cir. 2020); *United States v. Skouteris*, 51 F.4th 658, 672 (6th Cir. 2022) (enhancement “requires a showing that the loss was ‘more than minimal or trivial’ as gauged by the victim’s specific financial circumstances” (cleaned up)); *United States v. Castaneda-Pozo*, 877 F.3d 1249, 1252 (11th Cir. 2017) (per curiam) (“[T]he inquiry is specific to each victim.”).

⁴⁴ 949 F.3d at 1181.

⁴⁵ *Id.* at 1186.

⁴⁶ *Id.* at 1184, 1186.

⁴⁷ 69 F.4th 17, 25 (1st Cir. 2023).

⁴⁸ 728 F. App’x 651, 654 (9th Cir. 2018) (unpublished) (“Nothing in the plain language of either § 2B1.1(b)(2) itself or the accompanying commentary requires a district court to make a finding that the loss must be reasonably foreseeable. If the Sentencing Commission had intended for this to be a requirement, it would have said so explicitly.”). *But see United States v. Skouteris*, 51 F.4th 658, 673 (6th Cir. 2022) (enhancement requires a showing of both proximate and but-for cause).

⁴⁹ 949 F.3d at 1187 (“The government suggests that § 2B1.1(b)(2) does not require foreseeability, but proximate cause is a well-established principle of the common-law, and we presume that the Sentencing Commission did not mean to dispense with it without saying so.”).

harm.”⁵⁰ *United States v. Stepanian* held that cardholders were victims despite reimbursement because they bore initial charges and the reasonably foreseeable harm of temporary unavailability of funds.⁵¹

Application Note 4(C)’s mailbox-cluster presumptions can inflate victim counts in data-breach or mail-theft cases, but courts have split on whether those presumptions are mandatory rules or rebuttable inferences, an issue with a *Kisor* flavor similar to the access-device dispute.⁵²

Taken together, these authorities point in the same direction: Section 2B1.1(b)(2) is not a blunt numerosity tool but a victim-focused inquiry that asks who bore the loss in the section 2B1.1(b)(1) calculation and how that loss landed on them.⁵³ The First and Ninth Circuits read “substantial financial hardship” to require an individualized, fact-specific assessment; *George*, *Iwuanyanwu*, and *Stepanian* all insist that relatively modest dollar amounts can qualify where the victim is financially fragile, while reimbursement or institutional size can cut the other way.⁵⁴ At the same time, those courts have declined to include a separate foreseeability element to section 2B1.1(b)(2), instead folding proximate cause into the definition of “pecuniary harm.”⁵⁵ In cyber-fraud and credential-theft cases, that framework forces parties to do more than count breached records; they must tie victim status and hardship to actual, case-specific consequences of the breach (for example, missed rent, delayed medical care, or frozen accounts) rather than to abstract exposure alone.

C. Cyber-specific definitions and enhancements

Cyber-fraud and crypto-asset cases tend to concentrate a cluster of specialized definitions and enhancements that sit on top of the general section 2B1.1 loss and victim framework.⁵⁶ For offenses under the Computer Fraud and Abuse Act (CFAA), “loss” is statutorily defined to include not only direct monetary harm but also “any reasonable cost to any victim,” expressly including “the cost of responding to an offense, con-

⁵⁰ U.S.S.G. § 2B1.1(b)(1)(C).

⁵¹ 570 F.3d 51 (1st Cir. 2009).

⁵² U.S.S.G. § 2B1.1 cmt. n.4(C)(ii)(II). *See also United States v. Niewald*, 185 F. App’x 839, 840–41 (11th Cir. 2006) (unpublished) (per curiam) (applying the presumption in Application Note 4(C)(ii)(II) regarding the number of actual residents served by a “housing unit cluster box” to support determination that offense involved 250 or more victims).

⁵³ U.S.S.G. § 2B1.1(b)(1), (b)(2).

⁵⁴ *Id.* § 2B1.1(b)(2). *See George*, 949 F.3d at 1186; *United States v. Iwuanyanwu*, 69 F.4th 17, 24 (1st Cir. 2023); *United States v. Stepanian*, 570 F.3d 51, 56–57 (1st Cir. 2009).

⁵⁵ U.S.S.G. § 2B1.1(b)(2).

⁵⁶ *See id.* § 2B1.1.

ducting a damage assessment, and restoring the data, program, system, or information,” along with lost revenue due to service interruption.⁵⁷ The Commission’s 2025 *Primer on Computer Crimes* emphasizes that in U.S.S.G. § 2B1.1 cases involving 18 U.S.C. § 1030, courts regularly treat forensic, remediation, and restoration expenditures as actual loss, so long as they are reasonably tied to the offense conduct.⁵⁸ That approach is reflected in decisions such as *United States v. Middleton*, where the Ninth Circuit accepted a loss calculation based in part on the victim-internet-service provider’s internal remediation costs after a disgruntled former employee wiped billing systems and databases.⁵⁹ Commentary and practice guides from Department of Justice’s Computer Crime and Intellectual Property Section (CCIPS) and Congressional Research Service reports on the CFAA similarly treat response and remediation costs as central to both jurisdictional thresholds and Guideline loss in computer-intrusion prosecutions.⁶⁰

The 2026 amendments also address the protected-computer-trespass provision in U.S.S.G. § 2B2.3(b)(3), which had applied where a trespass offense involved invasion of a protected computer and loss above specified thresholds.⁶¹ Because this article focuses principally on section 2B1.1 cyber-fraud sentencing rather than trespass sentencing, that amendment does not materially affect the analysis here, but it further illustrates the Commission’s 2026 effort to streamline low-usage cyber-adjacent specific offense characteristics while retaining the core section 2B1.1 framework for computer-fraud loss.⁶²

In credential and carding cases, section 2B1.1’s treatment of “unauthorized access device[s]” has been a particular flashpoint.⁶³ Section 2B1.1 and Application Note 3(F)(i) historically prescribed a minimum loss amount (formerly \$500) per unauthorized access device, a category that sweeps in stolen account numbers, passwords, and other identifiers covered by 18 U.S.C. § 1029(e).⁶⁴ The Commission’s *Primer on Loss Calculation Under §2B1.1* notes that in the wake of *United States v. Riccardi* and

⁵⁷ 18 U.S.C. § 1030(e)(11).

⁵⁸ U.S. SENT’G COMM’N, PRIMER ON COMPUTER CRIMES 12 (2025). See U.S.S.G. § 2B1.1; 18 U.S.C. § 1030.

⁵⁹ 231 F.3d 1207, 1214 (9th Cir. 2000).

⁶⁰ See PETER G. BERRIS, CONG. RSCH. SERV., R47557, CYBERCRIME AND THE LAW: PRIMER ON THE COMPUTER FRAUD AND ABUSE ACT AND RELATED STATUTES (2023) (summarizing Computer Fraud and Abuse Act “loss” and Guideline treatment).

⁶¹ See U.S.S.G. § 2B2.3(b)(3).

⁶² See *id.* § 2B1.1.

⁶³ *Id.* § 2B1.1(b)(11); *id.* § 2B1.1 cmt. n.3(E)(i).

⁶⁴ *Id.* § 2B1.1 cmt. n.3(F)(i) (2021); 18 U.S.C. § 1029(e)(1)–(3).

United States v. Kirilyuk, courts in those circuits have rejected a *mandatory* per-device floor that is untethered to evidence of actual or intended loss.⁶⁵ Both *Riccardi* and *Kirilyuk* insist that district courts must have some evidentiary basis, whether empirical data, expert proof, or record-supported inference, to equate each card or credential with a particular dollar amount.⁶⁶ That requirement is especially consequential in large credential-dump prosecutions where databases may contain outdated, non-functional, or duplicative records. The Commission’s *Primer on Loss Calculation Under §2B1.1*, *Primer on Computer Crimes*, recent Congressional Research Service reports on federal computer-crime statutes, and practitioner commentary all describe an emerging consensus: In cyber cases, device counts can be used as a proxy, but only if grounded in proof, not in a categorical, across-the-board multiplier.⁶⁷

Related cyber-facing provisions govern “authentication features” and “sophisticated means.”⁶⁸ Section 2B1.1(b)(11) (formerly (b)(10)) enhances offenses that involve “authentication features” or certain device-making equipment; the Guidelines incorporate the broad definition of “authentication feature” in 18 U.S.C. § 1028(d)(1), which extends to holograms, codes, and other security elements used to verify identity or document authenticity.⁶⁹ In credential-stuffing, phishing, and malware-enabled account-takeover schemes, courts look to whether offenders misused tokens, one-time passwords, or other multi-factor credentials, or forged device identifiers that function as authentication features. The sophisticated-means enhancement in U.S.S.G. § 2B1.1(b)(10)(C) applies where the execution or concealment of the fraud is “especially complex or especially intricate,” with application notes and Commission training materials collecting cases upholding the enhancement for persistent, automated, or layered online schemes, even when individual steps (such as sending phishing emails or running scripts) are themselves simple.⁷⁰ The Commission’s primers and annual survey articles in the *American Criminal Law Review* stress

⁶⁵ LOSS CALCULATION UNDER §2B1.1, note 6, at 16–17; *United States v. Riccardi*, 989 F.3d 476, 486–90 (6th Cir. 2021); *United States v. Kirilyuk*, 29 F.4th 1128, 1133–36 (9th Cir. 2022).

⁶⁶ See *Riccardi*, 989 F.3d at 486–90; *Kirilyuk*, 29 F.4th at 1135–36.

⁶⁷ E.g., LOSS CALCULATION UNDER §2B1.1, note 6, at 17; PRIMER ON COMPUTER CRIMES, note 58, at 22–26; Frank O. Bowman, III, *A Simplified Economic Crime Guideline: Model Sentencing Guidelines §2B1.1*, 18 FED. SENT’G REP. 330, 336 (2006) (discussing how devices can be used as a proxy in cyber cases).

⁶⁸ U.S.S.G. § 2B1.1 cmt. n.10(B) (“authentication features”); *id.* § 2B1.1 cmt. n.9(B) (“sophisticated means”).

⁶⁹ *Id.* § 2B1.1(b)(11); 18 U.S.C. § 1028(d)(1).

⁷⁰ U.S.S.G. § 2B1.1(B)(10)(C); *id.* at 2B1.1 cmt. n.9(B); PRIMER ON COMPUTER CRIMES, note 58, at 14–15.

that multi-layer proxy networks, anonymizing crypto-asset flows, and cascaded shell-company structures are paradigmatic examples of sophisticated means in cyber and crypto-fraud sentencing.⁷¹

Finally, Chapter 3 adjustments, in particular “special skill” under section 3B1.3 and the section 2B1.1(b)(18)–(19) critical-infrastructure enhancements, take on a distinctive cast in cyber cases.⁷² Section 3B1.3 defines “special skill” as a skill “not possessed by members of the general public and usually requiring substantial education, training or licensing,” but the Commission and courts have long recognized that a skill may qualify based on self-tutelage or experience rather than formal credentials.⁷³ In *United States v. Petersen*, for example, the Ninth Circuit upheld the enhancement where the defendant’s self-taught ability to bypass security protocols and penetrate protected systems was “particularly sophisticated” and materially facilitated the offense, while the Sixth Circuit in *United States v. Godman* declined to apply section 3B1.3 to an “amateurish” use of readily available desktop software, cautioning against treating ordinary computer literacy as a special skill.⁷⁴ The Commission’s *Primer on Computer Crimes*, CCIPS guidance, and academic commentary coalesce around the same distinction: Expert-level coding, custom malware development, or protocol-level network exploitation can qualify as a special skill when used to commit the offense, but common abilities like basic scripting or use of retail software generally should not.⁷⁵

In sections 2B1.1(b)(19)(A)(iii)–(b)(19)(B), the “critical-infrastructure” enhancement adds another layer in CFAA and cyber-fraud cases involving financial, health, or other nationally significant systems.⁷⁶ The Guideline directs a 6-level increase and a minimum offense level of 24 where an 18 U.S.C. § 1030 offense “caused a substantial disruption of a critical infrastructure.”⁷⁷ The commentary defines “critical infrastructure”

⁷¹ *E.g.*, Orin S. Kerr, *Trespass, Not Fraud: The Need for New Sentencing Guidelines in CFAA Cases*, 84 GEO. WASH. L. REV. 1544, 1561–66 (2016) (criticizing overuse of sophisticated-means in routine computer cases).

⁷² U.S.S.G. § 3B1.3 (“special skill”); *id.* § 2B1.1(b)(18)–(19).

⁷³ *Id.* § 3B1.3 cmt. n.4; PRIMER ON COMPUTER CRIMES, note 58, at 26–27.

⁷⁴ *United States v. Petersen*, 98 F.3d 502, 507 n.5 (9th Cir. 1996); *United States v. Godman*, 223 F.3d 320, 323 (6th Cir. 2000).

⁷⁵ *E.g.*, Kerr, note 71, at 1561–66 (arguing that most computer skills should not be treated as “special” under § 3B1.3); Arthur L. Bowker & Gregory B. Thompson, *Computer Crime in the 21st Century and Its Effect on the Probation Officer*, 65 FED. PROB., no. 2, Sep. 2001, at 22–23 (summarizing early appellate treatment of special-skill enhancements in computer cases).

⁷⁶ U.S.S.G. § 2B1.1(b)(19)(A)(iii)–(b)(19)(B).

⁷⁷ *Id.* § 2B1.1(b)(19)(A)(iii), (b)(19)(B); *id.* § 2B1.1(b)(18)(A)(iii), (b)(18)(B) (2016); *United States v. Brown*, 884 F.3d 281, 286 (5th Cir. 2018). *See* 18 U.S.C. § 1030.

to include systems and assets “vital to national defense, national security, economic security, public health or safety,” and lists banking and financial systems among the examples.⁷⁸ In *United States v. Brown*, the Fifth Circuit vacated the application of U.S.S.G. § 2B1.1(b)(19)(A)(iii)—then section (b)(18)(A)(iii)—to a Citibank system specialist who temporarily disabled routers and affected call-center operations, concluding that the record did not show the kind of “serious impact” on national economic security contemplated by the enhancement.⁷⁹ Commission training materials and its 2024 *Primer on Departures and Variances* instruct courts to reserve both the section 2B1.1(b)(18) enhancement and related upward departures, such as those for offenses causing “substantial disruption to critical infrastructure,” for genuinely systemic impacts, rather than routine service outages or localized disruptions.⁸⁰

These cyber-specific rules illustrate how the Guidelines have adapted general economic-crime concepts to the realities of network intrusions, credential theft, and crypto-asset abuse. Statutory definitions in 18 U.S.C. §§ 1028, 1029, and 1030 supply broad coverage of digital identifiers and remediation costs, but appellate decisions in circuits such as the Ninth, Sixth, and Fifth Circuits have constrained categorical multipliers and insisted on evidence-based applications of loss, sophisticated means, special skill, and critical-infrastructure enhancements.⁸¹ Commission primers, Department prosecutorial guidance, and a growing secondary-source literature give courts a relatively rich body of interpretive material, but the caselaw continues to refine where ordinary cybercrime ends and the Guidelines’ most severe cyber-related enhancements begin.

D. Relevant conduct, acquitted conduct, and the First Step Act

Relevant conduct remains the backbone of economic-crime sentencing under the Guidelines. Section 1B1.3 directs courts to aggregate “all acts and omissions” that were part of the same course of conduct or common scheme or plan, including certain acts of co-participants, when calculating the offense level under Chapters 2 and 3.⁸² In fraud and cyber-fraud cases, this means that loss, victim counts, and specific offense character-

⁷⁸ U.S.S.G. § 2B1.1(b)(19) cmt. n.15(A).

⁷⁹ *Brown*, 884 F.3d at 286–87. See U.S.S.G. § 2B1.1(b)(18)(A)(iii) (2016).

⁸⁰ U.S. SENT’G COMM’N, PRIMER ON DEPARTURES AND VARIANCES 31, 38–39 (2024). See also PRIMER ON COMPUTER CRIMES, note 58, at 17–21 (citing 18 U.S.C. § 1030) (advising cautious application of critical-infrastructure enhancements in section 1030 cases).

⁸¹ 18 U.S.C. §§ 1028, 1029, 1030.

⁸² U.S.S.G. § 1B1.3.

istics often turn not only on what the defendant personally did, but also on reasonably foreseeable conduct of others within a jointly undertaken criminal activity. The Commission's 2026 *Primer on Relevant Conduct* emphasizes the now-familiar three-part inquiry for jointly undertaken activity—(1) scope; (2) furtherance; and (3) reasonable foreseeability—and stresses that sentencing accountability is narrower than conspiracy liability.⁸³

The Ninth Circuit's decision in *United States v. Treadwell* illustrates these constraints in a large telemarketing fraud.⁸⁴ There, the court held that a district judge may not simply saddle each defendant with the entire loss from the conspiracy; instead, the court must identify the portion of loss that fell within the scope of each defendant's agreement and was reasonably foreseeable to that defendant.⁸⁵ The Commission's *Primer on Loss Calculation Under §2B1.1* cites *Treadwell* and similar cases to underscore that courts must link loss and victim counts to the particular defendant's agreed-upon role, even in sprawling schemes involving many participants and transactions.⁸⁶

The First Circuit has adopted a similar approach in health-care fraud. In *United States v. Ahmed*, a language-services provider was convicted of health-care fraud for his role in a scheme involving inflated claims by clinical providers.⁸⁷ The First Circuit affirmed inclusion of losses attributable not only to the defendant's own billing, but also to overbilling by associated providers, reasoning that he at least implicitly agreed to that broader billing scheme and that the additional losses were reasonably foreseeable in light of how he pressured others and understood the reimbursement system.⁸⁸ The Commission uses *Ahmed* as a leading example of how implicit agreements and shared financial incentives can expand relevant conduct in complex economic schemes, including those that may involve automated billing, bots, or other cyber-enabled components.⁸⁹

Amendment 826 significantly narrows one long-controversial corner of relevant-conduct doctrine: The use of acquitted conduct to increase the Guideline range.⁹⁰ The amendment adds section 1B1.3(c), which pro-

⁸³ U.S. SENT'G COMM'N, PRIMER ON RELEVANT CONDUCT 3–8 (2026).

⁸⁴ *United States v. Treadwell*, 593 F.3d 990 (9th Cir. 2010), *overruled on other grounds by United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020).

⁸⁵ *Miller*, 953 F.3d at 1002–05.

⁸⁶ LOSS CALCULATION UNDER §2B1.1, note 6, at 1–4 (citing *Treadwell*, 593 F.3d at 1002).

⁸⁷ *United States v. Ahmed*, 51 F.4th 12 (1st Cir. 2022).

⁸⁸ *Id.* at 23–25.

⁸⁹ RELEVANT CONDUCT, note 83, at 6 (citing *Ahmed*, 51 F.4th at 24) (discussing implicit agreements).

⁹⁰ U.S.S.G. app. C, amend. 826.

vides that “[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.”⁹¹ The Commission’s *Primer on Relevant Conduct* explains that Amendment 826 limits the use of acquitted conduct in Guideline calculations but does not alter the treatment of uncharged or dismissed conduct, and it cross-references conforming changes to U.S.S.G. § 6A1.3 that reiterates that nothing in the Guidelines abrogates a court’s broad authority under 18 U.S.C. § 3661 to consider information at sentencing.⁹² Commission backgrounders and other briefs further describe Amendment 826 as a response to longstanding criticism of acquitted-conduct sentencing from courts, practitioners, and commentators, and as a recalibration rather than a wholesale rejection of relevant conduct.⁹³

Nonjudicial sources have traced the implications of Amendment 826 for federal sentencing practice. The Commission’s public “Acquitted Conduct” topic page, a 2024 “Amendment in Brief,” and a 2024 press release all emphasize that judges may no longer use acquitted conduct to raise the Guideline range, even though such conduct can still be considered under 18 U.S.C. § 3553(a) in appropriate cases.⁹⁴ Practitioner analyses likewise describe the amendment as prohibiting the use of acquitted conduct in Guideline calculations, while noting that it is not retroactive under 18 U.S.C. § 3582(c)(2).⁹⁵ Academic and advocacy commentary, such as discussions in the *Harvard Law Review* and briefs by organizations like the Brennan Center for Justice, situate Amendment 826 within broader constitutional and policy debates about the legitimacy of acquitted-conduct sentencing, often linking it to the Court’s *Apprendi–Booker* line and to

⁹¹ *Id.* (amending U.S.S.G. § 1B1.3(c)).

⁹² RELEVANT CONDUCT, note 83, at 16–17. *See* U.S.S.G. § 6A1.3; 18 U.S.C. § 3661.

⁹³ U.S. SENT’G COMM’N, 2024 AMENDMENTS IN BRIEF: ACQUITTED CONDUCT (2024).

⁹⁴ *Acquitted Conduct*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic/acquitted-conduct> (last visited July 14, 2026); ACQUITTED CONDUCT, note 93; Press Release, U.S. Sent’g Comm’n, Comm’n Votes Unanimously to Pass Package Reforms Including Limit on Use Acquitted Conduct Sent’g Guidelines (Apr. 17, 2024).

⁹⁵ 18 U.S.C. § 3582(c)(2). *See, e.g.,* Matthew Cox, *Federal Sentencing Guidelines Amendment 826: Acquitted Conduct*, MOORE, CHRISTOFF & SIDDIQUI (Jan. 3, 2025), <https://moorechristoff.com/insight/sentencing-guidelines-acquitted-conduct/>. *See also* *Minimal Explanation Suffices for Compassionate Release Denials; Amendment 826 Is Not Retroactive Under § 3582(c)(2)*, CASEMINE (Mar. 29, 2025), [https://www.casemine.com/commentary/us/minimal-explanation-suffices-for-compassionate-release-denials-amendment-826-is-not-retroactive-under-3582\(c\)\(2\)/view](https://www.casemine.com/commentary/us/minimal-explanation-suffices-for-compassionate-release-denials-amendment-826-is-not-retroactive-under-3582(c)(2)/view) (analyzing the Third Circuit’s per curiam disposition, summarily affirming two district court orders that denied a compassionate-release motion and a sentence-reduction motion).

proposed legislation like the Prohibiting Punishment of Acquitted Conduct Act.⁹⁶

The First Step Act of 2018 forms the third pillar of this framework.⁹⁷ While the Act did not amend U.S.S.G. § 1B1.3, it reshaped the statutory landscape in which relevant conduct operates.⁹⁸ The Commission's report *The First Step Act of 2018: One Year of Implementation* identifies five principal sentencing reforms: (1) narrowing and reducing certain recidivist drug enhancements under 21 U.S.C. § 851; (2) expanding the statutory safety valve at 18 U.S.C. § 3553(f); (3) limiting "stacking" of 18 U.S.C. § 924(c) penalties; (4) retroactively applying the Fair Sentencing Act of 2010; and (5) allowing defendants (rather than only the Bureau of Prisons) to file compassionate-release motions.⁹⁹ A Congressional Research Service overview similarly describes the First Step Act as reducing some mandatory-minimum exposures while expanding opportunities for individualized sentencing and early release.¹⁰⁰

Amendment 826 and the First Step Act push cyber-fraud and crypto-asset sentencings toward a more offense-focused, evidence-anchored model.¹⁰¹ Relevant conduct still allows aggregation of losses and victims across related transactions and codefendants where the scope-and-foreseeability test is satisfied, as in *Treadwell* and *Ahmed*.¹⁰² The 2026 multiple-count

⁹⁶ See, e.g., *United States v. McClinton: Seventh Circuit Upholds Use of Acquitted Conduct to Triple Sentencing Exposure on a Preponderance of the Evidence*, 135 HARV. L. REV. 2227 (2022) (citing *United States v. McClinton*, 23 F.4th 732 (7th Cir. 2022)) (criticizing acquitted-conduct sentencing); Letter from L.B. Eisen, Dir. Just. Program, and Ames Grawert, Senior Couns. & John L. Neu Just. Couns., Just. Program to the Honorable Charles E. Schumer, Majority Leader, U.S. Senate, and the Honorable Mitch McConnell, Minority Leader, U.S. Senate (Sep. 30, 2021). See also 18 U.S.C. § 3661 (the Prohibiting Punishment of Acquitted Conduct Act).

⁹⁷ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C.).

⁹⁸ *Id.*

⁹⁹ U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 3–8, 50–51 (2020). See 18 U.S.C. § 3553(f); *id.* § 924(c); Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 841).

¹⁰⁰ NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019). See also Liz Komar, The First Step Act: Ending Mass Incarceration in Federal Prisons, SENT'G PROJECT (Aug. 22, 2023), <https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/> (summarizing implementation and ongoing challenges).

¹⁰¹ U.S.S.G. app. C, amend. 826; First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C.).

¹⁰² *United States v. Treadwell*, 593 F.3d 990, 1004 (9th Cir. 2010); *United States v. Ahmed*, 51 F.4th 12, 23 (1st Cir. 2022).

amendment reorganizes Chapter 3, Part D into a single section 3D1.1 procedure and makes conforming changes to section 1B1.3, but the Commission states that relevant conduct should function identically to prior law; in fraud cases, aggregate harms remain calculated using the combined offense behavior taken as a whole.¹⁰³ But the Guideline calculation can no longer be ratcheted upward based solely on conduct that a jury has expressly rejected, and mandatory-minimum constraints in many economic and technology-driven cases are less rigid than before the First Step Act. The result, at least in principle, is a sentencing framework in which enhancements for loss, sophisticated means, or role must rest on conduct that is both properly within the jointly undertaken scheme and proven or admitted, filtered through statutory reforms that give district judges more room to calibrate sentences in light of the specific facts of modern fraud, cyber, and crypto-asset prosecutions.

III. Ninth Circuit applications in cyber and crypto-adjacent cases

A. Loss calculation in carding, credential, and computer-intrusion cases

The Ninth Circuit has developed a robust loss jurisprudence under section 2B1.1 that now structures how district courts in the circuit approach cyber-enabled fraud, credential-stuffing schemes, and crypto-asset offenses.¹⁰⁴ In *United States v. Kirilyuk*, the court reviewed a carding conspiracy in which the presentence report (PSR) applied the \$500-per-access-device rule in Application Note 3(F)(i) to more than 119,000 stolen American Express account numbers, producing a Guideline loss approaching \$60 million despite far lower actual and intended loss.¹⁰⁵ Relying on *Kisor v. Wilkie*, the panel held that the mandatory \$500-per-card minimum conflicted with the plain meaning of “loss” in section 2B1.1 and thus was not entitled to controlling deference under *Stinson v. United States*.¹⁰⁶ The court vacated the sentence and remanded for a fact-specific estimate of actual or intended pecuniary harm tied to the evidence, rather than to a mechanical commentary multiplier.¹⁰⁷ In post-*Kirilyuk* carding and credential cases, Ninth Circuit district courts have followed that approach by

¹⁰³ U.S.S.G. ch. 3, pt. D; *id.* § 3D1.1; *id.* § 1B1.3.

¹⁰⁴ U.S.S.G. § 2B1.1.

¹⁰⁵ 29 F.4th 1128, 1155 (9th Cir. 2022) (Bress, D., dissenting).

¹⁰⁶ *Kisor v. Wilkie*, 588 U.S. 558, 568–69 (2019); *Stinson v. United States*, 508 U.S. 36, 44–45 (1993).

¹⁰⁷ *Kirilyuk*, 29 F.4th at 1141.

anchoring loss in usage data, unauthorized charge patterns, and market-based valuations (including underground resale prices) instead of treating the commentary's per-device figure as dispositive, in line with the Commission's guidance that loss must be a "reasonable estimate" supported by the record.¹⁰⁸

As previously mentioned, Amendment 827 responded to these developments by requiring courts must employ a "realistic, economic approach" to estimating loss, particularly in cases involving complex financial instruments or volatile assets.¹⁰⁹ Together, *Kirilyuk* and Amendment 827 signal that in cyber-fraud and credential-theft cases, Guideline loss should be grounded in the text of section 2B1.1 and supported by case-specific economic evidence rather than by rigid commentary formulas designed for older credit-card fraud patterns.¹¹⁰

Although it predates most modern cyber-fraud, *United States v. Zolp* remains central to loss analysis whenever the instrument at issue functions like an investment asset.¹¹¹ In *Zolp*, a securities-fraud prosecution, the district court effectively treated the issuer's stock as entirely worthless when calculating loss, without separating price changes caused by the fraud from movements attributable to broader market forces.¹¹² The Ninth Circuit reversed and required a methodology that disentangled fraud-driven inflation from background volatility, insisting that loss reflect only the harm caused by the criminal conduct.¹¹³ That logic has direct application to crypto-asset and token schemes, particularly pump-and-dump or wash-trading cases, where volatility is endemic and expert testimony is often necessary to isolate the fraud-related component of any price decline. Academic commentary on insider-trading and securities-fraud sentencing underscores the need for economically grounded measures of loss and gain in capital-markets cases, reinforcing *Zolp*'s insistence that sentencing courts not simply assume that a traded instrument became worthless at the moment of disclosure.¹¹⁴ The Commission's *Primer on Loss Calcu-*

¹⁰⁸ LOSS CALCULATION UNDER §2B1.1, note 6, at 1. *See also United States v. Sullivan*, 765 F.3d 712, 716 (7th Cir. 2014) (absolute accuracy is not required as long as the calculation is not "outside the realm of permissible computations" (quoting *United States v. Jackson*, 25 F.3d 327, 330 (6th Cir. 1994))).

¹⁰⁹ LOSS CALCULATION UNDER §2B1.1, note 6, at 13; U.S.S.G. app. C, amend. 827. *See* subsection II.A.

¹¹⁰ U.S. SENT'G COMM'N, AN OVERVIEW OF LOSS IN USSG §2B1.1, at 18 (2009).

¹¹¹ *United States v. Zolp*, 479 F.3d 715 (9th Cir. 2007).

¹¹² *Id.* at 719–20.

¹¹³ *Id.* at 718–21 (requiring district court to separate fraud-driven price effects from general market forces in estimating loss and applying a clear-and-convincing standard given the size of the enhancement).

¹¹⁴ Nicholas P. Pellicani, *No Pain, No Gain: The Criminal Absence of the Efficient*

lation Under §2B1.1 similarly encourages courts to consider fair-market value, replacement cost, and the temporal dimension of market reactions when valuing securities and analogous digital instruments under section 2B1.1.¹¹⁵

The Ninth Circuit has also clarified the relationship between Guideline loss and restitution, a recurring issue in large cyber-fraud and crypto schemes. In *United States v. Dadyan*, a pandemic-relief fraud case involving Paycheck Protection Program and Economic Injury Disaster loans, the defendant argued that restitution under the Mandatory Victims Restitution Act (MVRA) could not exceed the Guideline loss figure found at sentencing.¹¹⁶ The court rejected that argument, reaffirming earlier precedent and holding that there is no categorical rule that restitution must be equal to or less than Guideline loss.¹¹⁷ Instead, MVRA restitution and section 2B1.1 loss serve different purposes and may diverge in amount so long as each calculation is properly grounded in its governing legal framework.¹¹⁸ For cyber-fraud and crypto-asset cases, where Guideline loss may turn on intended harm, extrapolated estimates, or conservative assumptions, while restitution is tethered to actual losses suffered by identifiable victims, *Dadyan* counsels district courts to explain large discrepancies but confirms that a discrepancy, standing alone, does not establish legal error.¹¹⁹ The Commission's *Primer on Loss Calculation Under §2B1.1* echoes this separation, warning courts not to mechanically import Guideline loss into restitution determinations, particularly where investigation costs, prejudgment interest, or other MVRA-specific components are involved.¹²⁰

Finally, the Ninth Circuit requires explicit findings on the scope of jointly undertaken criminal activity before attributing large loss figures to a single defendant in a multi-actor scheme. In *United States v. Treadwell*, a telemarketing-fraud case, the court held that a sentencing court “may not automatically hold an individual defendant responsible for losses attributable to the entire conspiracy,” but instead must identify the loss that fell within the scope of that defendant’s agreement with co-conspirators

Capital Markets Theory from Insider Trading Sentencing, 84 ST. JOHN’S L. REV. 1057 (2010).

¹¹⁵ LOSS CALCULATION UNDER §2B1.1, note 6, at 13–14. See U.S.S.G. § 2B1.1.

¹¹⁶ 76 F.4th 955, 959–60 (9th Cir. 2023). 18 U.S.C. § 3663A (Mandatory Victims Restitution Act).

¹¹⁷ *Dadyan*, 76 F.4th at 959.

¹¹⁸ *Id.* at 959–60. See U.S.S.G. § 2B1.1.

¹¹⁹ *Dadyan*, 76 F.4th at 960.

¹²⁰ LOSS CALCULATION UNDER §2B1.1, note 6, at 14, 20.

and that was reasonably foreseeable to that defendant.¹²¹ Later Commission guidance on relevant conduct cites *Treadwell* as a leading example of how section 1B1.3(a)(1)(B) limits loss attribution to jointly undertaken activity, distinguishing mere conspiracy membership from the narrower set of acts embraced by the defendant's own plan.¹²² In contemporary cyber cases, botnet-driven credential-stuffing, synthetic-identity rings, and large phishing or malware-as-a-service operations, this framework requires courts to link loss to each defendant's role, access to compromised data, and participation in monetization, rather than simply importing a global loss figure for the entire network. That approach is reinforced by Commission training materials and secondary literature urging careful, role-specific loss findings in complex frauds where different participants occupy very different positions in the technical and financial architecture of the scheme.¹²³

B. Victim counting and “substantial financial hardship”

Under section 2B1.1(b)(2), the Ninth Circuit's victim-related jurisprudence is especially important for cyber-enabled fraud, identity-theft, and large data-breach cases because it forces sentencing courts to engage with the questions of who counts as a “victim” and when a victim's losses rise to “substantial financial hardship.” In *United States v. George*, a large mortgage-fraud case, the court held that the “substantial financial hardship” enhancement turns on an individualized assessment of each victim's financial circumstances and requires proof of both but-for and proximate causation.¹²⁴ The panel emphasized that the Guidelines' examples, such as becoming insolvent, suffering substantial changes to employment or living arrangements, or incurring significant harm to credit, are not exclusive, but they illustrate that the enhancement is reserved for serious, victim-specific financial impacts, not merely the fact of loss itself.¹²⁵ Subsequent Commission training materials treat *George* as a leading example, underscoring that relatively modest dollar amounts can qualify when they destabilize already precarious finances (for example, rent payments siphoned from low-income tenants), while much larger losses may not

¹²¹ 593 F.3d 990, 1002–03 (9th Cir. 2010).

¹²² RELEVANT CONDUCT, note 83, at 2.

¹²³ LOSS CALCULATION UNDER §2B1.1, note 6; Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 231, 250 (2018) (discussing individualized responsibility and role differentiation in complex frauds).

¹²⁴ 949 F.3d 1181, 1187–88 (9th Cir. 2020).

¹²⁵ *Id.* at 1184–87; U.S.S.G. § 2B1.1 cmt. n.4(F).

constitute “substantial financial hardship” when borne by well-capitalized institutions.¹²⁶

The Ninth Circuit has also clarified how victim counting interacts with the loss calculation. In *United States v. Herrera*, a fraud involving California’s Employment Development Department and the United States Treasury, the defendant argued that government entities could not be “victims” and that the district court had over-counted.¹²⁷ The Ninth Circuit rejected that argument, holding that state agencies whose pecuniary losses are included in the section 2B1.1(b)(1) “actual loss” figure qualify as victims for section 2B1.1(b)(2), and that the Guidelines’ definition of “person” expressly includes governmental entities.¹²⁸ Relying on earlier circuit precedent in *United States v. Brown*, the court reaffirmed that as a matter of Guideline structure, the victims counted under section 2B1.1(b)(2) must be those whose losses are part of the loss calculation; persons or entities who suffered some harm but whose losses are not reflected in the section 2B1.1(b)(1) figure cannot be added to inflate the victim count.¹²⁹ The Commission’s *Primer on Economic Crime Victims* adopts this reading, summarizing *Herrera* and *Brown* for the proposition that the number-of-victims enhancement is tethered to the loss determination rather than to a broader conception of diffuse harm.¹³⁰

These principles matter acutely in data-breach and identity-theft scenarios, where financial institutions often reimburse accountholders. If only the bank’s reimbursement cost is included in the section 2B1.1(b)(1) loss figure, then under *Herrera* the bank is counted as the victim for section 2B1.1(b)(2) purposes unless the cardholders’ out-of-pocket expenses (such as unreimbursed overdraft fees or charges) are also quantified and included in the loss calculation.¹³¹ The Commission’s *Primer on Economic Crime Victims* explains that reimbursed consumers can still be “victims” when they suffer measurable pecuniary harm, for example, temporary loss of access to funds or bank fees, but only if those harms are incorporated into the monetary loss figure; “lost time” or emotional distress, standing

¹²⁶ ECONOMIC CRIME VICTIMS, note 42, at 9.

¹²⁷ 974 F.3d 1040, 1047 (9th Cir. 2020).

¹²⁸ *Id.* at 1050. See U.S.S.G. § 2B1.1(b)(1), (b)(2).

¹²⁹ 771 F.3d 1149, 1162 (9th Cir. 2014). See U.S.S.G. § 2B1.1(b)(1), (b)(2). See also U.S. SENT’G COMM’N, ECONOMIC CRIMES—VICTIMS, LOSS, AND RESTITUTION: 2018 NATIONAL SEMINAR 11–12 (2018) (discussing caselaw examples for “loss”).

¹³⁰ ECONOMIC CRIME VICTIMS, note 42, at 11. See *Herrera*, 974 F.3d at 1045; *Brown*, 771 F.3d at 1159–62.

¹³¹ ECONOMIC CRIME VICTIMS, note 42, at 10. See *Herrera*, 974 F.3d at 1047–50; U.S.S.G. § 2B1.1(b)(1), (b)(2). See also *United States v. Pham*, 545 F.3d 712 (9th Cir. 2008) (holding that “financial costs of resolving damage done to accounts were includible in calculation of actual loss”).

alone, do not suffice.¹³² For cyber-fraud cases involving hundreds or thousands of breached accounts, *Herrera* functions as a guardrail: Courts must connect each victim counted under section 2B1.1(b)(2) to a documented component of the section 2B1.1(b)(1) loss, rather than simply equating “breached record” with “victim.”

The Ninth Circuit has taken a comparatively strict view of certain victim-counting special rules, particularly those in Application Note 4(C) that apply to identity-theft and undelivered-mail offenses: In *United States v. Cornejo*, the defendant argued that Application Note 4(C)(ii)(I), which deems each unauthorized access device or means of identification to represent a separate victim when the actual number of victims is undeterminable, created only a rebuttable presumption that could be disregarded whenever the defendant believed fewer individuals were actually harmed.¹³³ The Ninth Circuit rejected that reading, stating that the Note does not support treating the special rule as a mere presumption and instead can operate as a counting rule where the true number of affected individuals cannot be reliably established.¹³⁴ The Commission’s *Primer on Economic Crime Victims* cites *Cornejo* for this proposition and contrasts it with decisions from other circuits that are more skeptical of commentary-based expansions of the Guidelines.¹³⁵

The Eleventh Circuit’s decision in *United States v. Tejas* illustrates that skepticism.¹³⁶ There, the government sought a “10 or more victims” enhancement in a mail-theft case by relying on the identity-theft commentary, even though the evidence showed the defendant had handled only a single piece of undelivered mail. The Eleventh Circuit refused to apply the special rule because the offense, as proved, involved fewer than 10 victims and therefore did not satisfy the plain text of section 2B1.1(b)(2)(A)(i), regardless of how the commentary might otherwise treat “means of identification.”¹³⁷ In its discussion of *Tejas*, the Commission has noted that such cases raise *Kisor*-style questions about the extent to which commentary may expand the Guideline beyond its textual boundaries.¹³⁸ When read together with the Ninth Circuit’s own *Kisor*-inflected approach in *United States v. Kirilyuk*, these authorities suggest that courts should be cautious about using special victim-counting rules to dramatically increase offense levels in data-breach and credential-dump cases without

¹³² ECONOMIC CRIME VICTIMS, note 42, at 1–2.

¹³³ *United States v. Cornejo*, 650 F. App’x 379, 380 (9th Cir. 2016) (unpublished).

¹³⁴ *Id.*

¹³⁵ ECONOMIC CRIME VICTIMS, note 42, at 8.

¹³⁶ *United States v. Tejas*, 868 F.3d 1242 (11th Cir. 2017).

¹³⁷ *Id.* at 1243.

¹³⁸ ECONOMIC CRIME VICTIMS, note 42, at 8 (citing *Tejas*, 868 F.3d at 1245–46).

close attention to the Guideline's text.¹³⁹

Beyond the Guidelines and caselaw, Department policy and victims'-rights literature reinforce this trend toward individualized, evidence-driven victim analysis. The Department's *Attorney General Guidelines for Victim and Witness Assistance* (AG Guidelines) instructs federal personnel to identify crime victims, document the specific economic harms they suffer, and ensure that restitution and related financial remedies are tied to those harms rather than assumed or inferred wholesale.¹⁴⁰ The Commission's *Primer on Crime Victims' Rights* similarly explains that victim-related determinations in federal court, including Guideline enhancements and restitution, should be grounded in documented pecuniary loss and the statutory definitions of "victim," not in broader notions of moral injury.¹⁴¹ Academic commentary on federal restitution and victims' rights has criticized practices that treat large groups of investors, donors, or data-breach subjects as a undifferentiated mass, urging courts instead to make transparent findings about which categories of victims suffered which types of quantifiable loss.¹⁴²

George, Herrera, Brown, and Cornejo, as read alongside *Tejas*, recent Commission primers, and Department victim-rights guidance, point in the same direction: section 2B1.1(b)(2) is not an imprecise counting instrument but rather a structured inquiry into who suffered pecuniary harm and how severe that harm was.¹⁴³ For cyber-fraud and identity-theft cases, that means sentencing courts must do more than count breached accounts

¹³⁹ 29 F.4th 1128, 1141 (9th Cir. 2022).

¹⁴⁰ U.S. DEP'T OF JUST., THE ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2012) [AG Guidelines].

¹⁴¹ U.S. SENT'G COMM'N, PRIMER ON CRIME VICTIMS' RIGHTS 5–15, 20 (2020) (citing AG GUIDELINES, note 140, at 9, 41).

¹⁴² See, e.g., Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. Crim. L. & Criminology 59, 94–97 (2014).

¹⁴³ See U.S.S.G. § 2B1.1(b)(2). See generally *United States v. George*, 949 F.3d 1181, 1186 (9th Cir. 2020) (advocating a narrower understanding of "substantial financial hardship"); *United States v. Herrera*, 974 F.3d 1040, 1050–51 (9th Cir. 2020) ("The district court did not plainly err in calculating the loss-enhancement, nor did it abuse its discretion in applying the leadership-role enhancement."); *United States v. Brown*, 884 F.3d 281 (5th Cir. 2018) (holding that "defendant's conduct did not constitute a 'substantial disruption of a critical infrastructure,' and thus, sentencing enhancement for causing such a substantial disruption was not warranted"); *United States v. Cornejo*, 650 F. App'x 379, 380 (9th Cir. 2016) (unpublished) (claiming that the district court's application of a four-level sentencing enhancement was not an error); *United States v. Tejas*, 868 F.3d 1242, 1245–46 (11th Cir. 2017) (arguing that application of the special rule was appropriate).

or stolen credential records. They must identify the specific persons or entities whose losses are included in the section 2B1.1(b)(1) calculation, determine whether any subset of those victims experienced substantial financial hardship in light of their own financial circumstances, and explain how any special victim-counting rules from the commentary can be applied consistently with the text of the Guideline. In practice, that will often require linking individual victims to particular unauthorized charges, reimbursement patterns, bank fees, or disruptions in access to funds, and then articulating why those harms were sufficiently serious to warrant enhanced punishment under section 2B1.1(b)(2).

C. Enhancements in digital fraud: sophisticated means, special skills, and infrastructure

In cyber-fraud and crypto-asset prosecutions, the Guidelines enhancements that measure the complexity of the scheme, the defendant's technical capabilities, and the sensitivity of targeted systems often drive the final offense level as much as the loss and victim calculations. Section 2B1.1(b)(10) authorizes a two-level increase where the offense involved "sophisticated means," while section 3B1.3 adds a two-level adjustment if the defendant used a "special skill" that significantly facilitated the offense.¹⁴⁴ In computer-crime cases sentenced under section 2B1.1, those adjustments interact with more specialized provisions, such as the authentication-feature enhancement and the critical-infrastructure-related increases that implement Congress's cyber-security directives, to produce substantial upward pressure on the Guidelines range.¹⁴⁵

Ninth Circuit decisions in traditional economic-crime cases supply the basic framework for applying the sophisticated-means enhancement in digital contexts. The Guideline commentary explains that "sophisticated means" includes especially complex or intricate conduct pertaining to execution or concealment, citing as examples the use of fictitious entities, shell corporations, or offshore accounts to hide assets or transactions.¹⁴⁶ In a line of cases, including *United States v. Tanke*, *United States v. Jennings*, *United States v. Horob*, and *United States v. Augare*, the Ninth Circuit has emphasized that the enhancement turns on whether the scheme employs layered, coordinated steps that meaningfully complicate detection or tracing, such as the use of sham business entities, falsified documentation, and routing funds through multiple accounts, rather than on the size of the

¹⁴⁴ U.S.S.G. §§ 2B1.1(b)(10), 3B1.3

¹⁴⁵ *Id.* §§ 2B1.1(b)(10), (b)(11), (b)(18), 3B1.3; PRIMER ON COMPUTER CRIMES, note 58, at 17–24.

¹⁴⁶ U.S.S.G. § 2B1.1 CMT. N.9(B).

loss alone.¹⁴⁷ Transposed to cyber-enabled fraud, this reasoning naturally encompasses conduct like chaining anonymizing virtual private networks, using bulletproof hosting, deploying automated credential-stuffing bots, or scripting multi-stage cashout processes through crypto-mixers and foreign exchanges, techniques that mirror the offline use of shell companies and offshore accounts in their capacity to obscure the origin and flow of criminal proceeds.¹⁴⁸

The special-skill adjustment in section 3B1.3 plays a parallel role where the defendant's technical expertise substantially lowers the cost of committing or concealing the crime.¹⁴⁹ The Guideline defines a "special skill" as one "not possessed by members of the general public and usually requiring substantial education, training or licensing," listing examples such as pilots, lawyers, doctors, and accountants.¹⁵⁰ In *United States v. Petersen*, the Ninth Circuit affirmed the application of section 3B1.3 where the defendant's self-taught computer skills enabled him to hack into a national credit-reporting agency and a telephone company, steal sensitive personal information, and manipulate a radio-station contest.¹⁵¹ The court treated his "extraordinary knowledge of how computers work" as the functional equivalent of a professional credential.¹⁵² By contrast, in *United States v. Lee*, the court reversed a special-skill enhancement for a defendant who created a fraudulent website mimicking the Honolulu Marathon's site and used it to sell bogus registrations, holding that merely copying scripts and basic HTML from an existing site did not demonstrate expertise beyond that of an intelligent layperson with access to publicly available tools.¹⁵³ Both *Petersen* and *Lee*, as the Commission's *Primer on Computer Crimes* underscores, suggest that bespoke malware development, protocol-level exploitation, or advanced reverse-engineering may qualify as "special skills," whereas routine use of widely available software, coding templates, or off-the-shelf attack kits generally should

¹⁴⁷ *E.g.*, *United States v. Tanke*, 743 F.3d 1296, 1307–08 (9th Cir. 2014); *United States v. Jennings*, 711 F.3d 1144, 1147–48 (9th Cir. 2013); *United States v. Horob*, 735 F.3d 866, 872–73 (9th Cir. 2013); *United States v. Augare*, 803 F.3d 1173, 1175–76 (9th Cir. 2015).

¹⁴⁸ PRIMER ON COMPUTER CRIMES, note 58, at 10–19, 24–26.

¹⁴⁹ U.S.S.G. § 3B1.3.

¹⁵⁰ *Id.* § 3B1.3 cmt. n.4.

¹⁵¹ 98 F.3d 502 (9th Cir. 1996); U.S.S.G. § 3B1.3.

¹⁵² *Petersen*, 98 F.3d at 506. *See also* Charles Doyle, CONG. RSCH. SERV., R97-1025, *Cybercrime: An Overview of the Federal Computer Fraud and Abuse Statute and Related Federal Criminal Laws* 13–14 (2014) (describing 18 U.S.C. § 1030 and its federal statutory companions).

¹⁵³ 296 F.3d 792, 797–99 (9th Cir. 2002).

not.¹⁵⁴ First Circuit authority applying section 3B1.3 in technologically sophisticated frauds, such as *United States v. Prochner*, similarly stresses the need for skills “well beyond that of a member of the general public,” reinforcing this functional, technology-neutral reading.¹⁵⁵

Cyber-fraud cases also frequently implicate the authentication-feature enhancement in section 2B1.1(b)(11).¹⁵⁶ The Ninth Circuit has been a leading forum for defining what counts as an authentication feature in a digital environment.¹⁵⁷ In *United States v. Sardariani*, the court held that forged notary seals and signatures used on fraudulent deeds fell within 18 U.S.C. § 1028(d)’s definition because they functioned as official markers issued by an “issuing authority.”¹⁵⁸ More recently, in *United States v. Barrogo*, the court concluded that a bank’s voice-verification system and associated biometric data also constituted “authentication features,” making clear that intangible credentials, such as voiceprints, one-time passcodes, or cryptographic tokens, can trigger the enhancement when they are used to verify identity or authorize transactions.¹⁵⁹ These decisions map comfortably onto cyber-enabled schemes that traffic in stolen or spoofed two-factor authentication data, FIDO tokens, or other hardware- or software-based access controls, even where no physical document is ever forged or presented. Commission guidance has begun to integrate these developments, emphasizing that authentication-feature enhancements can apply to non-physical identifiers commonly exploited in credential-theft and account-takeover schemes.¹⁶⁰

A FIDO token is a physical USB, NFC, or smart card device that provides secure, phishing-resistant, password less authentication using FIDO2 standards.¹⁶¹ It acts as a “something you have” factor, often com-

¹⁵⁴ PRIMER ON COMPUTER CRIMES, note 58, at 27. See *Petersen*, 98 F.3d at 506; *Lee*, 296 F.3d at 797–99.

¹⁵⁵ 417 F.3d 54, 61–62 (1st Cir. 2005). See U.S.S.G. § 3B1.3.

¹⁵⁶ U.S.S.G. § 2B1.1(b)(11) (citing 18 U.S.C. § 1028). See also 18 U.S.C. § 1028 (discussing authentication features).

¹⁵⁷ *United States v. Barrogo*, 59 F.4th 440 (9th Cir. 2023) (ruling that a non-physical PIN qualifies as an authentication feature in a digital environment under section 1028(d)(1) and establishing that digital authentication features do not need to be physically affixed to a tangible card or document to be protected under federal identity fraud laws). See 18 U.S.C. § 1028(d)(1). Cf. Michael Price, *Ninth Circuit Recognizes New Rules for the Digital Age*, BRENNAN CTR. FOR JUST. AT N.Y.U. (Mar. 18, 2013), <https://www.brennancenter.org/our-work/analysis-opinion/ninth-circuit-recognizes-new-rules-digital-age> (recognizing that “the old rules don’t always fit the digital realm”).

¹⁵⁸ 754 F.3d 1118, 1120–23 (9th Cir. 2014). See 18 U.S.C. § 1028(d).

¹⁵⁹ 59 F.4th 440, 446–48 (9th Cir. 2023).

¹⁶⁰ PRIMER ON COMPUTER CRIMES, note 58.

¹⁶¹ *Passkeys*, FIDO ALL., <https://fidoalliance.org/passkeys/> (last visited July 16, 2026).

bined with a personal identification number or fingerprint (biometric), allowing users to log in to apps, websites, and cloud services simply by touching the device.¹⁶²

Finally, the section 2B1.1 critical-infrastructure-related enhancements operationalize Congress's concern with attacks on systems "vital to national defense, national security, economic security, public health or safety, or any combination of those matters."¹⁶³ The Commission's 2003 *Report to Congress on Increased Penalties for Cyber Security Offenses* and the subsequent Amendment 654 established a tiered structure: (1) a two-level increase where the offense under 18 U.S.C. § 1030 involves a computer system used to maintain or operate a critical infrastructure or to support the administration of justice, national defense, or national security; (2) a four-level increase for certain intentional-damage offenses; and (3) a six-level increase where the conduct caused a "substantial disruption" of a critical infrastructure.¹⁶⁴ The Commission's recent *Primer on Computer Crimes* reiterates that these enhancements reach not only physical facilities, such as power grids or hospitals, but also cloud-service platforms, payment-processing networks, and other networked systems whose compromise can disrupt essential services, an increasingly common scenario in ransomware incidents and attacks on cryptocurrency exchanges that function as de facto financial-market infrastructure.¹⁶⁵

The 2025 Guidelines amendments did not materially alter section 2B1.1's sophisticated-means, authentication-feature, or critical-infrastructure provisions, nor section 3B1.3's special-skill adjustment; instead, the Commission focused on resolving circuit conflicts in other Guidelines and eliminating several personal-characteristic departure provisions.¹⁶⁶ As a result, in both the First and Ninth Circuits, cyber-fraud sentencings after the 2024–2025 amendment cycle continue to turn on how courts characterize the technical sophistication of the scheme, the defendant's expertise, and the infrastructure targeted. Commission publications and practitioner comments from the Federal Public and Community Defenders and National Association of Criminal Defense Lawyers document persistent concern that liberal application of these enhancements can overstate culpability in cases involving relatively modest harm but high-

¹⁶² *Id.*

¹⁶³ U.S.S.G § 2B1.1 cmt. n.15(A).

¹⁶⁴ *Id.* § 2B1.1(b)(19); *id.* § 2B1.1 cmt. n. 15(A); U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: INCREASED PENALTIES FOR CYBER SECURITY OFFENSES 4–13 (2003).

¹⁶⁵ PRIMER ON COMPUTER CRIMES, note 58, at 17–19.

¹⁶⁶ U.S. SENT'G COMM'N, 2025 AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY (2025).

tech trappings.¹⁶⁷ Those materials, together with Ninth and First Circuit caselaw, provide an essential framework for evaluating when cyber-enabled fraud truly merits treatment as sophisticated, special-skill, or critical-infrastructure conduct under the Guidelines, and when it more closely resembles conventional economic crime migrated into a digital medium.

IV. First Circuit applications in technology-enabled fraud

A. Intended loss and foreseeability after Amendments 792 and 827

Before 2015, the First Circuit approached “intended loss” under section 2B1.1 through an essentially objective lens.¹⁶⁸ In *United States v. Innarelli*, the court explained that, for Guideline purposes, “we focus our loss inquiry ... on the objectively reasonable expectation of a person in [the defendant’s] position at the time he perpetrated the fraud, not on his subjective intentions or hopes.”¹⁶⁹ This aligned with decisions such as *United States v. Lane* from the Seventh Circuit that emphasized the “objective financial risk to victims” created by the defendant’s conduct rather than his inner state of mind.¹⁷⁰ The Commission’s itself later identified these cases as exemplifying a broader split over whether intended loss should be evaluated subjectively or objectively, and it cited *Innarelli* and *Lane* in the background to its 2015 economic-crime amendments.¹⁷¹

Amendment 792, effective November 1, 2015, resolved that split in favor of a subjective standard.¹⁷² The amendment revised Application Note 3(A) to define “intended loss” as “the pecuniary harm that the defendant purposely sought to inflict,” expressly including “intended pe-

¹⁶⁷ Letter from J. Martin Richey, Assistant Fed. Pub. Def. & Jennifer Coffin, Staff Att’y, on Behalf of the Fed. Pub. and Cmty. Defs. & the Fed. Def. Sent’g Guidelines Comm. to the Honorable Ricardo H. Hinojosa, Acting Chair, U.S. Sent’g Comm’n 5–9 (Mar. 27, 2009); Letter from Jonathan J. Wroblewski, Dir., Off. of Pol’y & Legis., Crim. Div. to the Honorable Ricardo H. Hinojosa, Acting Chair, U.S. Sent’g Comm’n 7–12 (Mar. 27, 2009); INCREASED PENALTIES FOR CYBER SECURITY OFFENSES, note 165.

¹⁶⁸ See U.S.S.G. § 2B1.1 (2014). See, e.g., *United States v. Innarelli*, 524 F.3d 286 (1st Cir. 2008).

¹⁶⁹ 524 F.3d at 291.

¹⁷⁰ 323 F.3d 568, 590 (7th Cir. 2003).

¹⁷¹ U.S.S.G. app. C, amend. 792.

¹⁷² *Id.*

cuniary harm that would have been impossible or unlikely to occur.”¹⁷³ It deleted prior language that had invited an objective, risk-based approach, and the Commission explained that the amendment “adopts the approach taken by the Tenth Circuit” by defining intended loss as “the pecuniary harm that the defendant purposely sought to inflict,” thereby adopting a subjective standard.¹⁷⁴ The official amendment in Appendix C and contemporaneous Commission training materials make clear that 792 was targeted at resolving the *Innarelli/Lane* line of cases and establishing a single, nationally uniform rule.¹⁷⁵ Academic commentary, including James Felman’s reflections in the *Federal Sentencing Reporter* and later critiques by Brandon Garrett and others, has generally described Amendment 792 as a modest but important course correction that brings the Guideline text into closer alignment with basic principles of culpability.¹⁷⁶

Post-Amendment 792, the First Circuit has treated the new subjective definition as the governing standard while still insisting on fact-intensive proof. In *United States v. Carrasquillo-Vilches*, which superseded *United States v. Innarelli*, the defendant challenged a loss calculation that treated the full unpaid rent on a commercial lease as intended loss.¹⁷⁷ The First Circuit acknowledged the pre-Amendment 792 debate over objective versus subjective measures but upheld the district court’s calculation because “the record amply support[ed] the finding that the defendant subjectively intended to inflict at least” the threshold loss amount, pointing to the defendant’s misrepresentations, his lack of any realistic plan to pay, and his pattern of similar conduct.¹⁷⁸ Even though the PSR cited older, objective-standard cases, the court held that any imprecision in the PSR’s phrasing was harmless where the actual findings satisfied the post-792 subjective test.¹⁷⁹ The Commission’s *Primer on Loss Calculation Under §2B1.1* cites *Carrasquillo-Vilches* as a key post-amendment decision that “discuss[es the] standard before and after the amendment and affirm[s the] loss amount” under the subjective-intent definition.¹⁸⁰

¹⁷³ *Id.* § 2B1.1(b)(1)(C)(ii) (post-Amendment 792).

¹⁷⁴ *Id.*

¹⁷⁵ *E.g.*, LOSS CALCULATION UNDER §2B1.1, note 6, at 1.

¹⁷⁶ See James E. Felman, *Reflections on the United States Sentencing Commission’s 2015 Amendments to the Economic Crimes Guideline*, 27 FED. SENT’G REP. 288 (2015); Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 OHIO ST. J. CRIM. L. 605 (2021).

¹⁷⁷ 33 F.4th 36 (1st Cir. 2022) (superseding *United States v. Innarelli*, 524 F.3d 286 (1st Cir. 2008)).

¹⁷⁸ *Id.* at 43–44.

¹⁷⁹ *Id.* at 41–44.

¹⁸⁰ LOSS CALCULATION UNDER §2B1.1, note 6, at 5 (citing *Carrasquillo-Vilches*, 33

United States v. Ahmed illustrates how intended loss and relevant conduct interact in multi-participant schemes.¹⁸¹ In *Ahmed*, a language-services provider convicted of health-care fraud challenged a loss figure that included overbilling by clinical providers with whom he worked.¹⁸² The First Circuit upheld the district court’s loss calculation, emphasizing that the defendant understood how the billing system worked, pressured others to bill in a particular way, and therefore could reasonably be deemed to have purposely sought a broader range of fraudulent payments than those tied to his own direct claims.¹⁸³ The Commission’s *Primer on Relevant Conduct* uses *Ahmed* as a leading example of how implicit agreements and shared financial incentives can expand the scope of “jointly undertaken criminal activity” for purposes of both loss and intended loss, while still requiring careful findings on scope and foreseeability.¹⁸⁴ For cyber-enabled fraud and crypto-investment schemes, where roles can be diffuse, and automated systems may execute trades or transfers, the *Ahmed* framework underscores the need to tie loss figures to what the particular defendant joined and understood, not merely to the full theoretical harm of a sprawling enterprise.

Amendment 827 builds on this.¹⁸⁵ The Commission’s 2024 Amendments in Brief and its 2025 *Primer on Loss Calculation Under §2B1.1* reiterate that Amendment 827 is designed to “maintain[] the same longstanding approach for calculating loss” while eliminating any *Kisor*-based doubts about whether courts may consider intended loss.¹⁸⁶ Appellate decisions such as the Eleventh Circuit’s *United States v. Horn* and the D.C. Circuit’s judgment in *United States v. Sun* have already treated Amendment 827 as a clarifying codification of pre-existing law, confirming that “loss” under section 2B1.1 unambiguously encompasses both actual and intended loss.¹⁸⁷

Innarelli, *Carrasquillo-Vilches*, and *Ahmed*, read alongside Amendments 792 and 827 and the Commission’s own primers, give the First

F.4th at 41–44)

¹⁸¹ 51 F.4th 12 (1st Cir. 2022).

¹⁸² *Id.*

¹⁸³ *Id.* at 23–25.

¹⁸⁴ RELEVANT CONDUCT, note 83, at 6 n.32.

¹⁸⁵ U.S.S.G. app. C, amend. 827 (discussing *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022); *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021)).

¹⁸⁶ *United States v. Horn*, 129 F.4th 1275, 1301 (11th Cir. 2025). See 2024 AMENDMENTS IN BRIEF: CIRCUIT CONFLICTS & MISCELLANEOUS, note 26, at 1–2; LOSS CALCULATION UNDER §2B1.1, note 6, at 2–3.

¹⁸⁷ *Horn*, 129 F.4th at 1301; *United States v. Sun*, 2026 WL 184351, at *3–4; U.S.S.G. § 2B1.1.

Circuit a more coherent intended-loss framework.¹⁸⁸ The law now clearly requires a subjective inquiry into what pecuniary harm the defendant “purposely sought to inflict,” but permits courts to infer that intent from circumstantial evidence such as deal structure, communications, billing patterns, or scheme architecture.¹⁸⁹ In cyber-fraud and crypto-asset cases, that means sentencing judges in the First Circuit will be expected to look beyond raw transaction volumes or theoretical maximum exposure and instead ask what range of harm the defendant set out to cause, measured, for example, by the value of credentials the defendant tried to monetize, the size of portfolio drawdowns the defendant engineered, or the volume of on-chain transfers the defendant attempted, while still grounding any broader loss figure in the jointly undertaken activity and foreseeability principles articulated in *Ahmed*.¹⁹⁰ Commission guidance, practitioner commentary, and emerging law-review literature on economic-crime sentencing all point in the same direction: Intended-loss determinations in modern fraud cases, including cyber and crypto schemes, should be evidence-driven, defendant-specific, and transparent about both the factual basis for inferred intent and the limits of that inference.¹⁹¹

B. Victims, restitution, and the Mandatory Victims Restitution Act

The First Circuit’s restitution jurisprudence under the MVRA sheds useful light on how courts should think about “victims” and “loss” in cyber-fraud cases, even though restitution and Guideline loss serve different purposes.¹⁹² In *United States v. Naphaeng*, the court emphasized that restitution is strictly compensatory and must be limited to the victim’s *actual* pecuniary loss, not the broader, potentially inflated figures used in Guideline loss calculations.¹⁹³ *Naphaeng* recognized the confusion

¹⁸⁸ *United States v. Innarelli*, 524 F.3d 286, 290–91 (1st Cir. 2008); *United States v. Carrasquillo-Vilches*, 33 F.4th 36, 42–43 (1st Cir. 2022); *United States v. Ahmed*, 51 F.4th 12, 24 (1st Cir. 2022). See U.S.S.G. app. C, amend. 792; U.S.S.G. app. C, amend. 827; LOSS CALCULATION UNDER §2B1.1, note 6, at 5–9; ECONOMIC CRIME VICTIMS, note 42, at 2.

¹⁸⁹ LOSS CALCULATION UNDER §2B1.1, note 6, at 5–9.

¹⁹⁰ See *Ahmed*, 51 F.4th at 20–21.

¹⁹¹ See, e.g., Bowman, note 67, at 336 (observing characteristics of intended loss determinations); Jonathan J. Wroblewski, *A Better Economic Crimes Guideline*, SENT’G MATTERS SUBSTACK (Jan. 26, 2026), <https://sentencing.substack.com/p/a-better-economic-crimes-guideline> (discussing that the Commission’s proposal to add more culpability factors is incompatible with an effective post-*Booker* sentencing system).

¹⁹² 18 U.S.C. §§ 3663A–3664.

¹⁹³ 906 F.3d 173, 179–82 (1st Cir. 2018).

that arises when sentencing courts treat the section 2B1.1 loss table and MVRA restitution as interchangeable, and it reiterated that restitution cannot be used to impose a punitive monetary sanction untethered to prove harm.¹⁹⁴ That distinction tracks Congress's design: As the Congressional Research Service has noted, the MVRA is aimed at making victims whole based on actual losses, whereas Guideline loss can incorporate intended harm and serves a different, offense-level-setting function.¹⁹⁵

In a fraud case resulting in financial loss, the defendant's guideline sentencing range is determined in part by calculating the greater of either the intended loss or the actual loss. ... So viewed, intended loss serves a punitive purpose, punishing the defendant for the harm that he sought to inflict. In contrast, restitution is designed to compensate the victim, not to punish the offender. To this end, the MVRA mandates that a defendant convicted of certain federal crimes ... make restitution to victims commensurate with the victims' actual losses.¹⁹⁶

The Identity Theft Enforcement and Restitution Act, however, recognizes restitution awards for either the actual or intended harm caused by certain identity-theft offenses (violations of either 18 U.S.C. §§ 1027(a)(7), 1028A(a)), or 3663(b)(6).¹⁹⁷ Moreover, a plea agreement may call for restitution that 18 U.S.C. §§ 3663 and 3663A would not otherwise allow.¹⁹⁸

The First Circuit carried these themes forward in *United States v. Simon*, a complex health-care-fraud prosecution involving multiple defendants and large alleged scheme totals.¹⁹⁹ The court vacated portions of the restitution order because the district court had effectively treated the full scale of the fraudulent scheme as the restitution amount without adequately linking that global figure to specific, causally proven losses

¹⁹⁴ *Id.* at 179. See U.S.S.G. § 2B1.1.

¹⁹⁵ CHARLES DOYLE, CONG. RSCH. SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES 2, 13 (2018). See also *United States v. Lacey*, 699 F.3d 710, 721 (2d Cir. 2012) ("We note that unlike the loss calculation for the purposes of sentencing, which may incorporate a merely intended loss in order to punish a culpable defendant, restitution is designed to make the victim whole, and must therefore be based only on the actual loss caused by the scheme." (citation omitted)); *United States v. Harvey*, 532 F.3d 326, 339 (4th Cir. 2008) (citing cases from the First, Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits) ("We and other circuits have interpreted this language [18 U.S.C. 3664(f)(1)(A)] to require that an order of restitution be based on 'actual loss,' rather than 'intended loss.'").

¹⁹⁶ *Naphaeng*, 906 F.3d at 179.

¹⁹⁷ 18 U.S.C. §§ 1027(a)(7), 1028A(a), 3663(b)(6).

¹⁹⁸ *Id.* §§ 3663(a)(3), 3663A(a)(3).

¹⁹⁹ 12 F.4th 1 (1st Cir. 2021).

suffered by identifiable victims.²⁰⁰ *Simon* underscored that under the MVRA, restitution must be based on a “rough approximation” of actual loss supported by evidence, not merely on the face value of claims or the government’s theory of overall scheme size.²⁰¹ Commission training materials on economic-crime victims reinforce that the Guidelines may consider intended loss and broader relevant conduct, but restitution is constrained by but-for and proximate causation and actual pecuniary harm.²⁰²

Within the Guideline framework, the First Circuit’s victim-enhancement cases add an important layer. In *United States v. Stepanian*, the defendant participated in a credit-card skimming operation that resulted in unauthorized charges on cardholders’ accounts.²⁰³ Even though banks ultimately reimbursed many of the cardholders, the court held that the cardholders remained “victims” for Guideline purposes because they initially sustained unauthorized charges and suffered reasonably foreseeable temporary deprivation of funds and associated burdens.²⁰⁴ *Stepanian* thus makes clear that reimbursement does not erase victim status where the victim bore harm, even if only temporarily, captured in the section 2B1.1(b)(1) loss calculation.²⁰⁵ The Commission’s *Primer on Economic Crime Victims* relies on *Stepanian* to illustrate that identity-theft and payment-card victims may be counted even when financial institutions ultimately absorb the loss, because the individuals still experience pecuniary harm in the form of temporary charges, overdrafts, or lost access to funds.²⁰⁶

The more recent decision in *United States v. Iwuanyanwu* complements *Stepanian* by focusing on the “substantial financial hardship” requirement in section 2B1.1(b)(2).²⁰⁷ There, the First Circuit held that whether a victim suffered substantial financial hardship is a fact-specific, individualized inquiry that turns on the victim’s particular financial circumstances, not on any rigid dollar threshold.²⁰⁸ The court accepted that relatively modest losses can qualify when they materially impair a victim’s ability to meet basic needs, such as paying rent, food, or medical expenses,

²⁰⁰ *Id.* at 69.

²⁰¹ *Id.* at 65. (quoting *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir. 2008)).

²⁰² ECONOMIC CRIME VICTIMS, note 42, at 10.

²⁰³ 570 F.3d 51 (1st Cir. 2009).

²⁰⁴ *Id.* at 55–60.

²⁰⁵ *Id.* See U.S.S.G. § 2B1.1(b)(1).

²⁰⁶ ECONOMIC CRIME VICTIMS, note 42, at 10 (using *Stepanian* as example of victim status despite reimbursement in payment-card cases).

²⁰⁷ 69 F.4th 17 (1st Cir. 2023). See U.S.S.G. § 2B1.1(b)(2).

²⁰⁸ *Iwuanyanwu*, 69 F.4th at 24–25.

while much larger losses might not if absorbed easily by a large institution.²⁰⁹ The Commission’s *Primer on Economic Crime Victims* cites *Iwuanyanwu* as a leading example of this individualized approach and warns against treating substantial financial hardship as a purely quantitative measure.²¹⁰ That framing is especially salient in cyber-fraud and account-takeover cases, where dozens or hundreds of consumers may suffer small but disruptive unauthorized charges, temporary loss of access to deposits, or overdraft fees; properly applying section 2B1.1(b)(2) requires looking at how those losses affected particular victims rather than mechanically counting breached accounts.

Taken together, *Naphaeng* and *Simon* on the restitution side and *Stepanian* and *Iwuanyanwu* on the Guideline-victim side establish a coherent structure that carries naturally into cyber-fraud sentencing.²¹¹ Restitution under the MVRA is confined to actual, causally proven losses and is compensatory in character, while Guideline enhancements under section 2B1.1 may look to a broader set of harms, including temporary deprivation and, in some contexts, intended loss.²¹² Cardholders and account holders whose credentials are stolen or misused can be “victims” for Guideline purposes even if their banks later make them whole, and some of those victims may have suffered “substantial financial hardship” where even small, unauthorized charges or holds destabilize already precarious finances.²¹³ Commission primers, Department victim-rights guidance, and secondary sources on federal economic-crime sentencing all converge on the same bottom line: Judges must be explicit about which measure they are applying—MVRA restitution or Guideline loss—and must tie both victim-counting and substantial-hardship findings to concrete, record-based evidence of what happened to identifiable victims in the wake of the fraud.²¹⁴

²⁰⁹ *Id.* at 25.

²¹⁰ ECONOMIC CRIME VICTIMS, note 42, at 9 (citing *Iwuanyanwu*, 69 F.4th at 25; *United States v. George*, 949 F.3d 1181, 1184, 1186 (9th Cir. 2020)) (individualized substantial-hardship analysis).

²¹¹ See *United States v. Naphaeng*, 906 F.3d 173, 181–82 (1st Cir. 2018); *United States v. Simon*, 12 F.4th 1, 63–66 (1st Cir. 2021); *United States v. Stepanian*, 570 F.3d 51, 58–59 (1st Cir. 2009); *Iwuanyanwu*, 69 F.4th at 18.

²¹² U.S.S.G. § 2B1.1.

²¹³ ECONOMIC CRIME VICTIMS, note 42, at 8.

²¹⁴ See, e.g., AG GUIDELINES, note 140, at 22–40 (discussing restitution and victim loss documentation); Boss & Kapp, note 177.

C. Enhancements in complex financial and technology-facilitated schemes

The First Circuit's treatment of sophisticated-means and related enhancements provides a useful template for applying sections 2B1.1 and 3B1.3 to cyber-era economic crime.²¹⁵ In *United States v. Ledee*, the court affirmed substantial loss enhancements in a complex refund-fraud scheme involving multiple participants and layered transactions, emphasizing that section 2B1.1(b)(1) does not require proof of the defendant's personal gain so long as the reasonably foreseeable loss flowing from the scheme is established by a fair estimate grounded in the record.²¹⁶ The Commission's *Primer on Loss Calculation Under §2B1.1* cites *Ledee* as an illustration of two core principles that matter in cyber and crypto cases: (1) "loss" under section 2B1.1 focuses on the greater of actual or intended loss; and (2) district courts may reasonably estimate intended loss based on the objective financial risk the scheme created, even where the defendant argues that actual harm or personal profit was lower.²¹⁷ Those same concepts map naturally onto credential-stuffing campaigns, bot-driven account takeovers, and high-volume payment-card fraud in which the face value of compromised accounts or tokens far exceeds the subset exploited.

Although many First Circuit sophisticated-means decisions arise from more traditional financial and tax frauds, they anticipate fact patterns common in crypto and platform-abuse cases. Cases collected in the Commission's loss materials describe sophisticated-means enhancements being upheld where defendants used shell entities, layered transfers through multiple accounts, and deceptive documentation to disguise the origin and ownership of funds.²¹⁸ From a Guidelines perspective, those structures are functionally analogous to crypto "mixing," chain-hopping across multiple blockchains, and using nested exchanges or privacy coins to conceal proceeds of ransomware, business-email compromise, or large-scale credential monetization.²¹⁹ Commission training materials on economic and computer crimes likewise stress that sophisticated-means analysis is fact-driven: The enhancement turns on whether the scheme employed especially complex or intricate steps in execution or concealment, not on whether the technology itself (encryption, blockchain, or automated

²¹⁵ U.S.S.G. §§ 2B1.1, 3B1.3.

²¹⁶ 772 F.3d 21, 38 (1st Cir. 2014).

²¹⁷ *Id.*; LOSS CALCULATION UNDER §2B1.1, note 6, at 3.

²¹⁸ LOSS CALCULATION UNDER §2B1.1, note 6, at 4.

²¹⁹ U.S. SECRET SERV., PUBLIC ADVISORY: CRYPTOCURRENCY MIXERS (2025).

scripts) is novel.²²⁰ Although there is not yet a First Circuit flagship case on section 3B1.3 in a pure hacking context, the general standard, skills “not possessed by members of the general public” and used to significantly facilitate the offense, is easily satisfied by actors who write custom malware, exploit protocols, or design credential-harvesting infrastructure.²²¹

First Circuit precedent on the special-skill enhancement under section 3B1.3 further underscores how the Guidelines can capture technology-driven expertise.²²² In *United States v. Noah*, the court upheld a special-skill enhancement for a professional tax preparer who electronically filed fraudulent returns and arranged refund-anticipation loans, holding that “special skill” refers to a level of knowledge and proficiency “not possessed by members of the general public,” and that such skill “can be derived from experience or from self-tutelage” rather than formal education or licensure.²²³ The court stressed that what matters is whether the defendant’s abilities meaningfully increased the chances that the offense would succeed and made detection more difficult.²²⁴ Read alongside Commission guidance and Department practice manuals on computer and electronic-fraud prosecutions, *Noah* provides a ready analogue for defendants who design credential-harvesting infrastructure, write bespoke malware or bots, or architect large-scale phishing and account-takeover operations; those actors typically possess technical skills far beyond the general public and deploy them in ways that significantly facilitate the offense.²²⁵ The Commission’s *Primer on Computer Crimes* and its earlier *Report to the Congress on Increased Penalties for Cyber Security Offenses* similarly highlight that the Guidelines already contemplate enhancements when a defendant uses specialized computer expertise to compromise protected systems or to orchestrate complex network-intrusion and data-exfiltration campaigns.²²⁶ Together, these authorities suggest that in cyber-enabled fraud and crypto-asset cases, First Circuit doctrine on sophisticated means and special skill can be extended in a principled way: Courts should focus on the structural complexity of the scheme and the degree to which the defendant’s technical abilities elevated the risk,

²²⁰ LOSS CALCULATION UNDER §2B1.1, note 6, at 24; PRIMER ON COMPUTER CRIMES, note 58, at 15.

²²¹ U.S.S.G. § 3B1.3 cmt. n.4.

²²² *Id.* § 3B1.3 cmt. n.4.

²²³ 130 F.3d 490, 499–500 (1st Cir. 1997).

²²⁴ *Id.* at 500–01.

²²⁵ See U.S. SENT’G COMM’N, SELECTED POST-*Booker* AND GUIDELINE APPLICATION DECISIONS FOR THE FIRST CIRCUIT 59–60 (2012).

²²⁶ PRIMER ON COMPUTER CRIMES, note 58, at 26–27; INCREASED PENALTIES FOR CYBER SECURITY OFFENSES, note 165.

scale, or stealth of the offense, rather than on whether the scheme resembles “traditional” financial fraud.

V. Cross-circuit themes and open questions in cyber and crypto cases

Across the First and Ninth Circuits, among others, three themes have begun to structure how courts apply section 2B1.1 and related provisions to cyber-fraud and crypto-asset prosecutions.²²⁷ First, post-*Riccardi* and *Kirilyuk*, courts are increasingly wary of mechanical “proxy” rules for loss that drift too far from demonstrated economic harm, whether the \$500-per-access-device multiplier, presumptions about the number of “victims” associated with mailbox clusters, or similar shortcuts in mass-data and credential-theft cases.²²⁸ In *United States v. Riccardi*, the Sixth Circuit rejected a loss calculation that simply multiplied the number of stolen gift-card numbers by \$500 where the record did not support that figure as a reasonable estimate of actual or intended harm.²²⁹ The Ninth Circuit’s decision in *United States v. Kirilyuk* likewise treated the \$500 figure in Application Note 3(F)(i) as a rebuttable proxy that must give way when the evidence shows that many cards or credentials were unusable or never exploited.²³⁰ The Commission’s *Primer on Loss Calculation Under §2B1.1* and Amendment 827 both reinforce this evidence-driven approach, emphasizing that loss estimates must be grounded in a plausible record and that special rules are subject to challenge where the facts show they overstate harm.²³¹ The Third Circuit’s decision in *United States v. Banks*, which refused to defer to commentary defining “intended loss” in a way inconsistent with the Guideline text, further underscores the trend toward text- and evidence-based loss analysis.²³²

Second, in cases involving large pools of cyber or crypto victims, courts are converging on a more individualized understanding of “substantial financial hardship” under section 2B1.1(b)(2)(A)(iii).²³³ The Ninth Circuit’s decision in *United States v. George* held that fees between \$1,000 and \$3,000 could constitute substantial financial hardship for distressed homeowners, insisting that hardship must be evaluated relative to each

²²⁷ See U.S.S.G. § 2B1.1.

²²⁸ See *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021); *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022).

²²⁹ 989 F.3d at 479–83.

²³⁰ 29 F.4th at 1133–35.

²³¹ LOSS CALCULATION UNDER §2B1.1, note 6; U.S.S.G. app. C, amend. 827.

²³² 55 F.4th 246, 253, 258 (3d Cir. 2022).

²³³ U.S.S.G. § 2B1.1(b)(2)(A)(iii).

victim's circumstances rather than by reference to a single dollar threshold.²³⁴ The First Circuit, in *United States v. Iwuanyanwu*, likewise required an individualized assessment of whether a particular victim's losses, viewed against that victim's financial situation, crossed the "substantial hardship" line.²³⁵ The Seventh Circuit's opinion in *United States v. Minhas* takes a similar sliding-scale approach, upholding the enhancement where working-class victims lost just over \$2,000 but faced "years" of financial recovery as a result.²³⁶ These decisions are squarely in line with the Commission's *Primer on Economic Crime Victims*, which describes substantial financial hardship as a victim-specific inquiry and collects cases emphasizing that courts must focus on the real-world consequences of loss for each victim, particularly in mortgage-modification scams, small-business frauds, and consumer cyber-fraud.²³⁷ In large-scale data breaches and credential-dump schemes, this framework raises practical questions: whether the government must present detailed information for a subset of victims; whether it may rely on reasonable inferences about working-class consumers or small businesses; and to what extent the court may aggregate evidence while still grounding its findings in individualized hardship.

Third, recent caselaw and Commission materials have sharpened the distinction between Guideline loss, statutory restitution, and acquitted conduct. The Ninth Circuit in *United States v. Dadyan* stressed that there is "no categorical rule" requiring restitution to equal or fall below the Guidelines loss amount under section 2B1.1(b)(1); the two calculations serve different purposes and may legitimately diverge.²³⁸ The First Circuit's decision in *United States v. Naphaeng* similarly underscores that restitution under the MVRA is governed by statute and focuses on making victims whole, not on the Guideline's various proxies for economic harm.²³⁹ The Commission's *Primer on Loss Calculation Under §2B1.1* explicitly cautions courts not to assume that Guideline loss and restitution should match, and the Congressional Research Service's longstanding report *Restitution in Federal Criminal Cases* explains in detail how MVRA-based restitution orders can diverge from other sentencing metrics.²⁴⁰ At the same time, the Commission's *Primer on Economic Crime*

²³⁴ 949 F.3d 1181, 1186 (9th Cir. 2020).

²³⁵ 69 F.4th 17, 17 (1st Cir. 2023).

²³⁶ 850 F.3d 873, 876 (7th Cir. 2017).

²³⁷ ECONOMIC CRIME VICTIMS, note 42.

²³⁸ 76 F.4th 955, 959 (9th Cir. 2023). See U.S.S.G. § 2B1.1(b)(1).

²³⁹ 906 F.3d 173, 175, 179 (1st Cir. 2018); 18 U.S.C. § 3663A.

²⁴⁰ LOSS CALCULATION UNDER §2B1.1, note 6; CHARLES DOYLE, CONG. RES. SERV. RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES (2019).

Victims and NACDL's 2025 report *Empty Pockets and Empty Promises: How Federal Restitution Law Fails Everyone* both document the practical and distributional consequences of current restitution practice, highlighting, among other things, over \$100 billion in largely uncollectible restitution debt and the risk that restitution orders can function more as long-term punishment than meaningful victim compensation.²⁴¹

Against that backdrop, Amendment 826 adds section 1B1.3(c) and formally excludes acquitted conduct from the scope of “relevant conduct” used to calculate the Guideline range, absent overlap between the acquitted conduct and the offense of conviction.²⁴² The Commission's amendment and its *Primer on Relevant Conduct* emphasize that acquitted conduct is “unique” and that the change is designed to promote respect for jury verdicts while preserving the broader conception of relevant conduct for uncharged and dismissed behavior.²⁴³ Yet Amendment 826 leaves intact the sentencing court's broad authority under 18 U.S.C. §§ 3661 and 3553(a) to consider a wide range of information, including, in some circumstances, acquitted conduct, when deciding where to sentence within, or whether to vary from, the Guideline range.²⁴⁴ As a result, decisions like *Dadyan* and *Naphaeng* illustrate a three-way separation that matters acutely in cyber-fraud and crypto-asset cases: (1) Guidelines loss under U.S.S.G. § 2B1.1; (2) restitution under the MVRA; and (3) any residual consideration of acquitted (or uncharged) conduct under 18 U.S.C. § 3553(a).²⁴⁵

Despite these developments, several doctrinal questions remain open, particularly as they intersect with cyber-enabled fraud and volatile digital assets. One recurring issue is how to value stolen but never-used credentials, private keys, or access devices. Should courts look to the theoretical face value of the underlying accounts, to some measure of black-market value, or to a more nuanced estimate based on actual exploitation rates? Another unsettled question is how to adapt *United States v. Zolp*—which addressed loss calculation for thinly traded or manipulated stock in securities-fraud cases—to crypto-tokens whose values can swing dramatically based on market sentiment, exchange delistings, or protocol-level

²⁴¹ ECONOMIC CRIME VICTIMS, note 42; CORTNEY E. LOLLAR, *EMPTY POCKETS AND EMPTY PROMISES: HOW FEDERAL RESTITUTION LAW FAILS EVERYONE* (2025).

²⁴² U.S.S.G. app. C, amend. 826. See *id.* § 1B1.3(c).

²⁴³ RELEVANT CONDUCT, note 83, at 17; U.S.S.G. app. C, amend. 826.

²⁴⁴ See 18 U.S.C. §§ 3553(a), 3661; *Sentencing Practice Talk—Episode 27, Part 2*, U.S. SENT'G COMM'N (Oct. 31, 2024), <https://www.ussc.gov/education/sentencing-practice-talk-episode-27-part-2>.

²⁴⁵ *United States v. Dadyan*, 76 F.4th 955, 957 n.1 (9th Cir. 2023); *United States v. Naphaeng*, 906 F.3d 173, 189 n.6 (1st Cir. 2018); U.S.S.G. § 2B1.1; 18 U.S.C. § 3553(a).

events.²⁴⁶ Relatedly, decentralized-finance (DeFi) exploits often involve protocol code that executes as written, yet was arguably designed to facilitate “arbitrage-like” drains that users could foresee and exploit; courts have not yet settled whether and when such conduct constitutes loss for Guideline purposes, or how to account for scenarios in which some protocol participants view the outcome as an expected risk rather than a compensable loss. Commission primers and commentary acknowledge issues of volatility and valuation at a high level, but they do not yet supply detailed, crypto-specific rules, leaving district courts to adapt existing loss and victim frameworks case by case.²⁴⁷

Taken together, these strands suggest that cyber-fraud and crypto-asset sentencing in the First and Ninth Circuits and beyond is moving toward more empirically grounded and victim-specific fact-finding, with sharper doctrinal boundaries between Guideline loss, restitution, and acquitted conduct. Simultaneously, valuation problems unique to stolen credentials, private keys, and DeFi protocols remain only partially addressed, ensuring that cyber and crypto cases will continue to be a proving ground for how far the revised Guidelines can stretch to accommodate new forms of economic harm.

VI. Practice pointers for First and Ninth Circuit cyber-fraud sentencing

For practitioners litigating cyber-fraud and crypto-asset cases in the First and Ninth Circuits, the current Guidelines framework and recent caselaw suggest several practical strategies. As a starting point, loss arguments should be anchored in the post-2024 text of section 2B1.1 and the Commission’s most recent primers.²⁴⁸ The Guideline now states that “loss” is the greater of actual loss and intended loss, but both components must still be grounded in reasonably foreseeable pecuniary harm that is causally linked to the offense conduct.²⁴⁹ In the Ninth Circuit, *United States v. Kirilyuk* allows defense counsel to challenge mechanical use of per-device multipliers in carding and credential-dump cases, insisting that courts estimate loss based on the evidence, such as how many cards or credentials were valid and used, rather than defaulting to a commentary-based \$500 proxy.²⁵⁰ In the First Circuit, *United States v. Carrasquillo-Vilches* and *United States v. Ahmed* illustrate how courts ap-

²⁴⁶ 479 F.3d 715 (9th Cir. 2007).

²⁴⁷ See, e.g., LOSS CALCULATION UNDER §2B1.1, note 6.

²⁴⁸ U.S.S.G. § 2B1.1.

²⁴⁹ LOSS CALCULATION UNDER §2B1.1, note 6, at 3; U.S.S.G. § 2B1.1 cmt. n.3(A).

²⁵⁰ 29 F.4th 1128, 1135–39 (9th Cir. 2022).

ply the post-Amendment 792 subjective-intent standard for intended loss and how they analyze foreseeability in multi-participant frauds, including schemes that rely on automated billing or other technology-enabled processes.²⁵¹ Commission training materials on loss and relevant conduct highlight these cases as exemplars, and they provide a useful doctrinal frame for arguing that loss in cyber and crypto matters should track what the defendant “purposely sought to inflict,” not the theoretical maximum exposure implied by system capacity or database size.²⁵²

In cyber-specific fact patterns, credential dumps, account-takeover campaigns, token or non-fungible token schemes, counsel should be prepared to offer forensic and market evidence to support or challenge the government’s loss figures. That may include data on how many stolen credentials remained valid at the time of seizure, the distribution of actual unauthorized charges per compromised account, typical underground prices for similar data or tokens during the offense period, and expert analysis of how credential-stuffing or bot-driven exploitation normally converts into real-world loss. *Kirilyuk* itself points toward this approach by faulting a loss calculation that assumed a fixed dollar value per unauthorized access device without proof that each device was used, usable, or intended to be monetized.²⁵³ In crypto-asset cases, the Ninth Circuit’s earlier decision in *United States v. Zolp*, while arising in the securities context, underscores the value of expert testimony that separates fraud-driven price effects from background market volatility before computing loss.²⁵⁴ The Commission’s *Primer on Loss Calculation Under §2B1.1* expressly encourages a “realistic, economic approach” in such settings, including consideration of fair-market value, replacement cost, and the timing of price movements relative to the fraud and its disclosure.²⁵⁵ Secondary literature on economic-crime sentencing likewise urges courts to rely on empirical data and expert valuation methods rather than on untested proxy rules when dealing with high-volume data sets or volatile digital assets.²⁵⁶

Victim-related issues in cyber-fraud cases require equally granular

²⁵¹ *United States v. Carrasquillo-Vilches*, 33 F.4th 36, 42–43 (1st Cir. 2022); *United States v. Ahmed*, 51 F.4th 12, 24 (1st Cir. 2022).

²⁵² LOSS CALCULATION UNDER §2B1.1, note 6, at 5. See RELEVANT CONDUCT, note 83, at 6 n.32.

²⁵³ *Kirilyuk*, 29 F.4th at 1135–38.

²⁵⁴ 479 F.3d 715, 719–22 (9th Cir. 2007).

²⁵⁵ LOSS CALCULATION UNDER §2B1.1, note 6, at 13.

²⁵⁶ Boss & Kapp, note 177; Felman, note 177. See, e.g., James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT’G REP. 138 (2010).

treatment. Following the Ninth Circuit's decision in *United States v. George* and the First Circuit's decision in *United States v. Iwuanyanwu*, the section 2B1.1(b)(2)(A)(iii) "substantial financial hardship" enhancement demands individualized proof that particular victims experienced significant financial consequences in light of their own circumstances, not simply that they suffered some non-trivial loss.²⁵⁷ Where substantial hardship is in play, practitioners should consider presenting victim affidavits, bank or credit-card records, and business-impact statements showing how unauthorized charges, frozen accounts, or remediation costs affected specific households or small businesses, for example, by causing missed rent payments, forced relocations, or prolonged credit impairment. The Ninth Circuit's *United States v. Herrera* and the First Circuit's *United States v. Stepanian* also underscore that victims counted under section 2B1.1(b)(2) must be those whose losses are reflected in the section 2B1.1(b)(1) loss figure; reimbursed consumers, for example, can be counted as victims only to the extent their pecuniary harm (such as unreimbursed fees or temporary loss of access to funds) is quantified and included in the loss calculation.²⁵⁸ The Commission's *Primer on Economic Crime Victims* and Department's AG Guidelines both support an evidence-driven approach that differentiates between institutions, reimbursed consumers, and individuals who suffer lasting financial strain.²⁵⁹

In multi-actor cyber schemes, botnet operations, credential-harvesting services, crypto-laundering pipelines, counsel should press for careful findings on the scope of "jointly undertaken criminal activity" before loss and victim counts are attributed to a particular defendant.²⁶⁰ The Ninth Circuit's *United States v. Treadwell* holds that a sentencing court may not automatically impose the full conspiracy loss on each participant; the court must first determine the scope of each defendant's agreement and then limit loss attribution to reasonably foreseeable conduct within that scope.²⁶¹ The First Circuit's *Ahmed* decision applies the same framework to a complex health-care-fraud scheme, treating implicit agreements and shared financial incentives as relevant but still requiring evidence that the defendant joined a broader fraudulent project rather than merely oper-

²⁵⁷ *United States v. George*, 949 F.3d at 1185–88 (9th Cir. 2020); *United States v. Iwuanyanwu*, 69 F.4th 17, 25–28 (1st Cir. 2023). See U.S.S.G. § 2B1.1(b)(2)(A)(iii).

²⁵⁸ *United States v. Herrera*, 974 F.3d 1040, 1047–50 (9th Cir. 2020); *United States v. Stepanian*, 570 F.3d 51, 57–59 (1st Cir. 2009). See U.S.S.G. § 2B1.1(b)(1), (b)(2).

²⁵⁹ ECONOMIC CRIME VICTIMS, note 42, at 6; AG GUIDELINES, note 140.

²⁶⁰ RELEVANT CONDUCT, note 83, at 4.

²⁶¹ *United States v. Treadwell*, 593 F.3d 990, 1002–05 (9th Cir. 2010), *overruled on other grounds by United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020).

ating at its margins.²⁶² The Commission's *Primer on Relevant Conduct* synthesizes these cases and stresses that sentencing accountability is narrower than substantive conspiracy liability.²⁶³ In cyber-fraud practice, for example, this means that a developer who wrote credential-harvesting code but never had access to the stolen wallets or exfiltrated data should not automatically be held responsible for all downstream losses generated by other actors who repurposed the tool. Conversely, where the record shows that a coder, infrastructure operator, and money-launderer were all part of a shared enterprise to monetize stolen access, practitioners should be prepared for courts to treat a wide range of scheme losses as reasonably foreseeable to each.

Finally, acquitted-conduct issues should be addressed early in light of Amendment 826.²⁶⁴ As previously mentioned, section 1B1.3(c), which provides that relevant conduct does not include conduct for which a defendant was “criminally charged and acquitted in federal court,” unless that same conduct also establishes the offense of conviction.²⁶⁵ The Commission's explanatory materials describe the amendment as a response to longstanding criticism of acquitted-conduct sentencing and as a recalibration rather than a wholesale rejection of relevant-conduct doctrine.²⁶⁶ For practitioners in cyber-fraud and crypto-asset cases, the practical implication is that PSR objections should identify any portion of the loss, victim-count, or enhancement analysis that rests on acquitted counts and argue for exclusion of that conduct from Guideline calculations under section 1B1.3(c).²⁶⁷ At the same time, counsel should be mindful that 18 U.S.C. §§ 3661 and 3553(a) still permit courts to consider a broad range of information at sentencing; Commission primers and commentary emphasize that Amendment 826 constrains Guideline calculations but does not forbid all consideration of acquitted conduct in variance analysis.²⁶⁸ Recent practitioner commentary and academic discussion highlight this nuance and suggest that litigants should be explicit about when they are challenging acquitted conduct as relevant conduct versus when they are contesting its use under 18 U.S.C. § 3553(a).²⁶⁹

²⁶² *United States v. Ahmed*, 51 F.4th 12, 23–25 (1st Cir. 2022).

²⁶³ RELEVANT CONDUCT, note 83, at 4–5.

²⁶⁴ See U.S.S.G. app. C, amend. 826.

²⁶⁵ U.S.S.G. app. C, amend. 826. See *id.* § 1B1.3(c); subsection II.D.

²⁶⁶ ACQUITTED CONDUCT, note 93; RELEVANT CONDUCT, note 83, at 16–17.

²⁶⁷ U.S.S.G. § 1B1.3(c).

²⁶⁸ 18 U.S.C. §§ 3553(a), 3661. See also *Sentencing Practice Talk—Episode 27, Part 2*, U.S. SENT’G COMM’N (Oct. 31, 2024), <https://www.ussc.gov/education/sentencing-practice-talk-episode-27-part-2>. (discussing “Amendment 826 excluding the use of acquitted conduct from determining the guideline range”).

²⁶⁹ See, e.g., Cox, note 95; Daniel Scapicchio, *The Sixth Amendment Right to Fair*

VII. Conclusion

The 2024–2025 revisions to the Guidelines and the evolving caselaw in the First and Ninth Circuits do not resolve every question raised by cyber-enabled fraud and crypto-asset offenses. But they provide a more coherent framework than existed even a few years ago. Loss is now textually anchored; victim and hardship rules are increasingly individualized; and courts are more skeptical of rigid multipliers that poorly fit digital realities.

For sentencing judges and advocates, the core task is to bring the technical specifics of cyber and crypto conduct—how credentials are used, how tokens trade, how systems are restored—into that framework using the emerging First and Ninth Circuit precedents as guideposts rather than straightjackets.

About the Author

Mac Caille Petursson is an Assistant United States Attorney in the District of Alaska focusing on a wide range of criminal prosecution. She received her M.A. in Eurasian, Russian, and East European Studies from Georgetown University’s School of Foreign Service and her J.D. from Suffolk University Law School. Before becoming an AUSA, she clerked for the Honorable Kyle F. Reardon in the United States District Court for the District of Alaska. Before that, she spent seven years as a paralegal for several United States Attorneys’ Offices across the country, including in Boston, Massachusetts.

Sentencing: An Analysis of Acquitted, Dismissed, and Uncharged Conduct Under the Federal Sentencing Guidelines, U. PITT. L. REV. 85 (5) (2024). See 18 U.S.C. § 3553(a).
