No. 24-6326

IN THE SUPREME COURT OF THE UNITED STATES

MARK ALLEN HAYDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Kevin Joel Page

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INDEX TO APPENDICES

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 4, 2025
Lyle W. Cayce
Clerk

No. 22-10571

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CEDRIC ROSE,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-2232

Before ELROD, *Chief Judge*, and DENNIS, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Cedric Rose appeals the denial of his 28 U.S.C. § 2255 motion in which he challenged his Armed Career Criminal Act (ACCA) sentences in light of *Johnson v. United States*, 576 U.S. 591 (2015). The Government defends the district court's denial because of *United States v. Garrett*, 24 F.4th 485, 486 (5th Cir. 2022), where our court held that robbery by threat and aggravated robbery by threat convictions under Texas criminal law qualify as ACCA predicate offenses. Shortly after oral argument, however, the Texas Court of Criminal Appeals—the highest criminal court in Texas—

issued its decision in *Floyd v. Texas*, -- S.W.3d --, 2024 WL 4757855 (Tex. Crim. App. Nov. 13, 2024), which unequivocally abrogated *Garrett*. *PHI Grp., Inc. v. Zurich Am. Ins. Co.*, 58 F.4th 838, 842 n.3 (5th Cir. 2023) (explaining that the rule of orderliness applies unless there is a "clearly contrary subsequent holding of the [state's] highest court"). Because of this significant intervening change in law, we VACATE the judgment of the district court and REMAND for further proceedings. *See, e.g.*, *Utah v. Su*, 109 F.4th 313, 319–20 (5th Cir. 2024) (explaining that the "modest and relatively uncontroversial practice" of remanding in light of changes in precedent reflects "two premises implicit in our legal system: first, that changes in precedent generally apply to cases pending on appeal; and second, that appellate courts generally sit as courts 'of review, not first view'").

APPENDIX B

U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

February 3, 2025

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

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on its proposed amendments to the Sentencing Guidelines and issues for comment published in the Federal Register on December 19, 2024.[1] The letter also serves as the Department's written testimony for the Commission's upcoming hearing on February 12, 2025.

The Department greatly appreciates the care and attention that the Commission has shown in each of the proposed amendments. As explained further below, however, we have significant concerns about the Commission's proposed amendments to the career offender guideline, including the proposal to limit prosecutors to *Shepard* documents in proving a defendant's prior violent conduct, the elimination of state drug crimes from this guideline entirely, and the adoption of a minimum sentence length requirement. We are also concerned that, by creating definitions for the terms "controlled substance offense" and "crime of violence" that differ from those used elsewhere in the Guidelines, the current proposal undermines the goal of simplification reflected in this same set of proposed amendments.

With respect to the other amendments, the Department has concerns about the proposal to add a *mens rea* component to two longstanding enhancements in the principal firearms guideline. We are generally supportive, however, of the Commission's efforts to update that guideline to reflect the dangers posed by machinegun conversion devices and to simplify the three-step sentencing process. And we urge the Commission to resolve the circuit conflict over the enhancement for physically restraining a robbery victim by adopting the majority view that physical contact between the offender and the victim is not an absolute requirement.

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[1] *Notice of request for public comment and hearing*, 90 Fed. Reg. 1, 128 (Jan. 2, 2025), https://www.govinfo.gov/content/pkg/FR-2025-01-02/pdf/2024-31279.pdf; *see also* U.S. Sent'g Comm'n., *Proposed Amendments to the Sentencing Guidelines* (December 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf.

We thank you, the other Commissioners, and Commission staff for being responsive to the Department's sentencing priorities and to the needs and responsibilities of the Executive Branch. And we look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come.

* * *

I. Career Offender Guideline and The Categorical Approach

The Department commends the Commission's continuing efforts to address the pernicious effects of the categorical approach in federal sentencing. At its core, the current proposal would (i) modify the "crime of violence" definition in the career offender guideline to focus on the defendant's conduct, as determined from a limited set of documents available to prosecutors when making a "prima facie showing"; (ii) remove all state drug convictions from the definition of "controlled substance offense" used in the career offender guideline; (iii) potentially limit qualifying convictions based on the length of the sentence imposed on the defendant (or the time that the defendant served); and (iv) retain the definitions of the terms "controlled substance offense" and "crime of violence" from the current guidelines for all other references to those terms in the Guidelines Manual—and do so by reproducing the current definitions of those terms in the application notes of the other provisions. Although the Department agrees with certain aspects of the Commission's current proposal, we have significant concerns with other parts.

The Department's view that the "categorical approach" results in extreme and unwarranted sentencing disparities is well known, shared by countless judges, and requires little explication. Although those problems plague multiple definitions present in federal statutes and the Sentencing Guidelines, they are particularly acute with regard to the definition of a "crime of violence," where a violent offender is frequently absolved of the consequences of his actions based on the anomalous fact that a different person could have been convicted under the same statute without engaging in comparable violence. Such results defeat Congress' express intent that those who repeatedly commit violent and other aggravated offenses should be incapacitated for long terms.[2]

Furthermore, as the Department has previously explained,[3] it makes littles sense that the Sentencing Guidelines require courts to use only the categorical approach when assessing whether an offense is a "controlled substance offense" or a "crime of violence." The constitutional concern that has animated many of the Supreme Court's decisions on the categorical approach—*i.e.*, that judges cannot make factual findings that increase the applicable

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[2] *See, e.g.*, *United States v. Doctor*, 842 F.3d 306, 313-15 (4th Cir. 2016) (Wilkinson, J., concurring) (presenting an extensive exegesis on the shortcomings of the approach, stating that it "can serve as a protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence," that, "too aggressively applied, eviscerates Congress' attempt to enhance penalties for violent recidivist behavior," creating "a criminal sentencing regime so frankly and explicitly at odds with reality").

[3] *See* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 28 (Feb. 27, 2023) ("2023 DOJ Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=457.

statutory penalties—is not present when applying advisory guidelines.[4] Sentencing courts are instead permitted (indeed, required) to make all manner of factual determinations regarding a defendant's conduct, both current and past, so long as they rest on reliable evidence.[5]

Accordingly, were the Commission designing a guidelines system from scratch, the Department might well recommend that recidivist enhancements be based solely on the conduct that led to a defendant's prior convictions, not arid comparisons of legal definitions. But the Commission is not designing a system from scratch. It is proposing amendments to one part of a Guidelines Manual that has been in existence for decades. And that Manual is itself only one facet of a federal sentencing system that accounts for individuals' prior drug and violent-crime convictions in several statutory contexts, some of which feature language similar to the Guidelines and are likely to remain subject to the categorical approach for the foreseeable future.

Against that backdrop, the Department does not believe it sensible to jettison decades of litigation and judicial decisions determining that some offenses are categorically a "crime of violence" or a "controlled substance offense" under the current Guidelines' definitions of those terms. Rather, the Department has advocated for retaining current definitions in the Guidelines, while also allowing courts to consider whether offenders' actual conduct rendered their offense a "crime of violence" or "controlled substance offense," if the offense is not a categorical match. The Department reiterates our support for that approach below, explaining why much of the new proposed amendment is insufficient to remedy the deleterious effects of the current state of the law—and threatens to add complexity to an area that would benefit from streamlining and simplification, which is one of the Commission's own overarching goals.

A. Crime of Violence

1. The Commission's Proposal

As stated above, the Department greatly appreciates the Commission's continued efforts to shift the career offender guideline away from a strict categorical approach and to allow courts to consider the defendant's prior conduct, not just the legal definition of prior offenses, under that guideline. But the Department has significant concerns about the definitional provisions and limitations on proof set forth in the proposed amendments to the crime of violence definition.

Broadly speaking, we see three problems with the proposal: removing offenses that are categorically violent narrows the provision's scope and creates unnecessary litigation; the new language is imprecise and potentially confusing as to the scope of conduct that it intends to cover; and the tight restrictions on permissible evidence and related procedural issues will exacerbate these problems. We therefore reiterate our preference for amendments that retain (with appropriate modifications) definitions with which courts and litigants have become

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[4] *Cf. Beckles v. United States*, 580 U.S. 256, 265-66 (2017).

[5] *See* §6A1.3 (Resolution of Disputed Factors); *Pepper v. United States*, 562 U.S. 476, 489-91 (2011) (citing federal statutes and guideline provisions instructing courts to consider, without limitation any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law).

familiar, while also allowing judges to consider all reliable sources of information relating to the defendant's conduct.

a. The scope of offenses

The Department believes that every offense that currently qualifies as a "crime of violence" should continue to so qualify. The Commission's proposal appears to assume that it would achieve that objective. The proposal's elimination of both the current elements clause and the enumerated list of qualifying crimes, however, raises serious questions about whether that will be true.[6]

In particular, the Commission's data analysis adds together the number of individuals who were actually sentenced under the career offender guideline in FY 22 (as adjusted by the various drug-offense and point exclusions) and the number of individuals sentenced in FY22 not under the career offender guideline but who, the Commission believes, would have been so sentenced under the proposed amendment (similarly adjusted).[7] This simple addition assumes that every defendant who would be sentenced under the current career offender guideline would still be sentenced under the amended guideline. But for the reasons explained further below, that assumption is likely incorrect. Additionally, in calculating these estimates, the Commission relied on the "label of the instant and prior offense" to identify presumptive predicates instead of applying the actual conduct analysis that would be required by courts under the proposed amendment or the categorical approach (both of which would be challenging for the Commission to undertake).[8] As a result, these estimations likely overstate the number of defendants that would qualify under the proposed actual conduct approach.[9] Accordingly, the Commission's data analysis may not accurately reflect the effect of the proposed amendment, which would

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[6] The Department here responds to Issues for Comment Nos. 1 and 8. Issue for Comment No. 4 inquires whether the addition of the definition of "physical force" as "force capable of causing physical pain or injury to another person" is appropriate. The Department does not object to that insertion, which comports with the definition stated by the Supreme Court. *Johnson v. United States*, 559 U.S. 133, 140 (2010). However, the Department has previously suggested, and continues to maintain, that the definition of force should be modified to refer to the use of force against the person "or property" of another. This modification would bring the provision in line with the clauses that appear in 18 U.S.C. § 16(a) and 18 U.S.C. § 924(c). *See* 2023 DOJ Letter at 31.

[7] U.S. Sent. Comm'n, *Individuals Sentenced Under §4B1.1, Proposed Amendment, Data Background*, Slides 15, 18, 20 (2025), 2025_Career-Offender.pdf ("§4B1.1 Data Background").

[8] U.S. Sent'g Comm'n, Public Data Briefing, 2025 Proposed Amendment Relating to Individuals Sentenced Under §4B1.1, at 16:04-20 (discussing §4B1.1 Data Background, Slides 15, 18, 20).

[9] The Commission estimates that of the 1,354 defendants sentenced as career offenders in FY2022, only 305 would remain career offenders under the proposed amendments after excluding state drug offenses and excluding predicates that earned one and two criminal history points under §4A1.1. Of the 24,703 defendants sentenced in FY2022 for an instant violent offense or federal drug offense who were *not* sentenced as career offenders, the Commission estimates that as many as 654 *could potentially* have presumptive predicates under an actual conduct analysis and, thus, *may* have qualified as career offenders under the proposed amendments. But this analysis assumes that all predicates that have a label that appears violent would qualify, and thus, may only be able to provide a rough estimate. §4B1.1 Data Background, *supra*, Slides 15, 18, 20.

move the Guidelines even further away from Congress' directive that repeat violent offenders receive a sentence "at or near the maximum term authorized."[10]

We appreciate the Commission's recognition of the many flaws in the categorical approach. For better or worse, however, courts have already done the laborious work of determining that certain offenses are a categorical match to the current elements clause or one of the current enumerated offenses. The Commission should not require courts to address, on a case-by-case basis, the conduct underlying offenses that have already been deemed a categorical match to the current "crime of violence" definition.

Unfortunately, the proposed amendments would require exactly that kind of resource-intensive litigation. Because the proposal eliminates the current list of enumerated offenses, convictions for the notoriously violent offenses of murder, voluntary manslaughter, kidnapping, and aggravated assault would all require an assessment of the defendant's (or his accomplice's) actual earlier conduct, and a comparison to the new language in the definition, even if courts have already determined that the particular state or federal offense is a categorical match to the enumerated offense under the current definition.

The proposal does retain some language from the current elements clause. One might assume that, if an offense has, "as an element," the use, attempted use, or threatened use of force under the current definition, it is necessarily true that "the defendant engaged in" a use, attempted use, or threatened use of force under the proposed definition. But, given the ambiguities discussed below, that assumption is dubious. A defendant convicted of the substantive offense of armed robbery might argue that, although the offense has, as an element, the use of force, the government has not established that the *defendant*'s conduct involved force, versus the conduct of his accomplice. Similarly, a defendant convicted of conspiracy to commit armed robbery might argue that the government has not established that he used, attempted to use, or threatened to use force during the conspiracy. These concerns are significantly compounded by the limited documents on which the government can rely to establish the defendant's conduct, as we also discuss further below.

At the very least, removing the current definitions and allowing only a case-specific analysis invites unnecessary and resource-intensive litigation. Jettisoning the existing body of case law for the career offender guideline is particularly problematic when, as explained below, the current proposal retains the elements clause and the enumerated list of qualifying crimes in other parts of the Guidelines, such that litigation over the scope of these terms will continue even if they are eliminated from the career offender guideline.

b. The scope of covered conduct

The new suggested definition of the term "crime of violence" states:

The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, *in which the defendant engaged in any of*

[10] 28 U.S.C. § 994(h).

the following conduct: (A) The use, attempted use, or threatened use of physical force (i.e., force capable of causing physical pain or injury to another person) against the person of another; or (B) [presenting definitions of prohibited sexual acts, robbery, extortion, arson, and the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive materials as defined in 18 U.S.C. § 841(c)] (emphasis added).

The proposed amendment also provides that the "defendant's conduct" under the new provision may be assessed under part of the relevant conduct guideline, §1B1.3(a)(1)(A), but not §1B1.3(a)(1)(B). Finally, the proposal provides that an inchoate offense "is a 'crime of violence' if the defendant engaged in any of the conduct described in subsection (b)(1) regardless of whether the offense of conviction was for a substantive offense, aiding and abetting the commission of an offense, attempting to commit an offense, or conspiring to commit an offense."

Although we appreciate the Commission's focus on conduct as opposed to solely the elements of an offense, we are concerned about several related aspects of this definition. First, defining a "crime of violence" by reference to the "conduct" in which "the *defendant* engaged" (versus the conduct that "the offense involved") raises the question of whether a defendant has committed a crime of violence if his or her accomplice used or threatened force, as when two individuals together commit murder, but only one pulls the trigger. We understand the reference to §1B1.3(a)(1)(A) is meant to ensure that the defendant is responsible for not just his own conduct, but also certain accomplice conduct. But the tension between the definition's reference to the *defendant's* conduct (versus "offense conduct") and §1B1.3(a)(1)(A)'s reference to accomplice conduct could create confusion and is likely to result in significant litigation.[11]

Second, we disagree with the omission of §1B1.3(a)(1)(B), which encompasses conduct of accomplices or coconspirators during jointly undertaken criminal activity. It is unclear, for example, whether a defendant would be considered to have committed a crime of violence if he is convicted of the substantive offense of murder on a *Pinkerton* theory of liability. And if the answer is no, that leads to the exceedingly odd result that a defendant with a prior murder conviction would not be considered to have committed a crime of violence. It also invites even more litigation over the basis of a prior conviction in cases where the prosecution invoked multiple theories of liability, particularly if the government is limited in the evidence it can present to the district court (as further explained below).

Third, we are concerned that the language regarding inchoate offenses, which also repeats the phrase "the defendant engaged," could render most inchoate offenses outside the scope of the new "crime of violence" definition in two ways. For one thing, it doubles down on the issue noted above about "the defendant" versus others. For another, this language—rather than "the offense involved" or the defendant "attempted or agreed to" (or both)—appears to include an

[11] The Department, in response to Issue for Comment No. 2, agrees that consideration of whether an offense constitutes a crime of violence should involve an assessment of acts "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." It would not be appropriate to limit the provision to consider only violent conduct that occurred solely "during the commission of the offense." That narrower approach would likely raise difficult questions about when the "offense" commenced and concluded.

inchoate offense only if the government proves that actual violent conduct occurred, rather than an agreement or attempt to commit such violent conduct. Such an approach stands in contradiction to the longstanding view, embodied in the Model Penal Code and most federal statutes, that when a person attempts to commit a violent crime, or enters an agreement to commit such an offense, his intent and willingness to commit the crime—as well as the heightened danger of violence—warrants additional punishment. Since their inception, the Guidelines have embraced that view. Indeed, the Commission's position has long been that "[t]he terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense."[12] And that directive now appears in the text of the Guidelines, rather than the application notes.[13] There is no sound basis to abandon this foundational aspect of criminal law.

c. Unfounded limitations on proof

Each of the above problems is compounded by the proposal to require the government to make a "prima facie" showing of qualifying conduct based only on, essentially, *Shepard* documents—that is, the charging document, jury instructions and accompanying verdict form, a plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant, and any comparable judicial record (offering as an additional option permission to consult the judge's formal rulings of law or findings of fact, the judgment of conviction, and any explicit factual finding by the trial judge to which the defendant assented).

Experience teaches that this very limited set of documents is sometimes unavailable (depending on the quality of record-keeping in the various jurisdictions) and, even when available, often reveals relatively little about the actual facts of the defendant's conduct (particularly where there was a trial as opposed to a guilty plea). A charging document might list all possibly pertinent offenses. A judgment (which is currently listed only as an optional document) might specify the particular offense of conviction but will not distinguish between theories of liability (such as aiding and abetting or *Pinkerton* liability). The documents included in the proposed list that are most likely to provide facts (such as transcribed pleas) are not necessarily available, but other reliable descriptions of the criminal conduct—such as police reports, trial transcripts or exhibits, witness statements, or affidavits in support of complaints—often are.

Restricting sentencing courts to examination of such a limited set of documents risks gutting the new proposed conduct-based approach at its inception. With the limited set of documents identified, the most the government will ordinarily be able to prove is the statute of conviction, not the facts of the defendant's conduct (or those of any accomplice or co-conspirator). When that happens, the government will be left with only the argument that the statute of conviction necessarily required proof of conduct *by the defendant* meeting the new

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[12] *See* U.S.S.G. App. C, Amend. 268 at 131-32 (amending career offender guideline to provide, effective Nov. 1, 1989, that the terms "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses").

[13] U.S.S.G. §4B1.2(d).

definition. That regime would approximate the categorical approach that exists today—with the added complications regarding accomplice conduct and inchoate offenses discussed above. The result will be the same disparity and confusion that currently reigns, in which courts must dissect the pertinent statutes, and at the end of the day offenders who committed identical conduct are treated differently depending on the vagaries of the drafting of state statutes and of the quality of court record-keeping—with the added difficulty of assessing the theory of liability upon which the defendant was convicted and the conduct underlying an inchoate offense.

As the Department has repeatedly opined, the *Shepard* limitation should have no place in sentencing under an advisory guidelines system.[14] The decision establishing that limitation, *Shepard v. United States*, 544 U.S. 13, 16 (2005), involved the application of a statutory penalty enhancement and thus implicated constitutional concerns under Supreme Court case law addressing the Sixth Amendment. To address concerns that a court might make factual findings increasing a defendant's statutory maximum sentence, the Court held that sentencing judges could consult only a limited class of judicial records in identifying a prior conviction. Those concerns are inapplicable to advisory guidelines. To the contrary, courts routinely and necessarily resolve disputed facts at sentencing to calculate the advisory Guidelines range—including facts about a defendant's past conduct and history—using any reliable information.

In this area, as in all others related to Guidelines findings, the Department should be permitted to put on evidence not limited to a judicial record—subject to objection and challenge by the defense—to prove that the conduct giving rise to the prior conviction was, in fact, violent. Under §6A1.3 (Resolution of Disputed Factors), both parties may present information to the court, and the court may consider "any information that has sufficient indicia of reliability to support its probable accuracy."

If the Commission does adopt a limited list of evidence upon which courts may rely in determining the scope of a defendant's conduct, we urge the Commission to consider a significantly broader range of evidence. First, the Commission should clarify that sentencing courts may rely on any factual finding by a judge or jury, including the findings of a court during a guilty plea, trial, or sentencing, regardless of the defendant's assent.[15] The Commission should also permit consideration of any reliable testimonial or documentary evidence presented in the case giving rise to the predicate offense. In so doing, the Commission should jettison the concept of a "prima facie showing." The term "prima facie," which appears infrequently in the Guidelines Manual, tends to refer to evidentiary burdens and is largely unhelpful at the sentencing phase, where the Federal Rules of Evidence do not apply, *see* Fed. R. Evid. 1101(d)(3). It is also unnecessary because the government, as the proponent of the career offender enhancement, bears the ultimate burden of establishing its applicability.

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[14] *See* 2023 DOJ Letter at 31; David Rybicki, U.S. Dep't of Justice, Letter to Hon. Charles R. Breyer & Hon. Danny C. Reeves, Commissioners, at 4 (Feb. 19, 2019) ("2019 DOJ Letter"), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20190219/DOJ.pdf.

[15] It is unclear what distinction the Commission intends when it contrasts "[t]he judge's formal rulings of law or findings of fact" and "[a]ny explicit factual finding by the trial judge to which the defendant assented."

2. The Department's Proposal

To address all of these considerations—the sensibility of relying on past determinations under the categorical approach, the propriety of enumerating particularly violent crimes, and the need to consider actual conduct, using any reliable information, in order to assure sensible and consistent results—the Department has advocated adoption of a "conduct-based backup" to the existing elements and enumerated clauses, with additional modifications of those clauses as necessary. *See* 2023 DOJ Letter at 27-28.[16]

The Department endorsed a proposal that the Commission published on December 20, 2018, under which a court applying the elements clause would not be limited to the elements of the offense but would also be permitted to consider any means of committing the offense identified in judicial records, "as well as the conduct that formed the basis of the offense of conviction." 2019 DOJ Letter at 2. The Department has further suggested that courts be permitted, when necessary, to consider any other reliable evidence to prove the actual conduct of the defendant. *See* 2023 DOJ Letter at 28, 31; 2015 DOJ Letter at 1-2, 13. The Department continues to advocate retention of the elements and enumerated clauses, with appropriate amendments, and the addition of language instructing sentencing courts that—if the categorical and modified categorical approaches do not suffice to show whether the defendant was convicted of qualifying offense—the court should consider the conduct leading to the defendant's prior conviction. *See* 2015 DOJ Letter at 14.

Finally, as explained further below, we have serious concerns about providing for multiple differing definitions of "controlled substance offense" and "crime of violence." If the Commission does decide to amend the career offender definitions, but not the definitions elsewhere in the Guidelines, it would be wise to retain the elements clause and enumerated offenses in the career offender definition. That is, any amendments to the career offender definition should add ways to satisfy that guideline's definition, rather than change the current ways to satisfy the definition. If nothing else, such an approach would reduce the gap between the definitions of "crime of violence" and "controlled substance offense" in different parts of the Guidelines, thereby promoting uniformity and efficiency and reducing confusion.

3. Enumerated Offenses

For the reasons stated above, the definition of "crime of violence" should continue to rest on an elements clause, and enumeration of specific violent crimes, bolstered by a conduct-based backup. In that approach, it remains important to enumerate specific crimes that are always appropriately deemed violent, such as murder, manslaughter, aggravated assault, and robbery, sparing the courts the need to conduct any further factual inquiry where a defendant has been convicted of an offense matching the accepted definition of such a crime.

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[16] *See also* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Patti B. Saris, Chair, at 11-14 (Oct. 30, 2015) ("2015 DOJ Letter"), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/DOJ.pdf.

Although the proposal retains the current definitions of forcible sex offense, robbery, and extortion (and adds an unobjectionable definition of arson), it deletes (without explanation) the previous references to murder, voluntary manslaughter, kidnapping, and aggravated assault. Perhaps the assumption is that these eliminated offenses will be fully covered by the conduct-based clause. But for the reasons outlined above, that assumption is faulty. Moreover, retaining the current enumerated offenses would permit courts to efficiently apply the "crime of violence" definition to matters where it is settled that convictions for these crimes satisfied the generic definitions of these quintessentially violent acts.

The Commission should also take this opportunity to resolve anomalies that have appeared in the current definitions of robbery and extortion, which are retained in the proposal. The proposal includes a new application note stating, "the Commission anticipates that subsection (b)(1)(A) will be sufficient to include as crimes of violence conduct that would constitute most robbery and extortion offenses that involve violence. Subsections (b)(1)(C) and (b)(1)(D) are included to provide clarity and ease of application." The Department disagrees that the provisions—a conduct clause requiring proof of "physical force (*i.e.*, force capable of causing physical pain or injury to another person)," plus the provided definitions—are sufficient to capture most robbery and extortion offenses.[17]

a. Robbery

The proposed definition of robbery is materially the same as the current provision, at §4B1.2(e)(3), added effective November 1, 2023. The current version largely tracks the language of the Hobbs Act, 18 U.S.C. § 1951(b)(1), and was adopted to abrogate the decisions of a number of appellate courts that Hobbs Act robbery did not qualify as a predicate "crime of violence" under the elements clause (because the violence may be targeted at property as well as a person).

This salutary amendment, however, had the unintended consequence of likely eliminating as crimes of violence numerous state robbery statutes that previously qualified, on the grounds that those statutes allow conviction based on reckless conduct. The current definition, like that in the Hobbs Act, requires intentional conduct. But the majority rule is that violence directed at a person or property to accomplish a theft may be committed recklessly in order to amount to robbery. That is the position of the Model Penal Code, which defines robbery as occurring, in part, when, "in the course of committing a theft, [the defendant] inflicts serious bodily injury

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[17] The Department here responds to Issue for Comment No. 4. Issue for Comment No. 5 inquires whether the proposed definition of forcible sexual acts is sufficient. That definition matches the current provision, and the Department offers no objection.

Issue for Comment No. 6 asks whether the newly proposed definition of arson ("The willful or malicious setting of fire to or burning of property") is sufficient. The Department believes that it is, as it is consistent with the generic definition identified by the courts. *See, e.g.*, *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) (identifying "the consensus among state statutes that defines contemporary arson as involving the malicious burning of property, personal or real, without requiring that the burning threaten harm to a person."); *United States v. Delgado-Montoya*, 663 Fed. Appx. 719, 724 (10th Cir. 2016) (unpublished) (stating that other courts "have all concluded that the modern generic definition of arson is the intentional (or willful) and/or malicious burning of property," citing *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015)).

upon another."[18] No *mens rea* attaches to the infliction of injury, so the MPC's gap-filler makes recklessness the culpability standard by default.[19] That result is consistent with the common law, which required no proof of *mens rea* as to the use of force: as long as a theft was intended, any injury that resulted constituted robbery.[20] A majority of states continue to follow this rule by statute.[21]

Accordingly, the current definition of robbery should be amended, while preserving the language of the Hobbs Act, to make clear that a robbery offense committed with the reckless use of force also qualifies. Just as the Supreme Court stated in *Quarles v. United States*, 587 U.S. 645 (2019), that the ACCA should not be interpreted in a manner that would eliminate most state crimes of the same type from the generic definition selected by Congress, so too this Commission should not "enact[]a self-defeating statute," *id.* at 654, with regard to the quintessentially violent crime of robbery.

b. Extortion

The proposal suggests retaining the existing definition of "extortion" ("obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.").[22] That definition was added in Amendment 798 (Aug. 1, 2016).[23] As the Department has previously explained, *see* 2019 Letter at 9-10; 2023 DOJ Letter at 34-35, the change also had an unintended consequence of potentially eliminating the federal Hobbs Act extortion statute and most state extortion statutes as enumerated crimes of violence. That consequence should be corrected at this time and in the manner suggested in the Department's prior letters—*i.e.*, by defining extortion as obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury *to persons or property*, or (iii) threat of physical injury *to persons or property*.

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[18] *See* MPC §222.1(1)(a).

[19] *See id.*, cmt.4(b), at 113-14 (citing MPC §2.02(3)).

[20] *See Stokeling v. United States*, 586 U.S. 73, 81 (2019); *United States v. Ivy*, 93 F.4th 937, 944 (6th Cir. 2024).

[21] As of 2024, a total of 35 states criminalize robbery where some form of harm is caused. Ala. Code §13A-8-41; Alaska Stat. §11.41.500; Ark. Code §5-12-103; Colo. Rev. Stat. §18-4-301; Conn. Gen. Stat. §53a-134; 11 Del. Code §832; Haw. Rev. Stat. §708-840; Idaho Stat. §19-2520B; 720 Ill. Comp. Stat. §5/18-1; Ind. Code §35-42-5-1; Iowa Code §711.2; Kan. Stat. §21-5420; Ky. Rev. Stat. §515.020; La. Rev. Stat. §14:64.4; 17-A Me. Rev. Stat. §651; Mich. Comp. Laws §750.529; Minn. Stat. §609.245; Mo. Stat. §569.020; Mont. Code §45-5-401; N.H. Rev. Stat. §636:1; N.J. Stat. §2C:15-1; N.Y. Penal Law §160.10; N.D. Cent. Code §12.1-22-01; Ohio Rev. Code §2911.01; 21 Okla. Stat. §797; Or. Rev. Stat. §164.415; 18 Pa. Cons. Stat. §3701(a)(1)(i); R.I. Gen. Laws §11-39-1; Tenn. Code §§39-13-402, 39-13-403; Tex. Penal Code §29.03; Utah Code §76-6-302; 13 Vt. Stat. §608; Wash. Rev. Code §9A.56.200; W. Va. Code §61-2-12; Wyo. Stat. §6-2-401. Of those, only nine—Colorado, Connecticut, Illinois, Iowa, Kentucky, Louisiana, Montana, New Jersey, and New York—require more than the reckless infliction of injury.

[22] U.S.S.G. §4B1.2(e)(2).

[23] U.S.S.G. App. C, Amend. 798, at 125-32 (Supp. Aug. 2016).

B. Controlled Substances Offenses

The Commission has proposed amending the career offender guideline to eliminate state drug convictions from the definition of "controlled substance offense." Because it is quite rare that any person incurs three *federal* drug convictions that are counted separately under the Guidelines, this proposal effectively removes recidivist drug offenders from the career offender guideline. The Department opposes that aspect of the proposed amendment. We also oppose the suggested addition of a minimum sentence length requirement, whether limited to controlled substance offenses or applied to crimes of violence, too. But if the Commission were to adopt a sentence-length limitation, we favor the option that limits qualifying convictions to those addressed in §4A1.1(a) and (b) (sentence of at least sixty days) and would apply that limit only to controlled substance offenses.

1. Proposed Exclusion of State Offenses

One of the main features of the proposed amendment is to limit the term "controlled substance offense" to a list of federal convictions and thus eliminate all state drug convictions from the career offender guideline. The Department strongly objects to this aspect of the proposed amendment, which would upend years of federal sentencing practice, is not supported by the data that the Commission has publicly released, and would create unnecessary disparities between similarly situated defendants based merely on which jurisdiction (federal or state) previously prosecuted them. Such a change would also be unwise against the significant public safety threat and overdose deaths resulting from fentanyl, synthetic opioids, and other drugs.[24]

In 28 U.S.C. § 994(h), Congress directed the Commission to ensure that the Guidelines specify a sentence of imprisonment at or near the maximum term authorized for categories of defendants with two or more prior felony convictions that are each crimes of violence or drug offenses, including those "described in section 401 of the Controlled Substances Act."[25] As the Third Circuit has noted, the purpose of § 994(h) was "to impose substantial prison terms on repeat drug traffickers."[26] From the inception of the Guidelines, the career offender provision has included state drug crimes. The original application notes for the career offender guideline specifically stated that the term "controlled substance offense" included certain federal offenses and "substantially equivalent state offenses."[27] Over the following decades, Congress has never acted to amend § 994(h) to exclude state offenses or suggested that state court drug convictions should not be considered in the career offender analysis.

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[24] CDC, Nat. Center on Health Statistics, Provisional Drug Overdose Death Counts (updated Jan 15, 2025) ((over 80,000 deaths per year since 2020), at https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[25] 28 U.S.C. § 994(h)(2)(B).

[26] *United States v. Whyte*, 892 F.2d. 1170, 1174 (3d Cir. 1989) (quotation marks omitted).

[27] U.S.S.G. §4B1.2 n. 2 (1987 version), 1987 Federal Sentencing Guidelines Manual - Chapter Four - Criminal History and Criminal Livelihood.

Excluding state drug court convictions would be inconsistent with Congress' goal of providing for enhanced punishments for recidivist offenders. First, it is extremely rare that any defendant qualifies as a career offender solely because of prior federal drug offenses. According to the Commission's recidivism analysis of career offender defendants who were released from custody in 2015, only 25 defendants qualified as career offenders based solely on *federal* drug convictions.[28] That suggests that the proposed amendment would dramatically reduce drug offenses as career offender predicates, contrary to Congress' clear intent. Moreover, a federal prosecution is often an escalating result for a defendant whose criminal conduct has not been adequately addressed in the state judicial system.[29] By excluding all state convictions (regardless of the significance of the state case), the Commission will prevent the use of the career offender provision against significant drug traffickers with lengthy criminal histories and will limit the application of this provision to the much smaller universe of defendants who have been prosecuted in federal court. That would be the case even though state drug trafficking crimes are just as deleterious to public safety and health and those who repeatedly commit those offenses are just as appropriately subject to recidivist penalties as repeat federal offenders.

Although § 994 does not explicitly state that Congress intended for the career offender provisions to apply to state drug convictions, multiple courts have rejected arguments that the statute's reference to offenses "described in Section 401 of the Controlled Substances Act" and other federal statutes was intended to limit the application of recidivism penalties to those specific statutes.[30] Instead, appellate courts have found that the language in § 994(h)(b)(2) would apply to "drug trafficking conduct that could have been charged under the specified federal laws, but instead, was charged under state law."[31] That result follows from the text of § 994(h), which is not limited to individuals convicted under the enumerated statutes but instead applies to offenses "described" in those statutes.[32] The listed statutes "describe behavior commonly called 'drug trafficking'" that can be charged in federal or state court.[33] Reading the statute to apply to defendants previously convicted only of federal crimes would frustrate congressional objectives and create an illogical disparity in the sentencing treatment of repeat

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[28] U.S. Sent. Comm'n, *Individuals Sentenced Under §4B1.1, Proposed Amendment, Data Background*, Slide 12 (2025), 2025_Career-Offender.pdf ("§4B1.1 Data Background").

[29] The Commission's data demonstrates that most defendants prosecuted for federal drug crimes have prior state drug offenses. *See, e.g.*, U.S. Sent. Comm'n, *The Criminal History of Federal Offenders*, Page 5 (2018) ("There were 18,820 drug trafficking offenders in fiscal year 2016. Over two-thirds of these offenders (69.3%) had at least one previous conviction. Half of those offenders (52.0%) had at least one drug possession offense in their criminal histories."); §4B1.1 Data Background, *supra*, Slide 9 (of the 1,354 defendants sentenced as career offenders in FY2022 for instant federal drug offenses, 52.6% (711) had prior drug convictions); *id.*, Slide 12 (approximately 45% (465) of career offenders released in FY2015 had prior drug offenses; of those, 94.6% (440) had at least one qualifying state predicate while 25 had only federal predicates).

[30] *See United States v. Jones*, 15 F.4th 1288, 1294-95 (10th Cir. 2021) (explaining the pertinent history and the consistent rulings of other circuits).

[31] *United States v. Consuegra*, 22 F.3d 788, 790 (8th Cir. 1994).

[32] *Cf. United States v. Johnson*, 915 F.3d 223, 229 (4th Cir. 2019).

[33] *United States v. Beasley*, 12 F.3d 280, 283 (1st Cir. 1993) (Breyer, C.J.).

drug offenders. As then-Chief Judge Breyer explained in *Beasley*, if state offenses were not covered, § 994(h) "would not require a substantial prison term for a repeat drug trafficker apprehended by state authorities and punished under state, rather than federal, law" and would create an unwarranted and "close to irrational" disparity based upon "which jurisdiction happened to punish the past criminal behavior."[34]

Given the Commission's longstanding inclusion of state drug offenses and the sound reasons for including them, a decision to *exclude* all such offenses should be backed by substantial empirical data. But the data does not support exclusion of state drug offenses. Rather, the Commission's recidivism analysis of career offender defendants who were released from custody in 2015 shows relatively minor differences in the recidivism rates for individuals classified as career offenders based (a) solely on drug offenses, (b) a mix of drug and violent offenses, and (c) solely for violent crimes. Specifically, the Commission determined that 48.8% of drug-only offenders were rearrested within five years of release, slightly below the rearrest rates for those who qualified based on a mix of drug and violent crimes (52.8%) or violent crimes only (56.8%).[35] The differences were likewise modest within the class of drug-only career offenders: the rearrest rate for those who qualified as career offenders based only on *federal* drug convictions (only 25 defendants) was 52%, just above the rate (48.8%) for the class that includes state drug convictions.[36]

Finally, the proposed elimination of state convictions also would add unnecessary confusion and inconsistency to the Guidelines. Nowhere else in the Guidelines is a defendant's sentence so dependent on the mere jurisdiction of a prior conviction. Rather, the Guidelines have treated prior convictions equally, regardless of whether they were obtained in federal or state courts.[37] Under this proposal, a defendant's state drug trafficking offense would qualify as a controlled substance offense under multiple guideline provisions (such as §2K1.3 and §4B1.4) but would not be a controlled substance offense for career offender purposes simply because the defendant was previously prosecuted in state court. That would be the case even if the defendant had, for example, previously been sentenced to 20 years' imprisonment for a significant state drug trafficking offense. To avoid such unwarranted disparities, the Commission should not remove state drug offenses from the definition of controlled substance offense under §4B1.2.

2. List of Qualifying Federal Predicates

In proposing to limit the term "controlled substance offense" to federal drug crimes for purposes of the career offender guideline, the Commission seeks comment on whether that list should mirror the statutes listed in the career offender directive, 28 U.S.C. § 994(h), or include

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[34] *Beasley*, 12 F.3d at 283.

[35] §4B1.1 Data Background, Slide 11.

[36] §4B1.1 Data Background, Slide 12.

[37] U.S.S.G. §4A1.1 (background). The Guidelines applicable to offenses involving the sexual exploitation of a minor also include prior state offenses. U.S.S.G. §2G2.2(b)(5) & n.1 ("pattern of activity"); *United States v. Cover*, 800 F.3d 275, 281 (6th Cir. 2015).

several additions. As explained below, the Department believes that both proposals are too narrow and recommends that, if the Commission were to limit the career offender provision to federal drug offenses, it should at least ensure that all felonies under Title 21 and all Title 18 offenses that involve drug trafficking qualify as controlled substance offenses.

The Commission's most narrow proposed definition would substantially limit the controlled substance offense definition to the six statutes specified in 18 U.S.C. § 994(h). Only convictions under 21 U.S.C. § 841, § 952(a), § 955, § 959, or 46 U.S.C. § 70503(a) or § 70506(b) would be qualifying convictions. That proposal would yield unusual results. For example, the definition would include crimes related to *importation* of controlled substances (21 U.S.C. § 952) but would not cover offenses related to the *exporting* of controlled substances (21 U.S.C. § 953) or registration offenses related to imports or exports of controlled substances (21 U.S.C. § 957). This would be particularly anomalous because violations of 21 U.S.C. § 955 (which applies to possession of certain drugs on vessels departing the United States) would qualify. The result would be that most federal export offenses involving controlled substances would not be considered controlled substance offenses unless they were charged under § 955. Similarly, violations of 21 U.S.C. § 825 (which applies to labelling and packaging offenses related to controlled substances) would appear to be excluded. There is no logical reason to exclude such offenses, which fall within the current definition in §4B1.2.

There may also be some offenses that currently are not within the scope of the current definition that would become qualifying convictions under the narrower proposal. The current definition only applies to an offense that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." §4B1.2(b)(1). By expanding the definition to apply to all violations of these statutes, the definition will also apply to some conduct prohibited by the enumerated statutes that involves broader conduct. For example, by expanding the definition to include all violations of 21 U.S.C. § 841, it would cover the conduct covered by 21 U.S.C. § 841(d), which prohibits certain conduct related to boobytraps on federal property.

The narrowest proposed definition also excludes conspiracy and attempt crimes under 21 U.S.C. § 846 and § 963. That would exclude a large number of significant federal drug trafficking convictions from qualifying for career offender status, resulting in incongruous situations where a defendant convicted of a relatively small distribution offense would have a qualifying conviction, but a large-scale trafficker convicted of participating in a broad international drug trafficking conspiracy would not have a qualifying conviction. Such results are inconsistent with Congress' goal of ensuring that repeat drug offenders receive more substantial sentences.[38] Removal of conspiracy and attempt crimes also would represent a significant about-face on the part of the Commission, which recently moved inchoate offenses from the guideline commentary to §4B1.2(d) when it adopted Amendment 822 (effective in 2023).

Even the broader list of statutes proposed by the Commission is too narrow and will create potential uncertainty and inconsistency. The Commission is proposing to add to the list in

[38] *Whyte*, 892 F.2d. at 1174 (internal citations omitted).

§ 994(h) only 21 U.S.C. § 843(a)(6), § 843(b), § 846, § 856, § 860, § 960, and § 963 (if the object of the § 846 or § 963 conspiracy or attempt was to commit an offense covered by this provision). That list excludes other significant drug trafficking offenses. For example, it excludes defendants convicted of operating a continuing criminal enterprise under 21 U.S.C. § 848. Although the proposal specifically lists § 860 (which provides for higher penalties for violations of § 841(a)(1) and § 856 that occur near schools and other specific locations), it does not list other similar provisions that provide for enhanced penalties for specific drug trafficking offenses, including 21 U.S.C. § 849 (drug offenses near truck stops or safety rest areas), 21 U.S.C. § 859 (distributing drugs to persons under 21), § 860a (manufacturing methamphetamine while children are present), and § 960a (drug trafficking offense in support of terrorism). Because these other statutes (like § 860) are premised on a violation of 21 U.S.C. § 841, their omission from the list may create uncertainty about whether they constitute qualifying offenses.

The proposal also would appear to exclude other significant drug offenses, including 21 U.S.C. § 858 (endangering human life while manufacturing a controlled substance) and 21 U.S.C. § 861 (employment of minors in drug operations). It further would exclude other offenses that have been found to be controlled substance offenses under the current definition, including RICO offenses under 18 U.S.C. 1962,[39] and Travel Act offenses under 18 U.S.C. § 1952.[40] All of these omissions would inappropriately narrow the definition of controlled substance offense to exclude significant drug trafficking crimes. Should the Commission elect to exclude state crimes, it should at least ensure that all felonies under Title 21 and all Title 18 offenses that involve drug trafficking qualify as controlled substance offenses.

3. Minimum Sentence Requirement

The Commission has proposed several options that would prevent prior convictions from qualifying as career offender predicates if they did not meet various threshold terms of imprisonment. The Department opposes the adoption of a minimum sentence length requirement but recommends that, if the Commission adopts one, it should exclude only one-point convictions under §4A1.1(c). That limitation also should be applied only to controlled substance offenses, not crimes of violence.

As an initial matter, the Department questions whether carving out large numbers of convicted drug traffickers or violent offenders from qualifying for career offender status is consistent with the governing congressional directive. In the language of § 994(h), Congress required the recidivist penalties to apply to individuals over 18 who had certain prior convictions. It did not suggest that convictions that fall within those parameters can or should be further cabined based upon the sentence imposed or served. As a result, the Department has concerns about whether any of the options proposed by the Commission are within the scope of its authority or consistent with congressional intent.

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[39] *United States v. Williams*, 898 F.3d 323, 333-34 (3d Cir. 2018).

[40] *United States v. Morelock*, 369 Fed. Appx. 681, 685-86 (6th Cir. 2010).

The Commission's proposed amendment does not provide a substantial explanation for curtailing the career offender guideline based upon the sentence served for the defendant's prior offenses. To the extent the Commission believes the proposal responds to a concern that a large number of defendants are found to be career offenders based upon insubstantial criminal histories, the Commission's own statistics suggest otherwise. The Commission's FY 2022 datafile, for example, estimates that approximately 87 percent of career offenders with prior drug trafficking convictions had "three point" convictions (meaning that that their prior sentences were over one year and one month, *see* §4A1.1(a)), and that approximately 18 percent of defendants' prior qualifying drug convictions involved "one point" sentences of less than 60 days, *see* §4A1.1(c).[41] Moreover, sentence length can be reduced for a variety of reasons, including overcrowding situations and cooperation with authorities. The mere fact that a prior sentence was not lengthy is not necessarily an indication that the defendant's prior criminal conduct was insubstantial.

Applying any sentencing duration limitations on qualifying state career offender convictions also could exacerbate intrastate and interstate sentencing disparities. For example, it is not unusual for local prosecutors or local judges within the same state to have differing views and practices regarding sentencing. Thus, the same conduct in one county could receive a prison sentence, but a probationary sentence in another. Additionally, courts in different parts of the country may have very different views about the appropriate sentences for drug traffickers. A 200-kilogram methamphetamine case may be viewed differently on the Southwest border than in New England. By focusing on the duration of the sentence imposed or served for a state conviction, the Commission could extend these sentencing disparities into the career offender realm, causing defendants with state convictions for similar conduct to receive differing career offender statuses merely because of the location where the prior state conviction arose. A fairer approach would be to focus on the fact of the underlying conviction itself without allowing career offender status to turn on variations in local sentencing practices. This keeps the focus simply on the defendant's ongoing recidivist conduct when determining career offender status.

Should the Commission choose to proceed with any of its proposals based upon the duration of prior sentences, the Department's view is that Option One is preferable to the others—but that it should be applied *only* to "controlled substance offenses," not the definition of "crime of violence."[42] Option One would exclude "one point" convictions under §4A1.1(c), which are convictions for which a defendant's prior sentence of imprisonment was less than 60 days. Although the duration of the sentence imposed is not always a clear representation of a defendant's culpability, Option One would exclude only those sentences that are especially short, ensuring that convictions that triggered an appreciable term of imprisonment continue to carry meaningful recidivist consequences under the Guidelines.

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[41] This data is drawn from the Sentencing Commission's FY2022 Datafile (USSCFY22) and 2022 Criminal History Datafile (CRIMHIST22NID).

[42] Any concerns about supposedly minor drug offenses triggering a guideline range that the Commission may view as severe in comparison to a defendant's previous terms of imprisonment are not applicable for crimes of violence. Rather, the Department believes it appropriate and consistent with congressional intent to treat recidivist offenders with convictions for crimes that were inherently or actually violent as career offenders, regardless of the particular sentences imposed for those prior violent crimes.

The proposals that would require a defendant to have been sentenced to a specific sentence (one/three/five years), or to a term of imprisonment satisfying §4A1.1(a), sets too high a bar and would exclude significant offenses. For example, according to the Commission's recent data analysis, even six percent of defendants convicted of murder and 14 percent of defendants convicted of a forcible sex offense in FY2022 were sentenced to less than six months of imprisonment on average.[43] Additionally, the suggested limits could preclude the application of the career offender provision to a defendant who received a reduced sentence because the defendant, despite having committed a serious offense, provided substantial assistance in a previous case. If that defendant then engaged in recidivist drug trafficking activity, the previous sentencing benefit would allow the defendant to avoid career offender status.

The Commission also seeks comment on whether, if it adopts a limitation tied to the sentence imposed, that provision should exclude convictions from the career offender definition when the defendant shows that he actually served less than a specified amount of time in prison. The Department opposes the proposed carveout. The Commission's data analysis again indicates that time actually served does not necessarily reflect the seriousness of the offender's previous crime or the need for recidivist punishment.[44] In some states, defendants may be released after serving only a fraction of their sentences, not because a court has reconsidered the severity of the offense, but for reasons unrelated to the defendant's crime or rehabilitation, such as overcrowding and budget issues. Moreover, determining time actually served can present difficulties of proof in many cases, based on variations in state practices and the availability of sometimes dated state records. These record reviews can be further complicated by such factors as indeterminate sentences, suspended sentences, pretrial credit calculations, sentence revocations, and parole practices. Such additional layers of complexity run counter to the goal of simplifying the sentencing process.

4. Resolution of Circuit Conflicts

The Department maintains that, not only should the career offender guideline continue to address state drug trafficking offenses, but the Commission should also take this opportunity to resolve several circuit conflicts regarding the application of the categorical approach in this area. As a general matter, in contrast to the situation involving crimes of violence, the categorical approach as applied to the definition of "controlled substance offense" has not been as troublesome. But several topics have produced unnecessary litigation and counterfactual results. The Department addressed these at greater length in its February 2023 comment letter, but in brief:

- Courts are divided over whether the term "controlled substance" is limited to drugs regulated by the federal Controlled Substances Act or instead may be defined by state law. The Commission should resolve the conflict in favor of the majority view that

[43] §4B1.1 Data Background, *supra*, Slide 26.

[44] *See* §4B1.1 Data Background, *supra*, Slide 30 (showing that, among individuals released from state custody in 2018, 2 percent of those convicted of murder and 11 percent of those convicted of rape or other sexual assault served less than six months on average).

the term applies to a controlled substance as defined by state law as well as federal law—an approach that reflects the longstanding language of §4B1.2 and avoids nonsensical results.[45]

- The Commission should amend the definition of "controlled substance offense" to make clear that the question whether a crime involved a "controlled substance" under a federal or state law should be assessed as of the time that the defendant committed the predicate offense. The Supreme Court recently reached that result in the context of the ACCA,[46] and the Commission should apply the same approach to the Guidelines.[47]

- The Commission should amend the career offender guideline to provide that an offense involving an "offer to sell" qualifies as a "controlled substance offense," thus aligning §4B1.2(b) with the definition of "drug trafficking offense" in the illegal-reentry guideline, §2L1.2 cmt. n.2.[48] In addition, the amendments supported above—*i.e.*, defining a "controlled substance" as one scheduled by either state or federal law, as of the time of the prior offense—should be added to application note 2 to §2L1.2, without otherwise changing that application note's definition of "drug trafficking offense."[49]

C. Consistency of Definitions in the Guidelines

The Commission proposes to change the current definitions of "controlled substance offense" and "crime of violence" in the career offender guideline but leave those current definitions in several other guidelines. We do not support inconsistent definitions of "controlled substance offense" and "crime of violence." First, those terms apply far more frequently outside the career offender context. Thus, the proposal fails to address the problems of the categorical approach in most cases. Second, having competing definitions of these terms introduces unnecessary complexity and confusion.[50]

The definitions of "crime of violence" and "controlled substance offense" apply to far more defendants sentenced under other guidelines as compared to defendants sentenced under

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[45] *See* 2023 DOJ Letter at 20-22.

[46] *Brown v. United States*, 602 U.S. 101 (2024).

[47] *See* 2023 DOJ Letter at 22.

[48] *See* 2023 DOJ Letter at 36-37.

[49] *See* 2023 DOJ Letter at 22.

[50] The Department here responds to the Commission's Issue for Comment No. 10. That passage also seeks comment on whether, if definitions are moved to other guidelines, they should appear in the guideline text rather than commentary. In the Department's view all substantive changes to a guideline should be incorporated in the text rather than an application note—as the Commission did last amendment cycle when moving the definition of "loss" in §2B1.1 from an application note to the text.

the career offender guideline. For example, according to Commission data for FY 2023, approximately three times as many offenders received an enhancement under the firearm provision (§2K2.1) for prior commission of a "crime of violence" or "controlled substance offense" than were subject to the career offender guideline.[51] In the Department's view, the frequency with which courts consider recidivist enhancements under other provisions makes it imperative to remedy the problems resulting from the categorical approach in all of its applications, not only in the career offender guideline.

One of the primary reasons to eliminate the categorical approach is to reduce complexity and unnecessary litigation. This proposal does the opposite. It introduces new, unclear definitions for the career offender guideline that will result in substantial new litigation, as discussed above. But it also retains the categorical approach in its most-frequent application, such that the Guidelines will continue to require the extensive litigation and absurd results that are the hallmarks of the categorical approach. As we have explained repeatedly,[52] the courts, litigants, and the public are best served by a single definition of these terms that applies throughout the Guidelines Manual. That approach best promotes ease of application and consistency.

We are aware that some references to the terms "controlled substances offense" and "crime of violence" in other guidelines are grounded in statutory directives different from those that apply to the career offender guideline. None of these directives, however, prevents the Commission from using an appropriate definition consistently across the Guidelines. Indeed, the Commission has generally recognized—correctly, in our view—the importance of consistency across guidelines definitions, even where different statutory directives apply. And we are not aware of any statutory directive that would preclude consistent application of the categorical *plus* conduct-based approach for which the Department has long advocated.

The statutory directive underpinning §2K2.1, for example, instructs the Commission to "appropriately" enhance penalties in cases in which an individual convicted under 18 U.S.C. § 922(g) has one or two prior convictions for a "violent felony" or a "serious drug offense," referencing terms used in the Armed Career Criminal Act (ACCA).[53] This directive requires that the enhancements in §2K2.1 for a "crime of violence" or "controlled substance offense" encompass any offense that would qualify as an ACCA "violent felony" or "serious drug offense." But it does not require that these terms be co-extensive with, let alone identical to, the ACCA definitions. To the contrary, the Commission has long defined the term "crime of violence" as used in §2K2.1 in ways that are both broader and narrower than the term "violent

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[51] Specifically, according to the Commission's *2023 Sourcebook of Federal Sentencing Statistics*, during FY 2023, approximately 4,017 defendants received higher base offense levels under §2K2.1(a)(1), (a)(2), (a)(3), or (a)(4)(A) based on prior convictions for crimes of violence or controlled substance offenses, while approximately 1,351 defendants were sentenced under §4B1.1.

[52] *See* 2023 DOJ Letter at 34; 2015 DOJ Letter at 4 ("[T]he Department supports a standardized definition of 'crime of violence' throughout the guidelines. We believe that standardization will reduce litigation and foster more consistent decision-making and more equal and just outcomes. We urge the Commission to adopt a single definition of 'crime of violence' in the guidelines.").

[53] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 110513, 108 Stat. 1796, 2019.

felony" under ACCA. The Guidelines definition of "crime of violence," for example, has included several enumerated offenses (including murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, and robbery) that are not part of the ACCA's enumerated offense clause, as well as the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)," an offense that is not listed as an ACCA violent felony. At the same time, the ACCA includes burglary, whereas the guidelines definition of a "crime of violence" does not.

In short, although congressional directives may limit to some degree the Commission's authority to define the relevant terms, those directives do not prevent the Commission from incorporating a sensible conduct-based approach throughout the Guidelines.

II. Firearms Offenses

A. Machinegun Conversion Devices (MCDs)

1. The Department Favors Option One

The Department thanks the Commission for publishing proposed amendments to address the emerging public safety threat posed by crimes involving machinegun conversion devices (MCDs). These devices, "which are easily manufactured,"[54] are designed to be inserted into semiautomatic firearms to convert that weapon into an illegal fully automatic machinegun.[55] By so doing, MCDs substantially increase a firearm's dangerousness. MCDs are cheap to make (often on a 3D-printer), easy to disguise, and difficult to regulate. As one court has explained, the added "dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it."[56] Federal law accordingly makes the possession of an unregistered MCD, even when not affixed to a firearm, a separate, stand-alone crime.[57]

As the Commission explains, its proposal responds to concerns—expressed by the Department, federal judges, and probation officers—that the Guidelines in their current form fail to reflect the gravity of offenses involving MCDs.[58] The problem arises because, although

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[54] *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022).

[55] Subject to few exceptions, machineguns are illegal to possess. 18 U.S.C. § 922(o).

[56] *Hixson*, 624 F. Supp. 3d at 940.

[57] *See* 18 U.S.C. § 922(o); 26 U.S.C. § 5861(d).

[58] *See* Scott A.C. Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 3 (July 15, 2024) ("2024 DOJ Annual Letter"), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=129; *Hixson*, 624 F. Supp. 3d at 933 (noting that "[t]he Guidelines do not include machine guns—including devices that convert semiautomatic weapons into fully automatic weapons—in the definition of "'firearms'"); July 12, 2024 Comment Letter of Probation Officers Advisory Group, at 7 (explaining that "there are numerous cases in which the possession of conversion devices (not connected to a firearm), is not accounted for within this guideline," and recommending that the Commission "revise the definition of a firearm or add a specific offense characteristic or language in the commentary to cover [MCDs]"),

MCDs qualify as firearms under the definition of that term in the National Firearms Act (NFA),[59] §2K2.1 as currently drafted incorporates the definition of "firearm" from a separate federal law, the Gun Control Act (GCA).[60] And unlike the NFA, the GCA does not include MCDs within its definition of the term "firearm." The consequence is that offense level enhancements tied to the word "firearm," such as common enhancements for the number of firearms possessed or exporting firearms, are inapplicable to MCDs.

The Commission's Public Data Briefing on MCDs confirms that the Guidelines are currently failing to reflect the seriousness of crimes involving MCDs. During FY 2023, approximately 8,013 defendants were sentenced under §2K2.1 for firearms offenses not involving MCDs, and these defendants were subject to an average minimum guideline range of 48 months.[61] At the same time, 380 defendants were sentenced under §2K2.1 for firearms offenses involving MCDs, and those defendants were subject to a nearly identical minimum guideline range of 50 months.[62]

The Commission has proposed two options for addressing this problematic gap in §2K2.1's coverage. Option One would amend the definition of "firearm" applicable to §2K2.1 to include any firearm described in 18 U.S.C. § 921(a)(3) (*i.e.*, the GCA definition of firearm) or 26 U.S.C. § 5845(a) (*i.e.*, the NFA definition of firearm). It would also move the definition of "firearm" from the commentary to the guideline itself in a newly created subsection. Option Two would apply the NFA definition of a firearm to several specific enhancements in §2K2.1(b) and the cross-reference in §2K2.1(c).

The Department believes that both options would be an improvement over the status quo. But consistent with the views expressed in our most recent annual report,[63] we favor Option One. That option is simpler, more straightforward, and more likely to avoid gaps in coverage going forward. We also see little risk that adopting Option One will cause problems in the application of subsections that are omitted from Option Two's coverage. For example, under Option Two, the NFA definition of "firearm" would *not* apply to §2K2.1(b)(2), which provides for a reduced offense level of 6 in certain situations where a defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection." A defendant convicted for MCD-related offenses would not be able to benefit from that provision, both because his possession will not have been "solely for lawful sporting purposes or collection" and because the provision *excludes*

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at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=200.

[59] 26 U.S.C. § 5845(b).

[60] 18 U.S.C. § 921(3).

[61] U.S. Sent'g Comm'n, Public Data Briefing, Proposed Amendment on Firearms (January 2025), at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Firearms-MCD.pdf

[62] *Id.*

[63] 2024 DOJ Annual Letter at 3.

defendants subject to enhanced base offense levels under §2K2.1(a)—and offenses involving MCDs trigger several of those enhanced base offense levels.[64]

2. Response to the Commission's Issues for Comment

The Commission has published several Issues for Comment concerning the proposed amendment. The Department addresses each of them in turn.

a. Issue for Comment No. 1 asks whether the proposed amendment appropriately addresses the concern that §2K2.1 insufficiently accounts for the dangers presented by MCDs and/or whether the Commission should address those concerns in another way. The Department believes that the proposed amendment is an appropriate response to the relevant dangers but is insufficient to address the challenge standing alone, in part because it does not account for the cumulative threat posed by the combination of MCDs and large-capacity magazines.

Subsection (a)(4)(B) of §2K2.1 currently provides an alternative base offense level of 20 when a defendant is convicted of being a felon in possession of a firearm and the offense involves *either* a semiautomatic firearm that is capable of accepting a large capacity magazine *or* a machinegun (which includes MCDs).[65] So, if the offense already involves a semiautomatic firearm with a large capacity magazine, the presence of an MCD will not make a difference in the base offense level. According to the Commission's Public Data Briefing, that would have been true in 65.5% (249) of the 380 firearms prosecutions involving MCDs in FY 2023, where the offense involved not only an MCD, but also a semiautomatic firearm with a large capacity magazine. In other words, for most felon-in-possession defendants, the base offense level of 20 would already be triggered by the large capacity magazine, and the presence of an MCD will have no effect on the guideline range and be unaccounted for in such cases.

In our July 15 annual letter, the Department requested that the Commission make each of these aggravators cumulative, rather than apply in the alternative, given the reality that so many criminal defendants have added *both* a large capacity magazine and an MCD to their semiautomatic firearm.[66] We believe that making such a change would more fully address the dangers presented by MCDs, because when a defendant possesses an MCD it makes that defendant's conduct more threatening to public safety. Indeed, a defendant with an MCD-equipped firearm is more likely also to use a high-capacity magazine because the benefit of a high rate of fire would be diminished if used in conjunction with a standard capacity magazine. Difficult to control even for experienced users, machineguns and firearms with MCDs are unlikely to be used for hunting or sport. That too speaks in favor of a cumulative enhancement.

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[64] U.S.S.G. §§2K2.1(a)(1), (a)(3), (a)(4)(B), (a)(5) (enhanced base offense levels for offenses involving firearms as defined under the NFA).

[65] §2K2.1(a)(4) ("20, if ... (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense...").

[66] 2024 DOJ Annual Letter at 3.

The Department's 2024 annual letter also identified the need to ensure that the drug trafficking guideline (§2D1.1) adequately reflects the dangers posed by MCDs in that context. The Commission has published a proposed amendment to §2D1.1 specifically to address the risks posed by an armed drug trafficker whose firearm is a machinegun or equipped with an MCD. While the Department will address this proposal at the appropriate time and appreciates this first step, we note here our concern that the proposal may not capture the cumulative problem of drug traffickers who arm themselves with machineguns *and* large capacity magazines—raising significant public safety concerns.[67]

b. Issue for Comment No. 2 asks whether it is appropriate for MCDs to be given the same weight as other firearms under the various enhancements in §2K2.1. The Department believes that such treatment is appropriate. We understand the contrary intuition—*viz.*, that because MCDs may look innocuous and are not themselves the object firing deadly projectiles, they do not warrant equivalent treatment to other items qualifying as firearms.

The Department does not share that view. As explained above, MCDs are themselves machineguns under federal law, and their unregistered transfer or possession is unlawful regardless of whether they are affixed to another gun. We therefore believe it wholly appropriate for the Guidelines to treat MCDs as full-fledged firearms for purposes of §2K2.1. That is especially true given the incremental harm caused by a defendant who traffics in devices that can render one or more additional weapons that much deadlier.

As a practical matter, moreover, we see the guideline ranges likely to result from treating MCDs as firearms under §2K2.1 as commensurate with the seriousness of the offense conduct. *United States v. Hixson*—the case cited above and in our 2024 annual letter—provides an illustrative example. The defendant there was convicted for possessing a firearm with an extended magazine and for possessing nine MCDs (Glock switches). If the MCDs were scored as firearms, the defendant's offense level would have increased from 17 to 25, and his guideline range from 30-37 months to 70-87 months.[68] A low-end sentence of 70 months is hardly disproportionate for a recidivist offender who possessed nine MCDs and showed willingness to traffic in them by selling four MCDs to a confidential informant.[69] Indeed, the district judge sentenced Hixson to 66 months as an upward variance from the range calculated without treating MCDs as firearms for purposes of §2K2.1(b).[70]

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[67] *See e.g.*, KETV NewsWatch 7, *Omaha Police Department, ATF Seeing Surge in Dangerous Machinegun Conversion Devices Kits That Make Handguns Fully Automatic* (Feb. 6, 2024), *available at* https://www.ketv.com/article/omaha-police-surge-machine-gun-conversion-kits-handguns-fully-automatic/46629040.

[68] *Hixson*, 624 F. Supp. 3d at 938.

[69] *Hixson*, 624 F. Supp. 3d at 940 ("This offense involved 9 Glock switches, some of which Mr. Hixson sold believing they would be resold to others.").

[70] *Hixson*, 624 F. Supp. 3d at 942.

c. Issue for Comment No. 3 asks how MCDs should be factored when calculating the number of firearms for purposes of §2K2.1(b)(1) and (b)(5)(C),[71] and whether the calculation should depend on whether the MCD was affixed to another firearm. Our answer is largely the same as for the previous issue: each MCD should count as a firearm, such that a gun equipped with an MCD should count as two firearms. The reasons for that treatment are straightforward. Each MCD *is* a firearm under the NFA and the "machinegun" definition in 18 U.S.C. § 921(a)(23); each MCD converts a firearm into a fully automatic machinegun; and a fully automatic machinegun is simply more dangerous than a firearm that does not fire automatically. Treating each MCD as a firearm gives each MCD its intended statutory weight; in contrast, failing to treat each MCD as a firearm results in the seriousness of the defendant's conduct not being appropriately reflected in the defendant's guideline range.

We do not think MCDs should be treated differently based on whether they are affixed to a firearm. The Commission's Public Data Briefing shows that 22.1% of the 380 defendants whose offense involved an MCD during FY 2023 involved a standalone MCD, 13.4% involved both affixed and standalone MCDs, and 64.2% involved MCDs affixed to a firearm. In our assessment, these numbers may be interesting descriptively, but they do not change the fact that an MCD easily transforms an ordinary firearm into a much more lethal and dangerous device. Beyond that, we do not view the two types of offense conduct as necessarily differing in seriousness.

Take, for example, two scenarios, one involving five MCDs affixed to five firearms and the other involving ten standalone MCDs in a small bag. The five firearms with attached MCDs are ready to shoot right now; on the other hand, they are bulky and may set off metal detectors. The ten MCDs in the bag are more easily concealed due to their size, will likely not set off a metal detector, and arguably enable ten different criminals to commit further crimes. Furthermore, treating unaffixed MCDs differently than affixed MCDs would invariably result in lower guideline ranges for MCD traffickers than for their customers who affix an MCD to a firearm. It is not uncommon for MCD traffickers to distribute hundreds if not thousands of MCDs, each of which presents a significant danger to the community at large.[72] Treating unaffixed MCDs—often marketed disguised as something else—as anything other than

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[71] §2K2.1(b)(5)(C) applies when the defendant "transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms," *inter alia*, by a criminal or for criminal use.

[72] *See, e.g.*, *YouTuber And Auto Key Card Manufacturer Sentenced To Five Years In Prison For Transferring Unregistered Machinegun Conversion Devices*, U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF FLA. (Sept. 8, 2023) (conspiracy involved at least 6,600 individual lightning links, which can be dropped into an AR-15 to convert it to a fully automatic machinegun), https://www.justice.gov/usao-mdfl/pr/youtuber-and-auto-key-card-manufacturer-sentenced-five-years-prison-transferring; *Alabama Man Sentenced To Ten Years In Prison For Transferring Machinegun Conversion Devices And Theft Of Government Funds*, U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF FLA. (Oct. 6, 2023) (search warrant resulted in 111 3D-printed auto sears, 11 silencers, and three 3D printers), https://www.justice.gov/usao-mdfl/pr/alabama-man-sentenced-ten-years-prison-transferring-machinegun-conversion-devices-and; *Two Northern Kentucky Men Sentenced for Role in Conspiracy to Illegally Distribute Firearms*, U.S. ATTORNEY'S OFFICE, EASTERN DISTRICT OF KY. (May 20, 2024) (conspiracy involved MCDs and over 100 firearms through straw purchasers), https://www.justice.gov/usao-edky/pr/two-northern-kentucky-men-sentenced-role-conspiracy-illegally-distribute-firearms.

individual firearms would result in these traffickers receiving sentences far lighter than their conduct would otherwise merit.[73]

Finally, we believe that properly accounting for MCDs under §2K2.1(b)(5) is especially important in light of recent legislative action. In 2023, the Commission amended §2K2.1(b)(5) in response to a congressional directive included in § 12004(a)(5) of the Bipartisan Safer Communities Act, which required the Commission to provide increased penalties for defendants convicted of offenses involving the trafficking of firearms.[74] Because MCDs are often unaffixed when defendants are creating, transporting, or trafficking those devices, a proposal that treats MCDs as firearms only when they are affixed to *other* firearms would understate the seriousness of activities akin to conduct that the Commission recently recognized to be highly culpable—namely, supplying other individuals with highly dangerous weapons.[75]

d. In Issue for Comment No. 4, the Commission asks whether the proposed change should apply to all the enhancements in §2K2.1(b)(1) and (c) that currently use the GCA definition of firearm or whether one or more of the provisions should be excepted. We have already addressed treatment of MCDs under subsection (b)(1), and our view is that the change should apply to all the other listed provisions as well.

Under the first of those (§2K2.1(b)(4)), four levels would be added in certain scenarios where the offense involves one or more MCDs that are stolen, have serial numbers modified so as to render them illegible or unrecognizable to the unaided eye, or lack a serial number entirely. The issue for comment focuses on whether, because MCDs involved in federal crimes are for the most part privately made and not marked with a serial number, the enhancement would apply in nearly every case under §2K2.1(b)(4)(B)(ii).

In part because of the *mens rea* requirement in §2K2.1(b)(4)(B)(ii), it is not clear whether the enhancement would actually apply in every MCD case, as a practical matter. But even if it did, that would be no reason to carve out that enhancement. As explained above, the possession of an MCD is generally prohibited under 18 U.S.C. § 922(o), even when it is unaffixed. And the

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[73] *See, e.g., YouTuber And Auto Key Card Manufacturer Sentenced To Five Years In Prison For Transferring Unregistered Machinegun Conversion Devices*, U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF FLA. (Sept. 8, 2023) (YouTuber sold over 6,000 MCDs etched into metal "Auto Key Cards" marketed various ways as a "pen holder," a "novelty," and a "political sculpture); *see also* U.S. Dept. of Justice, ATF Letter to Sen. Grassley, at 3 (Jan. 17, 2025) ("Chinese and other foreign-based companies utilize deceptive marketing practices, such as selling the MCDs as "dog tags" or "toy car kits" to avoid detection), ATF to Grassley - Chinese Switches.

[74] Pub. L. No. 117-159, § 12004(a)(5) ("the United States Sentencing Commission shall review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses.").

[75] *Cf.* U.S.S.G., App. C., Amend. 819 (explaining that 2023 amendments to §2K2.1(b)(5) addressed the heightened culpability of offenders "'upstream' in the gun trafficking pipeline," whose "conduct contributes to the illegal flow of firearms").

transfer of an unregistered MCD is a separate offense under 26 U.S.C. § 5861(e), punishable by up to ten years' imprisonment.[76] It is perfectly appropriate that the Guidelines include an enhancement for conduct that Congress has deemed to be an offense in and of itself.

Furthermore, the risk that enhancements under §2K2.1(b)(4) and other provisions will yield disproportionately high guideline ranges is reduced because, with one limited exception, the Guidelines cap at level 29 "[t]he cumulative offense level determined from the application of subsections (b)(1) through (b)(4)." Following a timely guilty plea, the offense level would drop to 26, which results in a guideline range of 63-73 months for a defendant in Criminal History Category I. A defendant with zero criminal history points would benefit from an additional two-level reduction under §4C1.1, resulting in a guideline range of 51-63 months. As noted above, such a range is hardly excessive for a defendant possessing or trafficking in one or more illegal devices specifically designed to convert a weapon into a machinegun. Nor is the result too severe when viewed in light of the 15-year maximum sentence provided by the Bipartisan Safer Communities Act for convictions under § 922(g) and § 933(b), and, as noted above, given the separate offense of transferring of an unregistered MCD under 26 U.S.C. § 5861(e), punishable by up to 10 years of imprisonment.

The Commission's proposed change would be equally sensible as applied to the remaining enhancements listed in the Issue for Comment. Section 2K2.1(b)(5) applies when a defendant provides a firearm to certain prohibited persons, including a person with prior convictions for crimes of violence and drug trafficking, a person who intends to commit a crime with the firearm, or a person who received such a firearm as a result of inducing such criminal conduct. Where the offense conduct involves an MCD rather than or in addition to a standard firearm, it is hard to see it as any less culpable, given the increased threat of injury and death made possible by the MCD.

As for subsection (b)(6)—which would apply to illegally exporting MCDs outside of the country—that conduct is no less culpable than exporting firearms limited to the GCA definition. Similarly, using an MCD in connection with another felony offense, or knowing that it would be used in connection with another felony offense, is equally, if not more culpable than such conduct limited to firearms as defined in 18 U.S.C. § 921(a)(3).

We also think it relevant that the enhancements at §2K2.1(b)(5)(B) and (C) and (b)(6) apply to transferring both firearms *and* ammunition. MCDs are, at a minimum, comparable to ammunition in the Guidelines scheme. If the Commission is concerned that MCDs in and of themselves are not capable of causing harm, the same is true of ammunition: unless that ammunition accompanies a gun or makes its way to someone with a gun, it is merely a potentially dangerous object. Likewise, while an MCD may be innocuous standing alone, it is deadly when added to a loaded gun for which it has been designed.

As for subsection (b)(7), it provides that, where a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, the sentencing court must increase the offense level for the substantive offense. This provision is rarely applied in its

[76] 26 U.S.C. § 5871. We note as well that serial number marking requirements apply to NFA firearms, and in fact, apply more broadly than under the GCA. *See* 26 U.S.C. § 5842.

current form—in FY 2023, for example, courts applied it to only four defendants, amounting to less than 0.1% percent of all those sentenced under §2K2.1.[77] But we see no reason not to apply the provision when the crime that the defendant sought to conceal via the recordkeeping violation involved MCDs.

Lastly, as concerns the cross reference under subsection (c), the fact that the defendant used an MCD to commit an offense associated with a higher offense level (that is, a more serious offense) should not preclude the defendant from being sentenced under §2X1.1 (attempt, conspiracy, solicitation) with reference to the guideline for that more serious offense, as is already the case for firearms defined under the GCA. And if the defendant used an MCD to commit another offense and death resulted, the most analogous homicide guideline should apply, just as it would if the defendant used a firearm defined under 18 U.S.C. § 921(a)(3) to commit another offense and death resulted.

e. Issue for Comment No. 5 asks whether there are any weapons that meet the NFA definition of firearm but not the GCA definition that should not be treated as firearms for purposes of §2K2.1. Our answer is no. Apart from MCDs, the number of weapons falling into this category appears to be extremely small. Moreover, regardless of the technical characteristics that may bring a device or component into one of the statutory definitions but not the other, the device must first be a "weapon" or a component thereof to fall under the NFA.[78] While the term "weapon" is not defined in the statute, the term's plain meaning connotes an instrument of offensive or defensive combat.[79] Where a defendant is charged with a weapons offense under the NFA, the Department sees no valid reason why a defendant should receive a sentencing benefit because the weapon is not a firearm under the GCA. Indeed, §2K2.1 is the guideline for offenses under the NFA, and those provisions should be applied with equal weight to NFA offenses.

f. Finally, noting that Option One would move the definition of "firearm" from the Guidelines commentary to the text, the Commission asks in Issue for Comment No. 6 whether it should move other definitions to the text to ensure consistent application. As stated above, the Department believes that it is generally prudent in light of recent case law to include definitional terms in the Guidelines text rather than the commentary. With respect to §2K2.1 in particular, Application Notes 1, 2, and 3 all contain definitional provisions that likely can be incorporated into the text without causing confusion, as does Application Note 13(A). The Department takes no position at this time on whether other provisions in the commentary, such as those addressing application of particular subsections in §2K2.1, could readily be moved to the text.

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[77] U.S. Sent. Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2023*, at 132, at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch2_Guideline_FY23.pdf.

[78] *See e.g.*, 26 U.S.C. §§ 5845(b) ("The term 'machinegun' means ***any weapon*** ..."); § 5845(e) ("The term 'any other weapon' means "any weapon or device capable of being concealed on a person from which a shot can be discharged....").

[79] *See e.g., Bond v. United States*, 572 U.S. 844, 861 (2014) ("[T]he use of something as a 'weapon' typically connotes 'an instrument of offensive or defensive combat' ... or 'an instrument of attack or defense in combat, as a gun, missile, or sword.") (internal citations omitted).

B. Mens Rea *Requirement*

Part B of the proposed amendment would establish a *mens rea* requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers. Although the Department would support predicating these enhancements on a rebuttable presumption of knowledge, it opposes the current proposal. The proposed amendment presents substantial evidentiary challenges that would critically undercut the public-safety function of these common enhancements and fail to account for the seriousness of the criminal conduct involved.[80]

These enhancements, as currently written, serve an important public-safety function that is independent of the defendant's *mens rea*. Congress imposed serialization requirements on manufacturers and importers of firearms "to assist law enforcement authorities in investigating serious crimes."[81] Serial numbers allow "law enforcement to determine where, by whom, or when" a firearm was manufactured and "to whom [it was] sold or otherwise transferred."[82] "When police officers retrieve a gun at a crime scene, they can trace it to the buyer and consider him as a suspect."[83] But "[w]hen a firearm is stolen, determining this chain is difficult and when serial numbers are obliterated, it is virtually impossible. Therefore, stolen or altered firearms in the hands of people recognized as irresponsible pose great dangers[.]"[84] The enhancements at §2K2.1(b)(4)(A) and (B)(i) thus "reflect[ ] both the increased likelihood that the firearm will be used in the commission of a crime and the difficulty in tracing firearms with altered or obliterated serial numbers."[85]

The evidentiary burden imposed by these new *mens rea* requirements would be substantial, and indeed, most often insurmountable. Because stolen firearms or ones with altered serial numbers may circulate in criminal channels for years, the government rarely has evidence tying the theft or alteration to the defendant who is charged with trafficking or possessing the firearm in question. Nor does the government typically have evidence of the communications surrounding the acquisition of such firearm, where the gun's features may be discussed. Accordingly, without a specific admission from the defendant, proving the defendant's knowledge that a particular firearm was previously stolen or its serial number was modified will be extremely difficult in practice. Indeed, criminal actors may deliberately decline to inquire into the provenance of a firearm when acquiring it, and firearm theft is a common means of supplying firearms to prohibited persons and criminals. Defendants being sentenced under

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[80] Recent data shows that these enhancements are present in approximately one third of cases sentenced under §2K2.1. *See* U.S. Sent. Comm'n, *What Do Federal Firearms Offenses Really Look Like?*, at 9 (2022).

[81] *Abramski v. United States*, 573 U.S. 169, 180 (2014).

[82] 87 Fed. Reg. 24,652, 24,652 (Apr. 26, 2022).

[83] *Abramski*, 573 U.S. at 182.

[84] *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992).

[85] *What Do Federal Firearms Offenses Really Look Like?*, *supra*, at 12.

§2K2.1 for firearms offenses should not receive a benefit for their ignorance, and putting the burden on the government to prove a defendant's *mens rea*—even with a willful-blindness backstop—will often result in a failure to account for the seriousness of the defendant's conduct.

In addition to these general evidentiary challenges, the difficulty will be heightened in the serial-number context specifically. Often the best available evidence that a defendant knew of serial number's condition will be obviousness of the alteration. By superimposing a *mens rea* requirement onto the naked-eye test now present in §2K2.1(b)(4)(B)(i), the Commission may unintentionally suggest that such obviousness is irrelevant or insufficient. Were the courts to adopt this interpretation—undoubtedly after much litigation—the serial-number enhancement will rarely be seen in practice.

In short, the Department expects that if the proposed amendment were adopted, the evidentiary difficulties would cause applications of these enhancements to plummet. Were that to happen, these enhancements would cease to promote public safety, leaving the Guidelines without meaningful recognition of the societal harms caused by the trafficking and possession of stolen firearms and firearms with altered or obliterated serial numbers.

On the other side of the ledger, the Commission has not identified any compelling need for a stricter *mens rea*. These enhancements have been present without a *mens rea* since the inception of the Guidelines Manual in 1987, and they have not, to the Department's knowledge, engendered substantial judicial criticism. Indeed, sentencing data indicates that downward variances are modest in cases where these enhancements are present. In 2022, for example, the Commission reported that the average sentence imposed under §2K2.1 where these enhancements were present was 55 months, compared to a guideline minimum of 61 months, which suggests that sentencing judges do not, by and large, find the guideline ranges yielded by these enhancements to be substantially too high.[86] In addition, last year's "naked eye" amendment already ameliorates the potential unfairness of applying the serial-number enhancement when the serial number's modification is not obvious or significant.

To the extent, however, that the Commission believes a *mens rea* requirement is necessary, we recommend a rebuttable presumption be included. The Department recommended a rebuttable presumption when the Commission first proposed an enhancement for unserialized firearms in 2023,[87] and we continue to believe that it appropriately balances concerns of fairness with the reality that evidence of a defendant's knowledge is most often found with the defendant, not the government. Indeed, such a presumption would balance those interests across *all* of the enhancements in §2K2.1(b)(4), including the one for unserialized firearms. The rebuttable presumption would also reflect the common judicial practice of assigning the burden of proving

[86] *What Do Federal Firearms Offenses Really Look Like?*, *supra*, at 32.

[87] 2023 DOJ Letter at 7.

a matter to the party with superior access to information concerning, or particular knowledge of, that matter.[88]

The Department would thus recommend the same language that it recommended in its February 2023 comment letter. As in that letter, the Department recommends that the following language apply to all of the enhancements in §2K2.1(b)(4):

> *"Subsection (b)(4) applies unless the defendant establishes by a preponderance of the evidence that he or she did not know, and had no reason to believe, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number [serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye]."*[89]

Such an approach would have the advantage of consistency by creating one *mens rea* across the three enhancements in subsection (b)(4). But should the Commission not wish to revisit the *mens rea* chosen when the unserialized-firearm provision was added in 2023, it should (at most) apply a rebuttable presumption to the stolen-firearm and serial-number provisions.

III. Circuit Conflicts

A. Definition of "Physically Restrained"

The Commission proposes three options to resolve a circuit conflict arising under the primary robbery guideline (§2B3.1), which provides for a two-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." The term "physically restrained" is defined—in an application note applicable across the Guidelines—as "the forcible restraint of the victim such as being tied, bound, or locked up."[90]

The Department supports Option One, which would amend the language of § 2B3.1(b)(4)(B) to make clear that "physical[] restrain[t]" to facilitate the commission of a robbery or to facilitate escape therefrom is not limited to physical contact or confinement. Rather, this enhancement would apply when a defendant restricts a victim's movements or "creates circumstances allowing [the victim] no alternative but compliance."[91] That would include holding a victim at gunpoint or blocking a victim's path of escape.

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[88] *See, e.g., Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"); 2 McCormick on Evidence § 337 (8th ed. 2022) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

[89] 2023 DOJ Letter at 7, adopted to current §2K2.1 language.

[90] U.S.S.G. §1B1.1 n.1(L).

[91] *United States v. Deleon*, 116 F.4th 1260, 1264 (11th Cir. 2024).

Section 2B3.1(b)(4)(B) provides for a two-level increase "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." Application Note 1 cross references the commentary to §1B1.1, which (in turn) defines "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up."[92] The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim's movement by brandishing a firearm triggers this enhancement.[93] In *United States v. Howell*, for example, the Sixth Circuit applied this enhancement when the defendant "ordered [the victim] at gunpoint to lie down on the floor."[94] The court reasoned that because the defendant "prevented [the victim] from continuing to move about," the victim was "physically restrained."[95] Importantly, "keeping someone from doing something is inherent within the concept of restraint."[96] As a result, the First, Fourth, Sixth, Tenth, and Eleventh Circuits have properly applied this enhancement "'when the defendant uses force, including force by gun point, to impede others from interfering with commission of the offense.'"[97]

The Department believes that the First, Fourth, Sixth, Tenth, and Eleventh Circuits have correctly interpreted the provision as written, and Option One clarifies as much. The current definition in §1B1.1(L) includes the qualifier "such as," which necessarily provides a list of examples that is "merely illustrative, . . . not exhaustive."[98] To conclude otherwise would read out the Commission's inclusion of the qualifying clause.[99]

Option One is also consistent with the purpose and structure of the enhancements in the robbery guideline. In terms of purpose, the majority view among the circuits properly accounts for the aggravating conduct of affirmatively inhibiting a victim's movements. As a practical matter, a victim who is ordered to the ground and required to remain there at gunpoint is no less physically restricted from movement than a victim whose wrists are tied together. As for structure, the robbery guideline and several others feature a two-point enhancement for physically restraining individuals to facilitate commission of the offense and a four-point enhancement for "abducti[ng]" someone for those purposes—a term defined to cover a victim

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[92] U.S.S.G. §1B1.1 n.1(L).

[93] *United States v. Wallace*, 461 F.3d 15, 34-35 (1st Cir. 2006); *United States v. Dimache*, 665 F.3d 603, 608 (4th Cir. 2011); *United States v. Howell*, 17 F.4th 673, 692 (6th Cir. 2021); *United States v. Miera*, 539 F.3d 1232, 1235-36 (10th Cir. 2008); *Deleon*, 116 F.4th at 1261-62.

[94] *Howell*, 17 F.4th at 692.

[95] *Id.*

[96] *Miera*, 539 F.3d at 1234.

[97] *See, e.g., id.* (quoting *United States v. Pearson*, 211 F.3d 524, 525-26 (10th Cir. 2000)).

[98] *United States v. DeLuca*, 137 F.3d 24, 39 (1st Cir. 1998).

[99] *See United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("By use of the words 'such as,' it is apparent that 'being tied, bound, or locked up' are listed by way of example rather than limitation.").

being "forced to accompany an offender to a different location."[100] The Guidelines thus provide graduated punishment depending on whether victims are forced against their will to stay at the robbery location or forced to go somewhere else with the offender. It is fully consistent with that tiered structure to apply the two-point enhancement for physical restraint of a person to actions that keep victims in the original location, whether through means that involve psychological coercion or contact with their bodies.

Option Two, which the Department opposes, generally adopts the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits. Those courts have required physical contact with a victim and have generally concluded that the restraint must entail "something more than a psychological restraint."[101] The Department believes that this approach is overly restrictive.

Consider two potential bank robbery scenarios:

In the first scenario, the defendant enters a bank, retrieves a firearm from his waistband, and points the firearm in the air. Upon seeing the defendant, all of the bank's customers drop to the floor and do not move as the defendant interacts with the bank teller. Throughout the entire interaction between the defendant and the bank teller, every occupant of the bank is frozen and immobilized out of a generalized fear.

In the second scenario, the defendant enters a bank, retrieves a firearm from his waistband, and points the firearm at the bank's customers. He walks directly to the customers and orders them to the ground at gunpoint. He tells them not to move and periodically points his firearm at the customers throughout his interactions with the bank teller to ensure their immobility.

These two scenarios are substantially different. The defendant's affirmative actions to restrict the customers' movements in the second scenario warrant an enhancement under § 2B3.1(b)(4)(B), and Option One appropriately accounts for this conduct. Option Two, however, draws no distinction between these two scenarios and fails to account for the aggravating conduct toward the victim bank customers.

If the Commission is not inclined to adopt Option One, then the Department recommends the hybrid alternative Option Three, which would provide for a two-level enhancement for scenarios involving restraint "through physical contact or confinement" and a one-level enhancement for offenses in which "any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape." At least under this option, the aggravating conduct of restricting a victim's movement—even without direct physical contact—would be accounted for in the guideline calculation in some respect.

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[100] U.S.S.G. §1B1.1 n.1(A).

[101] *United States v. Bell*, 947 F.3d 49, 57 (3d Cir. 2020).

As a final point, the Commission observes that other guidelines use the term "physically restrained" and asks whether (i) any amendments made to that term as used in §2B3.1 should be applied to those particular provisions and/or (ii) whether Application Note 1(L) to §1B1.1 should be revised so that the amended language reaches every cross-referenced provision. The Department believes that amending Application Note 1(L) to §1B1.1 may best serve the goals of simplicity and consistency across the Guidelines. At a minimum, though, any clarifying language adopted should be applied to §2B3.2(b)(5)(B) (Extortion by Force or Threat of Injury or Serious Damage) and §2E2.1(b)(3)(B) (Collecting an Extension of Credit by Extortionate Means). Those guidelines have tiered enhancement provisions that mirror the one in the robbery guideline, and consistency—along with the similar offense conduct covered by those guidelines—favors applying the same definitions across those provisions.

B. Definition of "Intervening Arrest"

In Part B of the amendment, the Commission proposes to define "intervening arrest" in U.S.S.G. § 4A1.2 to require "a formal, custodial arrest." The proposed amendment also notes that an intervening arrest "is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." It also clarifies that a "noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest." The Department does not object to this proposed amendment.

IV. Simplification of Three-Step Process

Last year, the Commission proposed simplifying the Guidelines by converting the existing three-step process set forth in the Manual's application instructions (§ 1B1.1) into a two-step process. In broad strokes, the proposed amendment would have deleted most departures from the Guidelines Manual and established a new Chapter Six to address the sentencing court's consideration of the factors set forth in 18 U.S.C. § 3553(a).

The Department explained in response to that proposal that, although we "support[ed] "simplification of the Guidelines, . . . we think it must be done through a meticulous, deliberative, and fully researched process to ensure both its legality and effectiveness."[102] We expressed concerns that the amendment as proposed could conflict with federal statutes and the Federal Rules of Criminal Procedure. We focused in particular on the proposed Chapter Six, which sought to limit and shape judges' sentencing discretion in a manner that (in our view) improperly intruded on sentencing judges' authority.

The Commission's current proposal similarly seeks to replace the three-step process with a two-step process by removing the departure provisions from the Guidelines Manual, but this time without a new Chapter Six addressing the district court's exercise of its sentencing discretion. The Department appreciates this change, which better reflects the relationship between the Guidelines and courts' authority under 18 U.S.C. § 3553(a) in the wake of *United*

[102] Letter from Jonathan J. Wroblewski to Hon. Carlton Reeves, Chair, at 10-15 (Feb. 22, 2024) ("Feb. 2024 DOJ Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=55.

States v. Booker, 542 U.S. 220 (2005). The move toward a two-step process also reflects the reality on the ground. The Commission's simplification data,[103] as well as stakeholder views expressed at the Commission's March 2024 hearings,[104] confirm that courts use departures far less often than variances and that many judges simply do not consider departures at all. Given that reality, the Department does not oppose the adoption of a two-step process and, to the extent permitted by law, the elimination of departure provisions needed to make that change.

At the same time, despite departures being applied in a relatively small percentage of cases (7.4% in FY 2022), the absolute number of defendants who received departures (4,725) is meaningful.[105] As reflected in the *2022 Sourcebook of Federal Sentencing Statistics*, that number is greater than the number of offenders sentenced in each of the First, Second, Third, Fourth, and Seventh Circuits.[106] And departures may play an especially important role in prosecutions for crimes that are less frequently charged or that arise under statutes raising particular complexities.[107] In such cases, the parties may look to departure provisions in structuring their plea agreements, and sentencing courts—having less experience applying the § 3553(a) factors to the factual scenario before them—may welcome the structure afforded by departure provisions in deciding whether a sentence outside the advisory range is warranted and, if so, to what extent.

In light of the departure provisions' continued utility to at least some litigants and judges, as well as the accumulated wisdom reflected in those provisions, the Department believes it of vital importance to preserve the provisions in a readily accessible form. The Commission's third Issue for Comment suggests that this could be in the form of a new Appendix to the Guidelines Manual. The Department supports that suggestion. Appendix C to the Guidelines Manual and its Supplement already contain a historical record of the more than 800 amendments made to the Guidelines and the reasons for each amendment, providing a valuable resource to judges and litigants when disputes arise over the interpretation of a guideline. We believe that an Appendix compiling departure provisions could serve a similarly important end. And, in response to the Commission's Issue for Comment No. 4, we also believe that such a compendium could contain the background information accompanying some departures that the Commission had previously determined to be relevant to the sentencing court's consideration.

There remains the question—raised in Issue for Comment No. 2—of whether the proposed amendment is consistent with the Commission's statutory authority or would conflict with any congressional directive. The Department previously expressed concern that the

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[103] 2024 Simplification Data, https://www.ussc.gov/education/backgrounders/2024-simplification-data.

[104] *Transcript of Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines*, at 217-19 (March 6, 2024) (Judge Altman), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/transcript_20240306.pdf.

[105] 2024 Simplification Data, https://www.ussc.gov/education/backgrounders/2024-simplification-data.

[106] 2022 Sourcebook of Federal Sentencing Statistics, at 35, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

[107] *See, e.g.*, §2Q1.2 cmt. nn.4-9 (providing for multiple departures under guideline applicable to certain environmental crimes); §2Q1.3 cmt. nn.3-8 (same).

Commission had not grappled with pertinent language in the PROTECT Act,[108] which amended the Guidelines addressing departures and below-guideline sentences for sexual offenses and crimes against children.[109] Other stakeholders responded that Congress appears to have limited the Commission's authority to amend the Guidelines provisions added or addressed in the PROTECT Act only through a particular date—May 1, 2005.[110] If the Commission agrees with that reading, then the PROTECT Act would no longer pose an absolute bar to the deletion of Chapter 5 departure provisions that Congress added or amended as part of that legislation.

We remain concerned, however, that the simplification amendment fails to comply with other congressional directives. Specifically, on several occasions, Congress has instructed the Commission to ensure that appropriate punishments are imposed for particular types of offenses, and the Commission has responded by creating a departure.[111] The proposed amendment, however, would eliminate these departures without introducing some other means of implementing these directives. If the Commission chooses to eliminate departures, we urge that it take the necessary steps to continue to implement these and other congressional directives.

Finally, the Department previously observed that the Commission's simplification proposal raised "questions related to the interplay of the Guidelines with federal statutes and rules of procedure that specifically reference departures," such as 18 U.S.C. § 3742 and Federal Rules of Criminal Procedure 11 and 32.[112] We do not suggest that these provisions, which were enacted at a time when the Guidelines were mandatory, preclude the Commission from eliminating departures in the wake of *Booker* and *Pepper v. United States*.[113] But if the Commission moves forward with the simplification amendment, it may wish to suggest to

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[108] Pub. L. No. 108-21, § 401(b), 117 Stat. 650 (2003).

[109] Feb. 2024 DOJ Comment Letter at 11-12.

[110] Federal Public and Community Defenders Comment on Simplification of the Three-Step Process, at 21 (Feb. 22, 2024), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=165; *see also United States v. Schnepper*, 302 F. Supp. 2d 1170, 1181 (D. Haw. 2004) (stating that, in § 401(j)(2) of the PROTECT Act, Congress "provide[d] that the Commission may not add a new ground for departure or take any action that is inconsistent with the limitations expressed in § 401(b) [of the Act] on or before May 1, 2005").

[111] *See, e.g.*, §5K2.24 (departure provision implementing the "direction" to the Commission in § 1191 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 110 Stat. 2960); § 2X7.2 cmt. n.1 (departure provision added to implement § 103 of the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296).

[112] Feb. 2024 DOJ Comment Letter at 12 & n.35.

[113] 562 U.S. 476 (2011) (invalidating 18 U.S.C. § 3742(g)(2), which restricts the discretion of a district court on remand by precluding the court from imposing a sentence outside the Guidelines range except upon a "ground of departure" that was expressly relied upon in the prior sentencing and upheld on appeal).

Congress and the Criminal Rules Committee that they adopt conforming amendments to those provisions to reflect the elimination of departures from the sentencing process.[114]

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues throughout the amendment year.

Sincerely,

Scott Meisler

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cc: Commissioners
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[114] *Cf.* 28 U.S.C. § 995(a)(20) (authorizing the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy").