United States Sentencing Commission Public Meeting Minutes
December 19, 2024

Chair Carlton W. Reeves called the meeting to order at 2:05 p.m. in Suite 2–500, One Columbus Circle, N.E., Washington, D.C., 20002.

The following Commissioners were present:

- Carlton W. Reeves, Chair
- Laura E. Mate, Vice Chair
- Claire Murray, Vice Chair
- Luis Felipe Restrepo, Vice Chair
- Claria Horn Boom, Commissioner
- John Gleeson, Commissioner
- Candice C. Wong, Commissioner
- Scott A.C. Meisler, Commissioner Ex Officio

The following Commissioner was not present:

- Patricia K. Cushwa, Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen C. Grilli, General Counsel

Chair Reeves welcomed the public to the Commission's public meeting, whether they were attending in-person or watching via the Commission's livestream broadcast.

Chair Reeves introduced his fellow commissioners. Sitting to his right were Vice Chair Claire Murray, Commissioner Candice Wong, and Commissioner John Gleeson. Sitting to his left were Vice Chair Luis Felipe Restrepo, Vice Chair Laura Mate, Commissioner Claria Horn Boom, and ex-officio Scott Meisler.

Chair Reeves stated that members of Commission staff were also attending, some of whom were in the room but most of whom were not because the agency is full of dedicated people, all of whom could not fit in the room. He recounted how staff did the research, drafted the priorities, and set up the meeting room to help the Commission fulfill its statutory obligations and duties.

Chair Reeves noted that the first item of business will be to adopt the August 8, 2024, public meeting minutes. However, before that, he recounted that the blue and white colors of the 2024 Guidelines Manual were the colors of his alma mater, Jackson State University. The Chair congratulated Jackson State University and Coach T.C. Taylor, for being the 2024 HBCU Football Division 1 National Champions. Chair Reeves noted how it was not often that he had the chance to talk about Jackson State. He also announced that Jackson State University's

marching band, the Sonic Boom of the South, would be participating in the Tournament of Roses Parade on January 1, 2025, and he was very proud that they would do so.

Chair Reeves announced that the first item of business was a motion to adopt the August 8, 2024, public meeting minutes. Vice Chair Restrepo moved to adopt the minutes, with Vice Chair Murray seconding. Chair Reeves called for discussion on the motion. Hearing no discussion, Chair Reeves called for a vote, and the motion was adopted by voice vote.

Chair Reeves announced that the next item of business was the Report of the Chair. He noted how each year the Commission votes to adopt priorities that will guide its annual policymaking process. This summer the Commission solicited priorities from the public asking how the Commission could improve federal sentencing.

In response, the Commission received more than 1,200 pages of insightful comments from judges, members of Congress, executive branch officials, probation officers, advisory groups, attorneys, professors, advocates, organizations, incarcerated individuals, and others.

Chair Reeves stated that he could not express how thankful the Commission was for the overwhelming amount of public feedback. From the halls of the Senate to the desks of prison libraries, he continued, countless people took the time to give the commissioners ideas about how to make our criminal justice system fairer. The ideas were thoughtful, well researched, and illuminate the path forward for the Commission. Chair Reeves thanked every person who commented.

Chair Reeves stated that the Commission would vote on a number of proposals that drew on the public comment it received. Some of today's proposals were new and reflected the input from the public and stakeholders in the 1,200 pages of comments. Some of today's proposals were new versions of concepts the Commission has published in the past but have been revised to reflect recent feedback the Commission has received. What all of today's proposals embraced, he emphasized, was that they were consistent with the promise that he and the Commission have made: When you speak to the Commission, you will be heard.

Chair Reeves acknowledged that people had spoken to the Commission about issues that would not be addressed in today's proposals. For example, the Commission recently held round tables to discuss drug sentencing and supervised release. Over the next month, he announced, the Commission would consider whether to publish additional proposals that reflect that public comment, stakeholder input, and feedback from judges that it has received on those issues. Stay tuned for the Commission's meeting in January, the Chair advised.

Chair Reeves announced that before the Commission voted, he wished to give a special note of thanks to some of the members of the Commission's advisory groups who were departing. The advisory groups are very important to the agency and the commissioners and perform a lot of work for them. The Commission's work could not be done without those members and their commitment to making the guidelines more perfect.

Chair Reeves explained that when advisory group members leave, it was important that the Commission honor their contributions to the Commission's work. From the Tribal Issues Advisory Group, the Commission thanked Tricia Tingle, Tim Purdon, and Jesse Laslovich for their years of service. From the Practitioners Advisory Group, the Commission thanked Sara Silva, Jon Sale, and Stacey Neumann. And from the Victims Advisory Group, the Commission thanked Margaret Garvin, Francey Hakes, Katie Shipp, and Julie Grohovsky.

Chair Reeves expressed a special note of thanks to Professor Mary Graw Leary, who was ending her term as Chair of the Victims Advisory Group. Professor Leary served very well as Chair and Chair Reeves expressed his confidence that she would continue to do all she can to represent the voices of victims and their families. He recalled how the Commission had called on Professor Leary to testify many times. Chair Reeves expressed the Commission's appreciation that she commented on every proposal that impacted members of the Victims Advisory Group and victims at large.

The Chair announced that the Commission had certificates of appreciation for all the departing advisory members. Because Professor Mary Graw Leary was in the room, Chair Reeves took the opportunity to present her certificate personally.

Chair Reeves stated that the next item of business was a possible vote to publish in the Federal Register proposed guideline amendments and issues for public comment. He called on the General Counsel, Kathleen Grilli, to advise the Commission on the first possible vote concerning a proposed simplification amendment.

Ms. Grilli stated that the proposed simplification amendment, attached hereto as Exhibit A, contained two parts. Part A included issues for comment on whether any changes should be made to the Guideline Manual relating to the three-step process set forth in §1B1.1 (Application Instructions).

Part B contained a proposed amendment that would restructure the Guideline Manual to simplify both the current three-step process and existing guidance in the Guideline Manual regarding a court's consideration of individual circumstances of the defendant, as well as certain offense characteristics.

Ms. Grilli advised that a motion to publish with an original public comment period closing on February 3, 2025, and a reply comment period closing on February 18, 2025, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Mate moved to adopt the proposed motion to publish, with Commissioner Wong seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote

concerning a proposed career offender amendment.

Ms. Grilli stated that the proposed career offender amendment, attached hereto as Exhibit B, would eliminate the categorical approach when determining whether an offense qualifies as a crime of violence. The proposed amendment provides a definition of crime of violence that is based on a defendant's conduct and a definition of controlled substance offense that is limited to the specific federal statutes for purposes of the Guideline Manual's Chapter Four career offender guideline.

Ms. Grilli advised that a motion to publish with an original public comment period closing on February 3, 2025, and a reply comment period closing on February 18, 2025, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Murray moved to adopt the proposed motion to publish, with Commissioner Boom seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed firearm amendment.

Ms. Grilli stated that the proposed firearm amendment, attached hereto as Exhibit C, contained two parts. Part A addressed the application of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to machine gun conversion devices and includes issues for comment. Part B of the proposed amendment established a mens rea requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with a modified serial number. Part B also contained an issue for comment.

Ms. Grilli advised that a motion to publish with an original public comment period closing on February 3, 2025, and a reply comment period closing on February 18, 2025, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to adopt the proposed motion to publish, with Commissioner Gleeson seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed circuit conflicts amendment.

Ms. Grilli stated that the proposed circuit conflicts amendment, attached hereto as Exhibit D, addressed two circuit conflicts and had two parts. Part A contained a proposed amendment

addressing a circuit conflict concerning whether the physically restrained enhancement in the robbery guideline, §2B3.1 (Robbery), can be applied to situations in which the victim is restricted from moving at gun point but is not otherwise immobilized through physical measures.

Part B contained a proposed amendment addressing a circuit conflict over whether a traffic stop is an intervening arrest for purposes of determining whether a person's multiple prior sentences should be counted separately or treated as a single sentence when assigning criminal history points. Part B also included issues for comment.

Ms. Grilli advised that a motion to publish with an original public comment period closing on February 3, 2025, and a reply comment period closing on February 18, 2025, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Gleeson moved to adopt the proposed motion to publish, with Commissioner Boom seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed issue for comment on the criteria for selecting guideline amendments covered by §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)).

Ms. Grilli stated that the proposed issue for comment, attached hereto as Exhibit E, addressed the Background Commentary to §1B1.10, which provides a non-exhaustive list of the criteria that the Commission typically considers in selecting amendments to be included in §1B1.10(d) for retroactive application. The issue for comment sought public comment on whether the Commission should amend the criteria.

Ms. Grilli advised that a motion to publish with an original public comment period closing on April 18, 2025, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Gleeson moved to adopt the proposed motion to publish, with Commissioner Wong seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioners Boom, Gleeson, and Wong voted in favor of adopting the motion. The motion was adopted.

Chair Reeves asked if there was any further business before the Commission and heard none. Before adjourning the meeting, the Chair noted that it was the end of the year and expressed his hope that everyone would have a happy holiday whether they were in the room or watching via the livestream. He urged everyone to please be safe during this period of time and enjoy their holidays.

Chair Reeves asked if there was a motion to adjourn the meeting. Vice Chair Murray moved to adjourn, with Commissioner Restrepo seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 2:23 p.m.

EXHIBIT A

PROPOSED AMENDMENT: SIMPLIFICATION OF THREE-STEP PROCESS

Synopsis of Proposed Amendment: In August 2024, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2025, "[s]implifying the guidelines and clarifying their role in sentencing," including "possibly amending the *Guidelines Manual* to address the three-step process set forth in §1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics." U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176 (Aug. 14, 2024).

In December 2023, the Commission published a proposed amendment that would have provided for a two-step process in §1B1.1 (Application Instructions) with accompanying changes throughout the *Guidelines Manual* to convert the Commission's existing departures and policy statements to "additional considerations." More specifically, that proposed amendment would have revised §1B1.1 to account for a two-step sentencing process, established a new Chapter Six further specifically addressing the court's consideration of the factors set forth in 18 U.S.C. § 3553(a), eliminated Chapter Five, Part H and most of Part K, and reclassified most "departures" currently provided throughout the *Guidelines Manual* as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a). *See* Proposed Amendments to the Sentencing Guidelines (Dec. 2023) at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines.

The Three-Step Process in the Guidelines Manual

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") provides the Commission with broad authority to develop guidelines that will further the basic purposes of criminal sentencing: deterrence, incapacitation, retribution, and rehabilitation. The Act contains detailed instructions as to how this determination should be made, including that the Commission establish categories of offenses and categories of defendants for use in prescribing guideline ranges that specify an appropriate sentence and to consider whether, and to what extent, specific offense-based and defendant-based factors are relevant to sentencing. *See* 28 U.S.C. § 994(c) and (d). In relation to the establishment of categories of defendants, the Act placed several limitations upon the Commission's ability to consider certain personal and individual characteristics in establishing the guidelines and policy statements. *See* 28 U.S.C. §§ 994(d), (e).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. § 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range should continue to be "the starting point and the initial benchmark" in sentencing proceedings. *See* Gall v. United States, 552 U.S. 38, 49 (2007); *see also* Peugh v. United States, 569 U.S. 530 (2013) (noting that "the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). After determining the kinds of sentence and guideline range, the court must also fully consider the factors in 18 U.S.C. § 3553(a), including, among other factors, "the nature and circumstances of the offense and the history and characteristics of

the defendant," to determine a sentence that is sufficient but not greater than necessary. *See* Rita v. United States, 551 U.S. 338, 347–48 (2007).

Section 1B1.1 (Application Instructions) sets forth the instructions for determining the applicable guideline range and type of sentence to impose, in accordance with the *Guidelines Manual*. Post-*Booker*, the Commission incorporated a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range; (2) the court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. § 3553(a) in imposing a sentence that is sufficient, but not greater than necessary (whether within or outside the applicable guideline range).

The first step in the three-step process, as set forth in §1B1.1(a), requires the court to calculate the applicable guideline range and determine the kind of sentence by applying Chapters Two (Offense Conduct), Three (Adjustments), Four (Criminal History and Criminal Livelihood), and Parts B through G of Chapter Five (Determining the Sentence).

The second step in the three-step process, as set forth in §1B1.1(b), requires the court to consider "Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence." Authorized grounds for departures based on various circumstances of the offense, specific personal characteristics of the defendant, and certain procedural history of the case are described throughout the *Guidelines Manual*: several Chapter Two offense guidelines and Chapter Eight organizational guidelines contain departure provisions within their corresponding Commentary; grounds for departure based on criminal history are generally provided in Chapter Four; and Chapter Five sets forth various policy statements with additional grounds for departure. Chapter Five, Part H, addresses the relevance of certain specific personal characteristics in sentencing by allocating them into three general categories. The first category includes specific personal characteristics that Congress has prohibited from consideration or that the Commission has determined should be prohibited. *See*, *e.g.*, USSG §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)). The second category includes specific personal characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See*, *e.g.*, §§5H1.2 (Employment Record); 5H1.6 (Family Ties and Responsibilities (Policy Statement)). The third category includes specific personal characteristics that Congress directed the Commission to consider in the guidelines only to the extent that they have relevance to sentencing. *See, e.g.*, USSG §§5H1.1 (Age (Policy Statement)); 5H1.3 (Mental and Emotional Conditions (Policy Statement)).

The third step in the three-step process, as set forth in §1B1.1(c), requires the court to "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." Specifically, section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed—
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. For further information pertaining to the application of departure provisions other than §5K1.1 or §5K3.1 (either alone or in conjunction with §5K1.1 or §5K3.1, see https://www.ussc.gov/education/backgrounders/2024-simplification-data. Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines.

Proposed Amendment

The proposed amendment contains two parts. Part A contains issues for comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in §1B1.1 and the use of departures and policy statements relating to specific personal characteristics. Part B contains a proposed amendment that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

Part B of the proposed amendment would make changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the *Guidelines Manual* in the wake of *Booker* and subsequent decisions. *See* United States v. Booker, 543 U.S. 220 (2005); Irizarry v. United States, 553 U.S. 708 (2008) (holding that Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a court to give "reasonable notice" that the court is contemplating a "departure" from the recommended guideline range on a ground not identified for departure in the presentence report or in a party's prehearing submission, does not apply to a "variance" from a recommended guideline range).

Part B of the proposed amendment would revise Chapter One in multiple ways. First, it would delete the "Original Introduction to the Guidelines Manual" currently contained in Chapter One, Part A. This introduction would be published as a historical background in **[**Appendix B (Selected Sentencing Statutes)**][**a new Appendix D**]** of the *Guidelines Manual*. Second, Part B of the proposed amendment would revise the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. Part B of the proposed amendment sets forth the calculation of guideline range and determination of sentencing requirements and options under the *Guidelines Manual* as the first step of the sentencing process in §1B1.1(a). The court's consideration of the section 3553(a) factors is set forth as the second and final step of the sentencing process in §1B1.1(b). As revised, §1B1.1(b) expressly lists the factors courts must consider pursuant to 18 U.S.C. § 3553(a). Additionally, the definition of "departures" is removed from the application notes to §1B1.1, and the Background Commentary is revised accordingly.

In addition, Part B of the proposed amendment seeks to better address the distinction between the statutory limitations on the Commission's ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. § 3553(a). More specifically, Part B of the proposed amendment revises current §1A3.1 (Authority), which sets forth the Commission's authority in developing the guidelines. First, the provision is redesignated as §1A1.1 and, for clarity, is retitled as "Commission's Authority." Second, in addition to referring to 28 U.S.C. § 994(a) as the basis of the Commission's authority to promulgate guidelines, policy statements, and commentary, the provision would also explain how the Commission has complied with the requirements placed by Congress, noting what is not considered by the Commission in formulating the guidelines used to calculate the guideline range.

A new background commentary explains that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, do not apply to sentencing courts. It makes clear that "Congress set forth the factors that a court must consider in imposing a sentence that is 'sufficient but not greater than necessary' to comply with the purposes of sentencing in 18 U.S.C. § 3553(a)" and that "[t]hese statutory factors permit a sentencing court to consider the 'widest possible breadth of information' about a defendant ensuring the court is in 'possession of the fullest information possible concerning the defendant's life and characteristics.'" The new background commentary concludes by noting that the application instructions set forth in §1B1.1 are structured to reflect a two-step process in which the sentencing court must first correctly calculate the applicable guideline range as the "starting point and initial benchmark" and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).

Consistent with the revised approach, Part B of the proposed amendment would delete most "departures" currently provided throughout the *Guidelines Manual*. Changes would be made throughout the *Guidelines Manual* by deleting the departure provisions currently contained in commentary to various guidelines. Part B of the proposed amendment would also retitle Chapter Five to reflect its focus on the rules pertaining to the calculation of the guideline range, specifically to better reflect the chapter's purpose in the introductory commentary noting that "a sentence is within the guidelines if it complies with each applicable section of this chapter." All current provisions contained in Chapter Five, Part H (Specific Offender Characteristics) would be deleted. Similarly, all provisions in Chapter Five, Part K (Departures), with the exception of those pertaining to substantial assistance to the authorities, would be deleted. Only the provisions pertaining to substantial assistance would be retained, while the provision pertaining to early disposition programs would be moved to a new Part F in Chapter Three.

Finally, Chapter Five is also amended by revising the Commentary to §5B1.1 (Imposition of a Term of Probation) and §5D1.1 (Imposition of a Term of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation or supervised release. The commentary is further revised to retain factors the Commission had previously identified as relevant in Chapter Five, Part H pursuant to the congressional guidance provided to the Commission in 28 U.S.C. § 994(d) and (e).

The issues for comment set forth below are informed by the proposed amendment contained in Part B.

(A) Issues for Comment

1. Part B of the proposed amendment would remove the second step in the three-step process, as set forth in subsection (b) of §1B1.1 (Application Instructions), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics.

   The Commission invites general comment on whether reconceptualizing the three-step process in this manner streamlines the application of the *Guidelines Manual* and

better reflects the interaction between 18 U.S.C. § 3553(a) and the guidelines. Does the approach set forth in Part B of the proposed amendment better achieve these goals than the proposed amendment published in December 2023 (available at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines), which would have retained current departure provisions in more generalized language and reclassified them as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a)? Are there any other approaches that the Commission should consider to reconceptualize and simplify the three-step process, and if so, what are they?

2. The Commission seeks comment on whether revising the three-step process, either in general or as implemented in Part B of the proposed amendment, is consistent with the Commission's authority under 28 U.S.C. §§ 994 and 995 and all other provisions of federal law. Similarly, the Commission seeks comment on whether revising the three-step process is consistent with other congressional directives to the Commission, such as the restrictions on the Commission's authority to promulgate further reasons for downward departures set forth in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108–21, 117 Stat. 649 (2003).

3. The *Guidelines Manual* currently contains more than two hundred departure provisions in Chapter Five, Part K (Departures), and the commentary to various guidelines elsewhere in the Manual. Chapter Five, Part H, contains twelve policy statements addressing the relevance of certain specific personal characteristics in sentencing. Such provisions were either included by the original Commission or through subsequent guideline amendments to provide guidance to courts in identifying "aggravating or mitigating circumstance(s) of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *See* 18 U.S.C. § 3553(b).

   The proposed amendment contained in Part B would delete most "departures" currently provided throughout the *Guidelines Manual*. Only the provisions pertaining to substantial assistance to authorities (currently provided for in Chapter Five, Part K, Subpart 1) and Early Disposition Programs (currently provided for in §5K3.1 (Early Disposition Programs (Policy Statement)) would be retained in the Manual, while other deleted "departures" would be accounted for through the court's consideration of the applicable factors in 18 U.S.C. § 3553(a). If the Commission were to remove the second step in the three-step process, as proposed in Part B, should the Commission continue to expressly account for any "departure provisions" in the *Guidelines Manual* beside substantial assistance and Early Disposition Programs? If so, which provisions should be retained and how? Alternatively, should the Commission remove the departures contained in Chapter Five, Part K, and the provisions in Chapter Five, Part H, addressing the relevance of certain specific personal characteristics in sentencing, while retaining other departure provisions throughout the *Guidelines Manual*?

   The Commission also seeks comment on whether it should consolidate and preserve for historical purposes any deleted departure provisions. If so, how should the Commission

do so? For example, should the Commission somehow preserve the content of deleted departures in a new Appendix to the *Guidelines Manual* or in some other format?

4. At some places in the *Guidelines Manual*, commentary including a departure provision also provides background information that the Commission determined was relevant to the court's consideration. For example, in setting forth a series of departure considerations, Application Note 27 of the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) also provides background information regarding the nature and impact of certain controlled substances, such as synthetic cathinones and cannabinoids, that may be informative to a court's determination as to whether a departure is warranted. The Commission seeks comment on whether it should retain such type of background information even if the departure language is removed. If so, which provisions in the *Guidelines Manual* currently contain background information that should be retained?

Proposed Amendment:

[For ease and clarity of presentation, the proposed amendment shows the complete *Guidelines Manual* with revision marks redlining the specific provisions impacted. The proposed amendment is set forth in the following pages.]

EXHIBIT B

PROPOSED AMENDMENT: CAREER OFFENDER

Synopsis of Proposed Amendment: In August 2024, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2025, "[s]implifying the guidelines and clarifying their role in sentencing," including "revising the 'categorical approach' for purposes of the career offender guideline." U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176 (Aug. 14, 2024).

The proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It would eliminate the categorical approach when determining whether an offense qualifies as a crime of violence by providing a definition for "crime of violence" that is based on a defendant's conduct and a definition of "controlled substance offense" that is limited to specific federal drug statutes. These changes are intended to correct some of the "odd" and "arbitrary" results that the categorical approach has produced relating to the "crime of violence" definition (*see*, *e.g.*, *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id*. (Wilkinson, J., dissenting)), and to provide a definition of "controlled substance offense" that is based on enumerated federal drug trafficking offenses.

The Categorical Approach as Developed by Supreme Court Jurisprudence

Several statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the "categorical approach" and "modified categorical approach," as set forth by Supreme Court jurisprudence. The categorical and modified categorical approaches require courts to look only to the elements of the offense, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts may look to certain additional sources of information, now commonly referred to as the "*Shepard* documents," to determine the elements of the offense of conviction. *See* Taylor v. United States, 495 U.S. 575 (1990) (holding that, under the "categorical approach," courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); Shepard v. United States, 544 U.S. 13 (2005) (holding that courts may use a "modified categorical approach" in cases where the statute of conviction is "overbroad," that is, the statute contains multiple offenses with different offense elements).

Application of the Categorical Approach in the Guidelines

Supreme Court jurisprudence on this subject pertains to statutory provisions (*e.g.*, 18 U.S.C. § 924(e)), but courts have applied the categorical and modified categorical approaches to guideline provisions. For example, courts have used these approaches to

determine if a conviction is a "crime of violence" or a "controlled substance offense" for purposes of applying the career offender guideline at §4B1.1.

Commission data indicates that of the 64,124 individuals sentenced in fiscal year 2023, 1,351 individuals (2.1%) were sentenced under the career offender guideline. While representing a relatively small portion of the federal caseload each year, the categorical approach continues to result in substantial litigation.

General Criticism of the Categorical Approach as Developed by Supreme Court Jurisprudence

The Commission has received significant comment over the years regarding the complexity and limitations of the categorical approach, as developed by Supreme Court jurisprudence. Courts have criticized the categorical approach as a "legal fiction," in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to "odd" and "arbitrary" results (*e.g.*, United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017); United States v. McCollum, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting)).

Feedback from Stakeholders

The Commission has also received input at roundtable discussions with several stakeholders with diverse perspective and expertise within the criminal justice system. Many stakeholders suggested that the Commission should eliminate the categorical approach to capture violent offenses that are currently excluded while also narrowing the scope of the "controlled substance offense" definition, particularly its reach over predicate offenses. Many stakeholders also recommend that the definition of "controlled substance offense" should only cover federal drug offenses and exclude prior state drug offenses for purposes of the career offender guideline.

Many stakeholders have remarked that the Commission should limit the number of qualifying prior offenses overall for purposes the career offender guideline. Some stakeholders suggested that the Commission should condition which convictions qualify as predicate offenses by establishing a minimum sentence length threshold.

Proposed Changes to §4B1.2

The proposed amendment would amend §4B1.2 in several ways.

First, the proposed amendment would move the definition of "controlled substance offense" from subsection (b) to subsection (a). It would also revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The proposed amendment would also move to subsection (a) the provision currently located in Commentary to §4B1.2 stating that a violation of 18

U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense."

Second, the proposed amendment would place all provisions related to "crime of violence" in subsection (b). It would define the term "crime of violence" based on the defendant's own offense conduct which, consistent with subsection (a)(1)(A) of §1B1.3 (Relevant Conduct), is the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. It provides a list of types of qualifying conduct that includes a "force clause" at §4B1.2(b)(1)(A) (which closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person") and provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such as forcible sex offenses, robbery, arson, and extortion. The proposed amendment would also include a provision at subsection (b)(2) that would allow certain inchoate offenses to still qualify as "crimes of violence." In addition, the proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" by using only a specific list of sources of information from the record.

Third, the proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense." **Option 1** would limit qualifying prior convictions to only convictions that are counted separately under §4A1.1(a) [or (b)]. **Option 2** would limit qualifying prior convictions to only convictions that resulted in a sentence imposed of [five years][three years][one year] or more that are counted separately under §4A1.1(a) [or (b)]. Option 2 brackets the possibility of including a provision that provides that a conviction shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [three years] [two years][six months] in prison. **Option 3** would limit qualifying prior convictions to only convictions that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted under §4A1.1(a) [or (b)]. All three options include two suboptions. Suboption A in each option would set the minimum sentence length requirement for purposes of both "crime of violence" and "controlled substance offense." Suboption B in each option would set the minimum sentence length requirement for purposes of "crime of violence" only.

Changes to Other Guidelines

The current definitions of "crime of violence" and "controlled substance" at §4B1.2 are incorporated by reference in several other guidelines in the *Guidelines Manual*. The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of §4B1.2. The proposed amendment would make such changes to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1

(Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(~~b~~a) CONTROLLED SUBSTANCE OFFENSE.—

(1) DEFINITION.—The term "controlled substance offense" means an offense under 21 U.S.C. § 841, § 952(a), § 955, or § 959, or 46 U.S.C. § 70503(a) or § 70506(b), **[**or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)**]**.~~federal or state law, punishable by imprisonment for a term exceeding one year, that—~~

~~(1) 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; or~~

~~(2) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b).~~

(2) ADDITIONAL CONSIDERATION.—**{**A violation of 18 U.S.C. § 924(c) or § 929(a) is ~~a "crime of violence" or~~ a "controlled substance offense" if the offense of conviction established that the underlying offense was ~~a "crime of violence" or~~ a "controlled substance offense."~~.~~ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)**}***

* The text in braces currently appears in Application Note 1 of the Commentary to §4B1.2. The proposed amendment would place the text here with the changes shown in revision marks.

(~~a~~b) CRIME OF VIOLENCE.—

(1) DEFINITION.—The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, ~~that~~—in which the defendant engaged in any of the following conduct:

(~~1~~A) ~~has as an element the~~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~~.

~~(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(e).~~

(B) A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(C) The unlawful taking or obtaining of personal property from a person, or in the presence of a person, against the person's will by means of actual or threatened force (*i.e.*, force that is sufficient to overcome a victim's resistance), or violence, or fear of injury against: (i) the person, the property of such person, or property in the custody or possession of such person; (ii) a relative or family member of the person, or the property of such relative or family member; or (iii) anyone in the company of the person at the time of the taking or obtaining, or their property.

(D) The obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

(E) The willful or malicious setting of fire to or burning of property; or

(F) 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).

(~~d~~2) COVERED INCHOATE OFFENSES~~ INCLUDED~~.~~ The 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~~An 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.

(3) DETERMINATION OF WHETHER AN OFFENSE IS A "CRIME OF VIOLENCE".—In determining whether an offense is a "crime of violence," the focus of inquiry is on the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. *See* subsection (a)(1)(A) of §1B1.3 (Relevant Conduct).

(4) SOURCES OF INFORMATION.—In making a prima facie showing that the offense is a "crime of violence," the government may only use the following sources of information from the record:

(A) The charging document.

(B) The jury instructions and accompanying verdict form.

(C) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

[(D) The judge's formal rulings of law or findings of fact.

(E) The judgment of conviction.

(F) Any explicit factual finding by the trial judge to which the defendant assented.**]**

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

Option 1 (Limiting Prior Convictions to Sentences Receiving Points under §4A1.1(a))

[*Suboption 1A (Limitation applicable to both "crime of violence" and "controlled substance offense"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under ~~the provisions of §4A1.1(a), (b), or (c)~~§4A1.1(a) **[**or (b)**]**. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.**]**

[*Suboption 1B (Limitation applicable only to "crime of violence"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means ~~(1)~~ the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~, and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)~~. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a "controlled substance offense" that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a "crime of violence" that is counted separately under §4A1.1(a) **[**or (b)**]**.**]**

Option 2 (Limiting Prior Convictions Through a Sentence-Imposed Approach):

[*Suboption 2A (Limitation applicable to both "crime of violence" and "controlled substance offense"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of

a controlled substance offense)~~,~~; and (2) ~~the sentences for~~ each of at least two of the aforementioned felony convictions (A) is~~are~~ counted separately under ~~the provisions of §4A1.1(a), (b), or (c)~~§4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of this provision, "***sentence imposed***" has the meaning given the term "sentence of imprisonment" in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

[A conviction shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than **[**three years**][**two years**][**six months**]** in prison.**]]**

[Suboption 2B (Limitation applicable only to "crime of violence"):

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means ~~(1)~~ the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~, and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)~~. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a "controlled substance offense" that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a "crime of violence" that (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. For purposes of this provision, "***sentence imposed***" has the meaning given the term "sentence of imprisonment" in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

[A conviction of a crime of violence shall not qualify as a prior felony conviction under this provision if the defendant can establish that the

conviction resulted in a sentence for which the defendant served less than **[**three years**]** **[**two years**][**six months**]** in prison.**]]**

[Option 3 (Limiting Prior Convictions Through a Time-Served Approach):

[Suboption 3A (Limitation applicable to both "crime of violence" and "controlled substance offense"):

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~,~~; and (2) ~~the sentences for~~each of at least two of the aforementioned felony convictions (A) is~~are~~ counted separately under ~~the provisions of §4A1.1(a), (b), or (c)~~§4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.**]**

[Suboption 3B (Limitation applicable only to "crime of violence"):

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~, and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)~~. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a "controlled substance offense" that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a "crime of violence" that (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison.**]**

~~(c) ADDITIONAL DEFINITIONS.—~~

~~(1) FORCIBLE SEX OFFENSE. "***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.~~

~~The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(2) EXTORTION. "***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.~~

~~(3) ROBBERY. "***Robbery***" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.~~

(~~4~~d) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult ~~federal or state~~ conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

Commentary

Application ~~Notes~~Note:

~~1. **Further Considerations Regarding "Crime of Violence" and "Controlled Substance Offense".** For purposes of this guideline –~~

~~Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."~~

~~Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."~~

~~Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."~~

~~Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."~~

~~A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)~~

~~2. **Offense of Conviction as Focus of Inquiry.** Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.~~

~~3. **Applicability of §4A1.2.** The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.~~

~~4. **Upward Departure for Burglary Involving Violence.** There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.~~

1. **Conduct Constituting Robbery and Extortion Offenses.**—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.

Background: Section 4B1.2 defines the terms "crime of violence," "controlled substance offense," and "two prior felony convictions." Prior to **[**amendment year**]**, to determine if an offense met the definition of "crime of violence" or "controlled substance offense" in §4B1.2, courts used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

In **[**amendment year**]**, the Commission amended §4B1.2 to eliminate the use of the categorical approach and modified categorical approach established by Supreme Court jurisprudence for purposes of determining whether an offense is a "crime of violence" or a "controlled substance offense" in §4B1.2. *See* USSG App. C, Amendment **[___]** (effective **[**Date**]**). Section 4B1.2 provides a list of the federal drug statutes that qualify as a "controlled substance offense." The approach set out in the guideline for determining whether an offense of conviction is a "crime of violence" allows a court to consider the conduct of the defendant underlying the offense of conviction. The approach set forth by this guideline requires the court to consider the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. The government must make a prima facie showing that an offense of conviction is a "crime of violence" only by using the limited list of sources of information, commonly referred to as the "*Shepard* documents," that Supreme Court jurisprudence has determined is permissible to determine whether a conviction fits within the definition of a particular category of crimes.

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

(a) Base Offense Level (Apply the Greatest):

(1) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **20**, if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(3) **18**, if the defendant was convicted under 18 U.S.C. § 842(p)(2);

(4) **16**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or

(5) **12**, otherwise.

* * *

Commentary

* * *

Application Notes:

* * *

2. **Definitions for Purposes of Subsections (a)(1) and (a)(2).—**

~~For purposes of this guideline:~~

"~~***Controlled substance offense***~~" ~~has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

"~~***Crime of violence***~~" ~~has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~

(A) **Crime of Violence.—**

(i) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) 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; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(C) **Felony Conviction.—**"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the 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 (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the 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 (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(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; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with

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

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

* * *

(b) Specific Offense Characteristics

* * *

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

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

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by **2** levels; or

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

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant

offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

~~"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~

* * *

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

* * *

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "***semiautomatic firearm that is capable of accepting a large capacity magazine***" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **"Crime of Violence" and "Controlled Substance Offense".—**

(A) **Crime of Violence.—**

(i) **Definition.**—"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of

another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) 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; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

~~3~~4. **Definition of "Prohibited Person".**—For purposes of subsections (a)(4)(B), (a)(6), and (b)(5), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

[The proposed amendment would renumber the rest of the application notes accordingly]

* * *

~~10~~11. **Prior Felony Convictions.**—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsections (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

~~11~~12. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C.

§ 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note ~~7~~8).

* * *

~~13~~14. **Application of Subsection (b)(5).—**

(A) **Definitions.—**For purposes of this subsection:

~~"***Crime of violence***" and "***controlled substance offense***" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

* * *

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

* * *

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by **6** levels.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—For purposes of this guideline:

~~"***Crime of violence***" has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

* * *

4. **"Crime of Violence" under Subsection (b)(1).—**

(A) **Definition.**—For purposes of subsection (b)(1), "***crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(B) **Additional Considerations.—**

(i) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(iii) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

[The proposed amendment would renumber the rest of the application notes accordingly]

* * *

§4A1.1. Criminal History Category

* * *

(d) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under subsection (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

* * *

Commentary

* * *

Application Notes:

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4. **§4A1.1(d).**—In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(d) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(d). For purposes of this guideline, "***crime of violence***" has the meaning given that term in ~~§4B1.2(a). *See*~~ §4A1.2(p).

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

(p) CRIME OF VIOLENCE DEFINED

~~For the purposes of §4A1.1(d), the definition of "crime of violence" is that set forth in §4B1.2(a).~~

(1) DEFINITION.—For purposes §4A1.1(d), "***crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (A) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(2) ADDITIONAL CONSIDERATIONS.—

(A) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(B) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (i) an offense described in 18 U.S.C. § 2241(c) or (ii) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(C) "Extortion" is obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

(D) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(E) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(F) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

* * *

§4B1.4. Armed Career Criminal

* * *

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence~~, as defined in §4B1.2(a),~~ or a controlled substance offense~~, as defined in §4B1.2(b)~~, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

* * *

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence~~, as defined in §4B1.2(a),~~ or a controlled substance offense~~, as defined in §4B1.2(b)~~, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

Commentary

Application Notes:

* * *

3. **"Crime of Violence" and "Controlled Substance Offense".—**

(A) **Crime of Violence.—**

(i) **Definition.**—"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a

firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) 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; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

Background: This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the defendant's criminal history; *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application ~~Note~~Notes:

~~1. "***Crime of violence***" and "***controlled substance offense***" are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

1. **Crime of Violence.—**

(A) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(B) **Additional Considerations.—**

(i) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (I) an offense described in 18 U.S.C. § 2241(c) or (II) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Extortion" is obtaining something of value from another by the wrongful use of (I) force, (II) fear of physical injury, or (III) threat of physical injury.

(iv) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase

"actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(v) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vi) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

2. **Controlled Substance Offense.—**

(A) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) 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; or (ii) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(B) **Additional Considerations.—**

(i) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(iii) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(iv) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(v) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(vi) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vii) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

* * *

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

* * *

Commentary

Application Notes:

* * *

~~2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~

~~3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.~~

2. **Crime of Violence.—**

(A) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(B) **Additional Considerations.—**

(i) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (I) an offense described in 18 U.S.C. § 2241(c) or (II) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Extortion" is obtaining something of value from another by the wrongful use of (I) force, (II) fear of physical injury, or (III) threat of physical injury.

(iv) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property

in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(v) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vi) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Controlled Substance Offense.—**

(A) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) 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; or (ii) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(B) **Additional Considerations.—**

(i) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(iii) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(iv) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(v) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(vi) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vii) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

* * *

Issues for Comment:

1. As explained above, courts use the "categorical approach" and the "modified categorical approach," as set forth in Supreme Court jurisprudence, to determine whether a conviction is a "crime of violence" or a "controlled substance offense" for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Supreme Court cases, however, involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guideline provisions.

   The Commission seeks comment on whether determinations under the career offender guideline should use a different approach, such as the approach provided above, that permits the court to consider the defendant's conduct underlying the offense of conviction for purposes of the "crime of violence" definition. What are the advantages and disadvantages of the "categorical approach" as opposed to the approach set forth in the proposed amendment above?

2. The proposed amendment provides that courts may consider the full scope of the defendant's conduct under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct) (*i.e.*, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense") for purposes of the "crime of violence" definition. Should the focus of the inquiry be limited to the conduct that formed the basis of the conviction? If not, should the Commission limit the consideration of the defendant's conduct in some other way? If so, how should the Commission set forth such limitation? Should the Commission limit the consideration of the defendant's conduct only to such acts and omissions that occurred "during the commission of the offense of conviction" and exclude conduct "in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense" or make any other changes?

3. The proposed amendment would revise the definition of "controlled substance offense" in §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). Are there federal drug offenses that are covered by the proposed amendment but should

not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?

The Commission also seeks comment on whether, instead of excluding state drug offenses, it should limit the definition of "controlled substance offense" in some other way. For example, should the Commission keep the current definition of "controlled substance offense" and limit qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served? If so, how should the Commission set that limit and why?

4. The definition of "crime of violence" set forth in the proposed amendment above includes a "force clause" proposed at §4B1.2(b)(1)(A). The provision closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person." The Commission seeks comment on whether this definition is appropriate.

   The definition of "crime of violence" also includes provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such forcible sex offenses, robbery, arson, and extortion. The Commission seeks comment on whether the force clause set forth in proposed §4B1.2(b)(1)(A) would be sufficient to cover the other types of conduct specifically listed in the "crime of violence" definition. Specifically, the Commission seeks comment on whether the force clause would cover conduct constituting robbery and extortion offenses.

5. The definition of "crime of violence" includes a provision relating to forcible sexual acts at proposed §4B1.2(b)(1)(B). The Commission seeks comment generally on whether the scope of this provision for purposes of the "crime of violence" definition is appropriate.

6. The "crime of violence" definition includes a provision that would cover conduct constituting an arson offense at proposed §4B1.2(b)(1)(E). The Commission seeks comment generally on whether the proposed provision is appropriate.

7. The Commission seeks comment on whether the definition of "crime of violence" should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?

8. The proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" only by using a specific list of sources of information from the record. The sources of information that do not appear within brackets in the proposed amendment are specifically identified in *Shepard v. United States*, 544 U.S. 13 (2005), for use in the modified categorical approach. The sources

of information listed within brackets are comparable judicial documents identified in subsequent case law for the same purpose.

The Commission seeks comment on whether it should limit the sources of information that the government needs to make prima facie showing that an offense of conviction is a "crime of violence." Should the Commission list specific sources or types of sources that courts may consider in addition to the sources listed in the proposed amendment? If so, what documents or types of information should be included in this list? Are there any documents or types of information that should be excluded?

9. The proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense." The Commission seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a "crime of violence" or "controlled substance offense" is consistent with the Commission's authority under 28 U.S.C. § 994(h). The Commission also seeks comment on each of these options. Should the Commission differentiate between "crimes of violence" and "controlled substance offenses" in setting a minimum sentence length requirement?

10. As indicated above, several guidelines use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. *See* the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).

The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of §4B1.2. The Commission seeks comment on whether this is the appropriate approach or, in the alternative, whether any or all of these guidelines should continue to define the terms "crime of violence" and "controlled substance offense" by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the definitions contained in §4B1.2. Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

EXHIBIT C

PROPOSED AMENDMENT: FIREARMS OFFENSES

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B) addressing offenses involving firearms. The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Part A of the proposed amendment addresses the application of §2K2.1 to machinegun conversion devices (MCDs), which are designed to convert weapons to fully automatic firearms. Issues for comment are also provided.

Part B of the proposed amendment establishes a *mens rea* requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers. An issue for comment is also provided.

(A) Machinegun Conversion Devices (MCDs)

Synopsis of Proposed Amendment: Section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) employs, for different purposes, two distinct definitions of the term "firearm" drawn from separate statutory sources: 21 U.S.C. § 921(a)(3) ("Gun Control Act (GCA) definition of firearm") and 26 U.S.C. § 5845(a) ("National Firearms Act (NFA) definition of firearm"). One difference between the definitions is the inclusion of machinegun conversion devices (MCDs). Commonly referred to as "Glock switches" or "auto sears," MCDs are devices designed to convert weapons into fully automatic firearms. The NFA definition of firearm includes "machineguns," 26 U.S.C. § 5845(a), and the definition of "machinegun" includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun," 26 U.S.C. § 5845(b). Therefore, MCDs fall within the NFA definition of firearm. However, the GCA definition of firearm does not encompass MCDs. *See* 21 U.S.C. § 921(a)(3).

Section 2K2.1 uses the NFA definition of firearm for certain enhanced base offense levels. *See*, *e.g.,* USSG §2K2.1(a)(1), (3), (4), and (5). Therefore, those enhanced base offense levels apply to offenses involving MCDs. However, the remainder of §2K2.1, including the specific offense characteristics and the cross reference, uses the GCA definition of firearm. USSG §2K2.1, comment. (n.1). Therefore, MCDs do not trigger §2K2.1's specific offense characteristics or the cross reference. For example, an individual convicted under 18 U.S.C. § 922(o) for possessing five MCDs would receive an enhanced base offense level because the offense involved a firearm described in 26 U.S.C. § 5845(a). *See* USSG §2K2.1(a)(5). However, this individual would not receive an enhancement under §2K2.1(b)(1) for the number of firearms involved in the offense because the MCDs are not firearms under the GCA definition. *See* USSG §2K2.1(b)(1).

Commenters have expressed concern that §2K2.1 insufficiently addresses offenses involving MCDs. Commenters have described a significant recent proliferation of MCDs and pointed out the increased danger to bystanders and law enforcement officials when a weapon is equipped with an MCD because those weapons can fire more quickly and are more difficult to control.

Part A of the proposed amendment would amend §2K2.1 to address these concerns.

The proposed amendment provides two options to amend §2K2.1.

Option 1 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 move the definition from the Commentary to the guideline itself in newly created subsection (d).

Option 2 would expand the application of the following subsections, which now apply only to GCA firearms, so that those subsections would also apply to NFA firearms:

- Subsection (b)(1), which provides an enhancement based on the number of firearms involved in the offense;

- Subsection (b)(4), which provides an enhancement for offenses involving firearms that were stolen, had a modified serial number, or were not marked with a serial number;

- Subsection (b)(5), which provides an enhancement for certain offenses involving the transport, transfer, sale, or other disposition of a firearm to another person;

- Subsection (b)(6), which provides an enhancement for offenses involving transportation of a firearm outside the United States or the possession of a firearm in connection with another felony;

- Subsection (b)(7), which provides an enhancement for recordkeeping offenses that reflect an effort to conceal a substantive offense involving firearms or ammunition; and

- Subsection (c), which cross references other guidelines for cases in which the defendant used or possessed any firearm cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense.

Option 2, if applied to all of the listed subsections, would produce an equivalent result to Option 1, but Option 2 highlights the policy question as to whether expansion of the definition of "firearm" should apply to all relevant provisions.

Issues for comment are also provided.

Proposed Amendment:

Option 1 ("Firearm" definition includes GCA firearms and NFA firearms):

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

(d) Definition

(1) For purposes of this guideline, "***firearm***" includes any firearm described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a).

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

~~"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3).~~

Option 2 ("Firearm" definition depends on specific subsection):

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the 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 (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the 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 (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(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; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)), increase as follows:

	NUMBER OF FIREARMS	INCREASE IN LEVEL
(A)	3–7	add **2**
(B)	8–24	add **4**
(C)	25–99	add **6**
(D)	100–199	add **8**
(E)	200 or more	add **10**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not

unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in ~~subdivision~~paragraph (A), increase by **2** levels.

(4) If ~~(A)~~ any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) (A) was stolen, increase by **2** levels; or (B)~~(i) any firearm~~ had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, increase by **4** levels; or ~~(ii) the defendant knew that any firearm involved in the offense~~ (C) was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or~~ and the defendant knew, was willfully blind to, or consciously avoided knowledge of such fact, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

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

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

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or any ammunition as a result of inducing the conduct described in clause (i), increase by **2** levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) as a result of inducing the conduct described in clause (i), increase by **5** levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

(6) If the defendant—

(A) possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition in connection with another felony offense; or possessed or transferred any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition, increase to the offense level for the substantive offense.

(8) If the defendant—

(A) receives an enhancement under subsection (b)(5); and

(B) committed the offense in connection with the defendant's participation in a group, club, organization, or association of five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge that the group, club, organization, or association had as one of its primary purposes the commission of criminal offenses;

increase by **2** levels.

(9) If the defendant—

(A) receives an enhancement under subsection (b)(5);

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (ii) was unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition;

decrease by **2** levels.

(c) Cross Reference

(1) If the defendant used or possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3), unless otherwise specified.

* * *

8. **Application of Subsection (b)(4).—**

(A) **Interaction with Subsection (a)(7).—**If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control

Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)~~(i)~~ or ~~(ii)~~(C).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)~~(i)~~. However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)~~(i)~~ or ~~(ii)~~(C).

(B) **Defendant's State of Mind.**—Subsection (b)(4)(A) or (B)~~(i)~~ applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)~~(B)(ii)~~(C) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

9. **Application of Subsection (b)(7).**—Under subsection (b)(7), if a ~~record keeping~~recordkeeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (*e.g.*, if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

* * *

Issues for Comment

1. Part A of the proposed amendment seeks to respond to concerns that §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) insufficiently addresses the dangers presented by machinegun conversion devices (MCDs). The Commission seeks comment on whether the proposed amendment appropriately addresses those concerns. Should the Commission address those concerns in another way? If so, how?

2. Under Options 1 and 2 of Part A of the proposed amendment, an MCD would be treated as a firearm for purposes of §2K2.1. The Commission seeks comment on whether it is appropriate for MCDs to be given the same weight as other firearms. Should MCDs be treated differently from other firearms? If so, how?

3. Section 2K2.1(b)(1) and (b)(5)(C) provide enhancements based, in whole or in part, on the number of "firearms" involved in the offense. Under Options 1 and 2, an MCD would be considered a firearm. MCDs are designed to be affixed to another firearm. The Commission seeks comment on how MCDs should be factored when calculating the number of firearms for purposes of §2K2.1(b)(1) and (b)(5)(C). Should the

calculation depend on whether the MCD was affixed to another firearm? If an MCD is affixed to a semi-automatic firearm, should the resulting weapon be counted as one firearm or two firearms?

4. Section 2K2.1(b)(1), (b)(4), (b)(5), (b)(6), (b)(7), and (c) currently apply to firearms defined in 18 U.S.C. 921(a)(3) (the GCA definition of firearm). Under Options 1 and 2, the term "firearm," as used in those provisions, would also include any firearm described in 26 U.S.C. § 5845(a) (the NFA definition of firearm), such as an MCD. The Commission seeks comment on whether this change should apply to all of the listed provisions. Should one or more of these provisions be excluded from the change? For example, should the Commission make an exception to §2K2.1(b)(4)(C), as redesignated, which provides an enhancement for certain cases involving firearms that were not marked with a serial number, for MCDs, which are often privately made and not marked with a serial number?

5. With few exceptions (*e.g.*, MCDs), a weapon that meets the NFA definition of firearm also meets the GCA definition of firearm. Apart from MCDs, the Commission seeks comment on whether there are any exceptions (*i.e.*, 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. If so, what types of weapons should be excluded? In Option 2 of Part A of the proposed amendment, should the Commission expand the application of subsection (b)(1), (b)(4), (b)(5), (b)(6), (b)(7), or (c) to include machineguns (as defined in 26 U.S.C. § 5845(b)), rather than all NFA firearms?

6. In addition to amending the definition of "firearm" for purposes of §2K2.1, Option 1 of Part A of the amendment would move the definition from the Commentary to the guideline itself. However, the option would not move any other §2K2.1 definitions from the Commentary to the guideline. The Commission seeks comment on whether leaving some definitions in the Commentary will lead to inconsistent application of those definitions. Should the Commission move other definitions from the Commentary to §2K2.1 to the guideline itself? If so, which ones?

(B) *Mens Rea* Requirement

Synopsis of Proposed Amendment: Section 2K2.1 provides for offense level increases in cases involving stolen firearms, firearms with modified serial numbers, and firearms not marked with a serial number (commonly referred to as ghost guns). *See* USSG §2K2.1(b)(4). Subsection (b)(4)(A) provides a 2-level enhancement if a firearm is stolen. USSG §2K2.1(b)(4)(A). Subsections (B)(i) and (ii) provide a 4-level enhancement based upon the existence and state of any serial number on firearms considered for purposes of §2K2.1. USSG §2K2.1(b)(4)(B)(i) and (ii). The 4-level enhancement may apply, under subsection (b)(4)(B)(i), if a "firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye," and, under subsection (b)(4)(B)(ii), if a "firearm involved in the offense was not otherwise marked with a serial number." *Id.* The court may not apply both §2K2.1(b)(4)(A) and (b)(4)(B) cumulatively, as the provisions are alternative. *See* USSG §1B1.1, comment. (n.4(A)) ("Within each specific offense characteristic subsection, . . . the offense level adjustments are alternative; only the one that best describes the conduct is to be used.").

The enhancements for stolen firearms and modified serial numbers impose no requirement of the defendant's knowledge or other mental state. USSG §2K2.1(b)(4)(A) and (B)(i). The Commentary to §2K2.1 states that these enhancements apply "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." USSG §2K2.1, comment. (n.8(B)). However, subsection (b)(4)(B)(ii) for firearms not marked with a serial number applies only "if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number . . . or was willfully blind to or consciously avoided knowledge of such fact." *Id.*

The enhancement regarding firearms not marked with a serial number is the result of a 2023 amendment. USSG App. C, amend. 819 (effective Nov. 1, 2023). The amendment extended the 4-level enhancement at §2K2.1(b)(4)(B) to firearms not marked with a serial number. *Id.* The Commission determined, however, "that the enhancement should apply only to those defendants who knew or consciously avoided knowing that the firearm was not marked with a serial number." *Id.*

Accordingly, in its current form, §2K2.1(b)(4) imposes a mental state requirement when the enhancement applies based on a firearm not marked with a serial number but includes no such requirement when it applies based on a stolen firearm or firearm with a modified serial number.

Part B of the proposed amendment would apply the current mental state requirement from §2K2.1(b)(4)(B)(ii) to all of subsection (b)(4).

Under the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm was stolen." Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B)(i) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered

illegible or unrecognizable to the unaided eye." The proposed amendment would also make conforming changes to Application Note 8 of the Commentary to §2K2.1.

An issue for comment is also provided.

Proposed Amendment:

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

(b) Specific Offense Characteristics

* * *

(4) If the defendant knew, was willfully blind to the fact, or consciously avoided knowing that (A) any firearm was stolen, increase by **2** levels; or (B)~~(i)~~ any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye; or (~~ii~~C) ~~the defendant knew that~~ any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or was willfully blind to or consciously avoided knowledge of such fact~~, increase by **4** levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

* * *

8. **Application of Subsection (b)(4).—**

~~(A) **Interaction with Subsection (a)(7).—**~~If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the ~~offense involved~~ defendant knew, was willfully blind to the fact, or consciously avoided knowing that a firearm ~~with~~ had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or ~~if the defendant knew~~ that any firearm involved in the offense was not otherwise marked with a serial

number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or was willfully blind to or consciously avoided knowledge of such fact~~, apply subsection (b)(4)(B)~~(i)~~ or (~~ii~~C).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)~~(i)~~. However, if the ~~offense involved~~ defendant knew, was willfully blind to the fact, or consciously avoided knowing that a ~~stolen~~ firearm or ~~stolen~~ ammunition was stolen, or ~~if the defendant knew~~ that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or was willfully blind to or consciously avoided knowledge of such fact~~, apply subsection (b)(4)(A) or ~~(B)~~(~~ii~~C).

~~(B) **Defendant's State of Mind.**—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.~~

* * *

Issue for Comment

1. Under Part B of the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that" a firearm was stolen. Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." The Commission seeks comment on whether there are evidentiary challenges in firearms cases to proving a defendant's mental state. Are there changes the Commission should make to the proposed amendment to address potential evidentiary issues? If so, what changes should the Commission make?

EXHIBIT D

PROPOSED AMENDMENT: CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses two circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History). *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176, 66177 (Aug. 14, 2024) (identifying resolution of circuit conflicts as a priority). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A addresses a circuit conflict concerning whether the "physically restrained" enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the "physically restrained" definition set forth in the Commentary to §1B1.1 (Application Instructions). Three options are presented. Issues for comment are also included.

Part B addresses a circuit conflict concerning whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("single-sentence rule"). *See* USSG §4A1.2(a)(2).

(A) Circuit Conflict Concerning the "Physically Restrained" Enhancement at §2B3.1(b)(4)(B)

Synopsis of Proposed Amendment: Subsection (b)(4)(B) of §2B3.1 (Robbery) provides for a 2-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." For purposes of §2B3.1(b)(4)(B), the term "physically restrained" is defined in Application Note 1(L) to §1B1.1 (Application Instructions) as "the forcible restraint of the victim such as by being tied, bound, or locked up."

A circuit conflict has arisen concerning whether the enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those outlined in the Commentary to §1B1.1 (*i.e.*, "being tied, bound, or locked up").

The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim from moving at gunpoint suffices for the enhancement. *See*, *e.g.*, United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, "at close range," and was commanded to "look straight ahead into the gun and not to move"); United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where "two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery"); United States v. Howell, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit has "rejected the notion of a 'physical component' limitation as inapt" and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); United States v. Deleon, 116 F.4th 1260, 1261–62 (11th Cir. 2024) (affirming application of enhancement where the defendant "pointed a gun at the cashier while demanding money" but never "actually touched the cashier").

By contrast, the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits largely agree that a restraint must be "physical" for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify. *See*, *e.g.*, United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) ("displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the 'physical restraint' enhancement"); United States v. Bell, 947 F.3d 49, 57, 60–61 (3d Cir. 2020) (adopting "the requirement that the restraint involve some physical aspect"; placing fake gun on victim's neck and forcing him to floor did not suffice); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017) (vacating enhancement because "standing near a door, holding a firearm, and instructing a victim to get on the ground" did not "differentiate th[e] case in any meaningful way from a typical armed robbery"); United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019) ("more than pointing a gun at someone and ordering that person not to move is necessary"); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) ("briefly pointing a gun at a victim and commanding her once to get down" did not

constitute "physical restraint, given that nearly all armed bank robberies will presumably involve such acts"); *see also* United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) ("the phrase 'being tied, bound, or locked up' indicates that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way"; physically restrained adjustment did not apply where victim was ordered to walk down the stairs at gunpoint).

Part A of the proposed amendment presents three options for responding to this circuit conflict by amending the enhancement at §2B3.1(b)(4)(B).

Option 1 would generally adopt the approach of the First, Fourth, Sixth, Tenth, and Eleventh Circuits that the enhancement applies with or without physical measures. It would amend the language of §2B3.1(b)(4)(B) to specify that the increase applies to cases in which "any person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked) to facilitate commission of the offense or to facilitate escape." Option 1 also includes conforming changes to the Commentary to §2B3.1.

Option 2 would generally adopt the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits that physical measures must be used for the enhancement to apply. It would amend the language of §2B3.1(b)(4)(B) to clarify that the increase applies only in cases in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." Option 2 also includes conforming changes to the Commentary to §2B3.1.

Option 3 would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current "physically restrained" enhancement at §2B3.1(b)(4)(B). The new enhancement would provide for a 2-level enhancement for offenses in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." It would also add a 1-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." Option 3 includes conforming changes to the Commentary to §2B3.1.

Issues for comment are also provided.

Proposed Amendment:

Option 1 (First, Fourth, Sixth, Tenth, and Eleventh Approach – *Physical or Non-Physical Means*)

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

* * *

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any ~~person was physically restrained~~ person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked) to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," and "***abducted***," ~~and "***physically restrained***" are defined~~have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).

* * *

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or ~~was physically restrained by being tied, bound, or locked up~~ a victim's freedom of movement was restricted.

* * *

Option 2 (Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits Approach – *Physical Contact or Confinement Required*)

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

* * *

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any ~~person was physically restrained~~ person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," and "***abducted***," ~~and "***physically restrained***" are defined~~have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).

* * *

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or ~~was physically restrained by being tied, bound, or locked up~~ a victim's freedom of movement was restricted.

* * *

Option 3 (Combination of Both Approaches)

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

* * *

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; ~~or~~ (B) if any ~~person was physically restrained~~ person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape, increase by **2** levels; or (C) if 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, increase by **1** level.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," and "***abducted***," ~~and "***physically restrained***" are defined~~have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).

* * *

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or ~~was physically restrained by being tied, bound, or locked up~~ a victim's freedom of movement was restricted.

* * *

Issues for Comment

1. Part A of the proposed amendment sets forth three options to address the circuit conflict described in the synopsis above. The Commission seeks comment on whether it should address the circuit conflict in a manner other than the options provided in Part A of the proposed amendment. If so, how?

2. The term "physically restrained," as used in §2B3.1 (Robbery), is defined in Application Note 1(L) of the Commentary to §1B1.1 (Application Instructions). Other guidelines also use the term "physically restrained" and define such term by reference to the Commentary to §1B1.1. *See* §§2B3.2(b)(5)(B) ("[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."), 2E2.1(b)(3)(B) ("[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."), 3A1.3 ("If a victim was physically restrained in the course of the offense, increase by 2 levels.").

   If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend any or all of these other guidelines to mirror the proposed approach for §2B3.1? Instead of amending §2B3.1 or the other guidelines, should the Commission amend Application Note 1(L) of the Commentary to §1B1.1 to mirror the proposed approach for §2B3.1?

(B) Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)

Synopsis of Proposed Amendment: Section 4A1.2(a)(2) outlines whether multiple prior sentences should be "counted separately or treated as a single sentence" for purposes of assigning criminal history points ("single-sentence rule"). Prior sentences should be "counted separately if the sentences were imposed for offenses that were separated by an *intervening arrest* (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." USSG §4A1.2(a)(2) (emphasis added). If "there is no *intervening arrest*, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day." *Id.* (emphasis added).

There is a circuit split over the meaning of "intervening arrest." The Third, Sixth, Ninth, and Eleventh Circuits have held that a formal, custodial arrest is required, and that a citation or summons following a traffic stop does not qualify. *See* United States v. Ley, 876 F.3d 103, 109 (3d Cir. 2017) ("[A] traffic stop, followed by the issuance of a summons, is not an arrest. The Court therefore holds that, for purposes of section 4A1.2(a)(2) of the Sentencing Guidelines, an arrest is a formal, custodial arrest."); United States v. Rogers, 86 F.4th 259, 264–65 (6th Cir. 2023) ("for purposes of § 4A1.2(a)(2), an arrest requires placing someone in police custody as part of a criminal investigation"; "subtle interactions with law enforcement—such as traffic stops" are not "the focus of the Guidelines' approach" to prior sentences); United States v. Leal-Felix, 665 F.3d 1037, 1041 (9th Cir. 2011) (en banc) (for purposes of the guidelines, "an arrest is a 'formal arrest'" not a "mere citation" and "may be indicated by informing the suspect that he is under arrest, transporting the suspect to the police station, and/or booking the suspect into jail"); United States v. Wright, 862 F.3d 1265, 1282 (11th Cir. 2017) ("traffic citation for driving with a suspended license is not an arrest under § 4A1.2(a)(2)"). By contrast, the Seventh Circuit has adopted a broad view of the term, holding that a traffic stop amounts to an intervening arrest. *See* United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003) ("A traffic stop is an 'arrest' in federal parlance.").

Part B of the proposed amendment responds to this circuit conflict. It would add a provision to §4A1.2(a)(2) clarifying that an "[i]ntervening arrest . . . requires a formal, custodial arrest and 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 would also specify that a "noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest."

Proposed Amendment:

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) PRIOR SENTENCE

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by subparagraph (A) or (B) as a single sentence. *See also* §4A1.1(d).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

"Intervening arrest," for purposes of this provision, requires a formal, custodial arrest and 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. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

"Convicted of an offense," for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

* * *

EXHIBIT E

ISSUE FOR COMMENT: CRITERIA FOR SELECTING GUIDELINE AMENDMENTS COVERED BY §1B1.10

The Background Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) provides a non-exhaustive list of criteria the Commission typically considers in selecting the amendments to be included in §1B1.10(d) for retractive application: "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1)." USSG §1B1.10, comment. (backg'd). This non-exhaustive list of criteria has remained substantively unchanged since the Commission originally promulgated the policy statement at §1B1.10 in 1989.

Issues for Comment:

1. The Commission seeks comment on whether it should provide further guidance on how the existing criteria for determining whether an amendment should apply retroactively are applied. If so, what should that guidance be? Should it revise or expand the criteria? Are there additional criteria that the Commission should consider beyond those listed in the existing Background Commentary to §1B1.10? Are there identifiable sources that the Commission should consult that highlight retroactivity criteria relied upon by other legislative or rulemaking bodies?

   If the Commission continues to list criteria relevant to determining whether an amendment should apply retroactively, should it adopt any bright-line rules? Is there a different approach that the Commission should consider for these purposes?

2. The Commission seeks comment on whether any listed criteria are more appropriately addressed in the Commission's Rules of Practice and Procedure rather than the Background Commentary to §1B1.10.

3. Rule 4.1A (Retroactive Application of Amendments) of the Commission's Rules of Practice and Procedure provides "[g]enerally, promulgated amendments will be given prospective application only." The Commission seeks comment on whether it should retain this provision. If so, how should the Commission ensure that any listed criteria reflect this provision?