

Guideline Amendments



Agenda

1. Sexual Abuse of a Ward
2. Firearms
3. Acceptance of Responsibility
4. Safety Valve
5. Criminal History
 - Status Points
 - Zero-Point Offender
 - Downward Departure
6. Career Offender
7. Fake Pills
8. Sentencing Reduction Motions

1.

Sexual Abuse of a Ward

What does the Amendment Do? (§2A3.3)



Why did the Commission Act?

- DOJ expressed concerns about the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody or care

2.

Firearms

Amendment to Firearm Offenses

- New Straw Purchase and Firearms Trafficking Offenses
- Increased Penalties for Straw Purchases and Trafficking Offenses
- Increased Penalties for Organized Crime
- Reduction for Mitigating Circumstances
- Firearms not Marked with a Serial Number (Ghost Guns)



Why did the
Commission
Act?

Bipartisan Safer
Communities
Act

Proliferation of
“ghost guns” (no
serial number)

Bipartisan
Safer
Communities
Act

Increased penalties for several
firearm offenses

Created new firearms offenses
(*e.g.*, 18 U.S.C. §§932 and 933)

Directive to the Commission

Why did the Commission Act on “Ghost Guns”?

DOJ expressed concerns about the proliferation of ghost guns being used in criminal activity

Commission concluded no meaningful distinction between a firearm with obliterated serial number, which gets a 4-level increase, and a firearm without a serial number

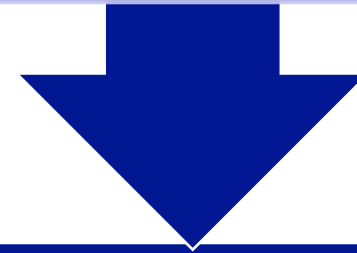
Directive to the
Commission

Increase penalties for:

straw
purchasers

trafficking in
firearms

organized
crime affiliation



Account for mitigating
circumstances for less
culpable straw purchasers

What does
the
Amendment
Do for
“Traffickers”?

Expands the current trafficking SOC to target those who traffic in firearms or induce others to traffic

New SOC for trafficking in connection with knowingly participating in criminal organization of five or more persons

Creates new decrease for less culpable straw purchasers

What does
the
Amendment
for “Ghost
Guns” Do?

Provides a 4-level increase if the defendant knew that the offense involved a firearm not marked with a serial number, or the defendant was willfully blind or consciously avoided knowing this fact.

New Straw Purchase and Firearms Trafficking Offenses

- The amendment makes two changes to account for the new offenses at 18 U.S.C. §§ 932 (Straw Purchasing of Firearms) and 933 (Trafficking in Firearms) established by the Bipartisan Safer Communities Act.
- First, the amendment amends Appendix A (Statutory Index) to reference the new offenses to §2K2.1.
- Second, the amendment revises §2K2.1 to set the base offense level for defendants convicted of these crimes at level 20 [2K2.1(a)(4)(B)(ii)(II)] if the offense involved either a semiautomatic firearm that is capable of accepting a large capacity magazine or a firearm described in 26 U.S.C. § 5845(a) or at level 14 [2K2.1(a)(6)(B)].

Increased Penalties for Straw Purchases and Trafficking Offenses

- The amendment revises §2K2.1 to provide increased penalties for defendants convicted under 18 U.S.C. §§ 932 or 933, or other offenses applicable to the straw purchases and trafficking of firearms.
- Specifically, the amendment revises the existing trafficking specific offense characteristic at §2K2.1(b)(5) in three ways and asks that we apply the **Greatest**.
- First, the amendment creates a new subsection, §2K2.1(b)(5)(A), which provides a 2-level enhancement for defendants **convicted of** illegally receiving a firearm under 18 U.S.C. § 933(a)(2) (the trafficking receipt provision) or § 933(a)(3) (attempting/conspiring to violate section 933).



Increased Penalties for Straw Purchases and Trafficking Offenses (Cont.d)

- Second, the amendment creates a new subsection, §2K2.1(b)(5)(B), which provides a 2-level enhancement for any defendant who engaged in straw purchasing or trafficking. This amendment provides an increase for defendants who attempted, conspired, or engaged in conduct involving the illicit transfer of a firearm or ammunition. It also includes receipt by inducement i.e. induce straw purchasing (tricking other people).
- Third, the amendment creates a new subsection, §2K2.1(b)(5)(C), which provides a 5-level enhancement for defendants who attempted, conspired, or engaged in conduct involving the illicit transfer of two or more firearms to a person who (i) had a prior conviction of 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. It also includes receipt by inducement i.e. induce straw purchasing (tricking other people).

2K2.1(b)(5) language

(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

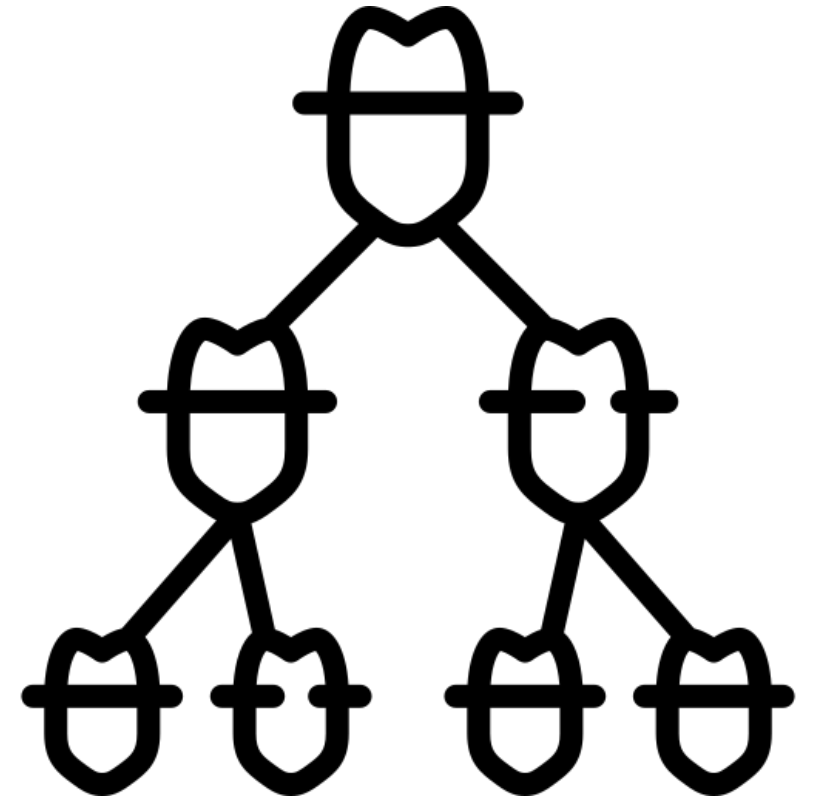
(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) 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 (f), increase by 5 levels.

Increased Penalties for Organized Crime

- The amendment amends §2K2.1 to increase penalties for defendants convicted under 18 U.S.C. § 932 or § 933 who are **affiliated with organized crime**.
- The amendment creates a new subsection, §2K2.1(b)(8), which provides a 2-level enhancement for defendants who receive an **increase at subsection (b)(5)** and who committed the offense **in connection with** the defendant's participation in an organization of **five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge**, that the organization has as one of its **primary purposes** the commission of criminal offenses.



2K2.1(b)(8) Language

(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.

Doctrines of Willful Blindness and Conscious Avoidance

Per the Commission, the doctrines of willful blindness and conscious avoidance are well established in criminal law. *See Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 769 (2011) where the Court noted that, while the Courts of Appeals articulate the “willful blindness” or “conscious avoidance” doctrines slightly differently, [the Courts of Appeals] all appear to agree on two basic requirements:

- 1) The defendant must subjectively believe that there is a high probability that a fact exists and
- 2) The defendant must take deliberate actions to avoid learning of that fact.

Firearms not Marked with a Serial Number (Ghost Guns)

- The amendment amends §2K2.1 to account for privately made firearms not marked with a serial number, commonly referred to as ghost guns.
- The amendment provides a 4-level enhancement if the defendant **knew** that the offense involved a firearm not marked with a serial number, or the defendant was **willfully blind or consciously avoided** knowing this fact. **(Mental state required as opposed to a stolen or obliterated firearm. See Amendment to Comm. Note 8.)**
- The amendment also specifically excepts firearms manufactured before the effective date of the Gun Control Act of 1968, which imposed the requirement that federal firearms licensees serialize newly manufactured or imported firearms.



2K2.1(b)(9) Language

(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.

Reduction for Mitigating Circumstances

The amendment amends §2K2.1 to account for straw purchasers with mitigating circumstances.

The amendment creates a new subsection, §2K2.1(b)(9), which provides a 2-level reduction for (A) defendants who receive an increase at subsection (b)(5); (B) does not have more than 1 criminal history point; and (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.



2K2.1(b)(4) language

(4) If

(A) any firearm was stolen, increase by 2 levels; or

(B)(i) any firearm had an altered or obliterated serial number; or (ii) 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.

3.

Acceptance of Responsibility

Acceptance of Responsibility §3E1.1 (p.376)

§3E1.1(a)

- 2-level decrease if defendant demonstrates Acceptance of Responsibility

§3E1.1(b)

- 1-level decrease if OL >_16 AND Government Motion (Avoid Trial Preparation)

What Does the Amendment Do?

Promulgated §3E1.1(b)

Preparing for trial ordinarily indicated by actions close to trial, such as:

- 2-level decrease if defendant demonstrates Acceptance of Responsibility

Preparing for trial is NOT:

- 1-level decrease if OL >_16 AND Government Motion (Avoid Trial Preparation)

4. Safety Valve

Guidelines Match The Statute



No more 'messy middle' issues related to 'qualifies under statute, but not under the guidelines.'



If your case qualifies for Safety Valve, apply the reduction in 2D1.1(b)(18), and include the statutory language in Part D and Recommendation.

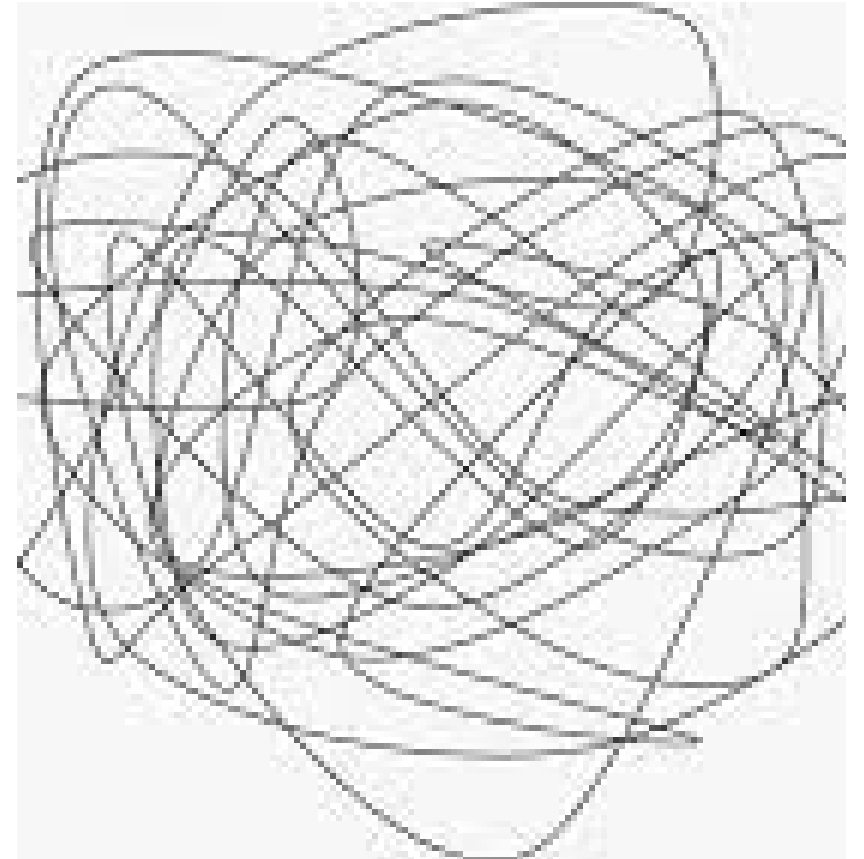


No variance language necessary.

Safety Valve Criminal History Criteria (kind of messy middle)

- (1) The defendant **does not have –**
- (A) More than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the guidelines;
 - (B) A prior 3-point offense, as determined under the sentencing guidelines; **and**
 - (C) A prior 2-point offense, as determined under the sentencing guidelines;

- Remaining criteria 2-5 unchanged (no violence/weapon, no death/serious injury, no leader, debriefed)
- 4th Circuit in US v Jones (2023)
 - All three criteria (A, B, AND C) must be met to disqualify based on Criminal History
- Supreme Court in Pulsifer v. United States (22-340) – pending. This may change in the spring.



5.

Criminal History

Status Points
Zero-Point Offender
Downward Departure

Why did the Commission Act on Criminal History?

Status points do not improve
predictive value of criminal history
score

Recidivism studies show “zero-point
offenders” are less likely to be arrested
than even “one-point offenders”

Changing legal landscape on simple
possession marihuana offenses

5. Criminal History

Status Points

Why did the Commission Act on Status Points?

An individual's criminal history calculation is strongly associated with the likelihood of future recidivism

However, status points only minimally improve the predictive value of the criminal history score

The guidelines separately account for consecutive punishment imposed upon revocations of supervised release, a likely occurrence if an offender is already under a criminal justice sentence

What does
the Status
Amendment
Do?

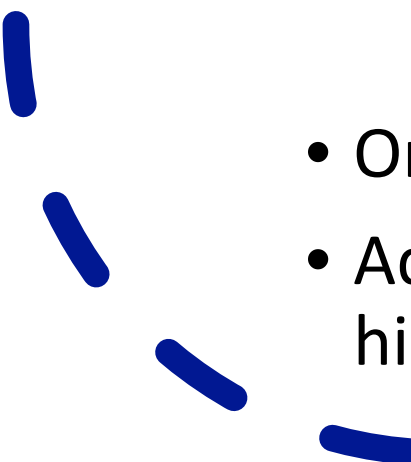
Eliminates status
points for defendants
with 6 or less criminal
history points

Reduces from 2 to 1
status point for
defendants with 7 or
more points



4A1.1(e)

“Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.”

- Subparagraphs (d) and (e) are switching.
 - (d) will now be cited for a prior crime of violence that receives 1 point due to single sentence.
 - (e) will be cited for status points in the Criminal History Computation section.
 - One point rather than 2
 - Added the condition that the defendant has at least 7 criminal history points before applying status points.
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5. Criminal History

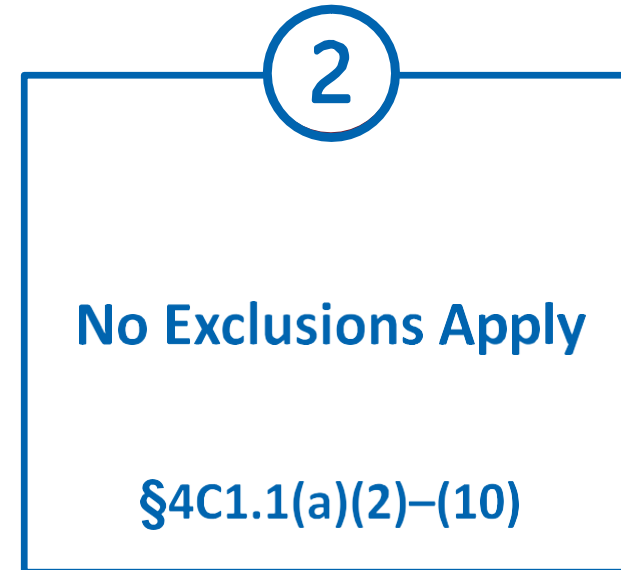
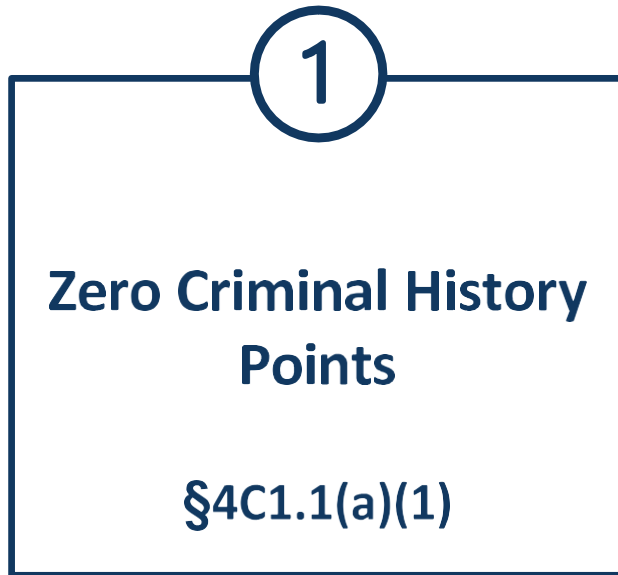
Zero-Point Offenders
4C1.1 Amendment

Why did the Commission Act on Zero-Point Offenders?

- Commission's recidivism data showed that offenders with zero criminal history points have considerably lower recidivism rates than other offenders, even those with one criminal history point
- Higher below guideline departure and variance rates for zero- point offenders

What does the Zero-Point Offender Amendment Do? Promulgated §4C1.1(a)

Two Level Decrease If...



4C1.1 (text)

(a) Adjustment. – If the defendant meets **all of the following criteria**:

- (1) The defendant did not receive any criminal history points from Chapter Four, Part A;
- (2) The defendant did not receive an adjustment under §3A1.4 (Terrorism);
- (3) The defendant did not use violence or credible threats of violence in connection with the offense;
- (4) The offense did not result in death or serious bodily injury;
- (5) The instant offense of conviction is not a sex offense;
- (6) The defendant did not personally cause substantial financial hardship;
- (7) The defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (8) The instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);
- (9) The defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and
- (10) The defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

Decrease the offense level determined under Chapters Two and Three by 2 levels.

4C1.1 (layman's terms)

- 1) 0 Criminal History Points
- 2) Not a terrorism case
- 3) No violence or threats
- 4) No death or serious injury
- 5) No sex offenders
- 6) No substantial financial hardship (this one may be hard)
- 7) No firearms
- 8) No human rights (2H1.1)
- 9) No hate crime, vulnerable victim, or serious human rights offense (3A1.1 or 3A1.5)
- 10) No aggravating role or continuing criminal enterprise

Zero-Point Exclusions

Terrorism Adjustment Applied (§3A1.4)

Def. did not use violence/threats

No death or serious bodily injury

Not a sex offense conviction

Def. did not cause substantial financial hardship

Def. did not possess, transfer, receive firearm

Offenses against individual rights

No adjustment for vulnerable victim or hate crime

No aggravating role under §3B1.1

Language Matters!

The defendant –
only your
defendant
specifically

The offense –
includes relevant
conduct

The offense of
conviction – just
the convicted
offense

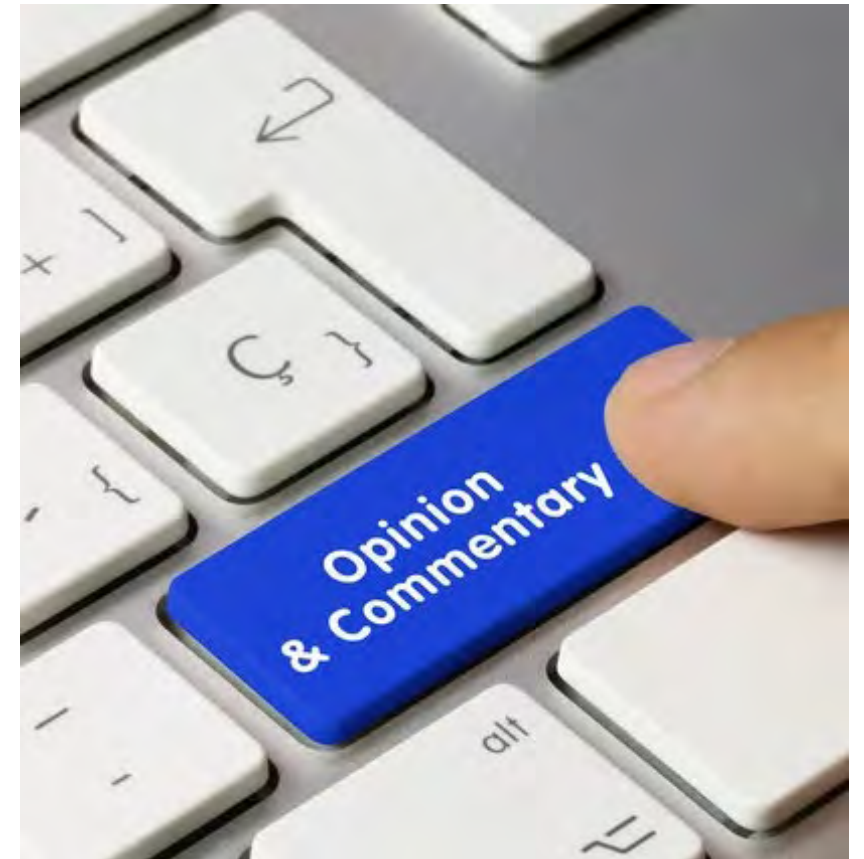
4C1.1(b)

- Definitions for
 - 1) Dangerous Weapon, Firearm, Offense, and Serious Bodily Injury (points to other guidelines)
 - 2) Sex Offense (points to statute)
 - 3) Substantial Financial Hardship (points to other guideline)

Commentary

Application of (a)(6). – The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of § 2B1.1 (Theft, Property Destruction, and Fraud).

Upward Departure – An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.



5.

Criminal History

4A1.3 Amendment

Downward Departure—

Possession of Marihuana added as example where Downward Departure may be warranted.

4A1.3 comment.(n.3)

3. Downward Departures –

(A) Examples. – A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

- i. The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.
- ii. The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

Simple Possession of Marihuana Departure

A downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marihuana for personal use and no intent to sell.

28 U.S.C.
994(j)

“The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence *or* an otherwise serious offense ...”

Implementation of 28 U.S.C. § 994(j)

If defendant qualifies under §4C1.1:

Zone A or B

- a sentence other than imprisonment is generally appropriate.

Zone C or D

- a departure, other than imprisonment may be appropriate, if offense is not a crime of violence or otherwise serious offense.

6. Career Offender

What does the Amendment Do?

Moves, without change, the definitions that include inchoate and accessory offenses, from the §4B1.2 Commentary to the guideline itself to resolve circuit split

Creates new robbery definition at §4B1.2 so Hobbs Act robbery will qualify as a crime of violence

Added new
offenses to
“Controlled
Substance
Offense”
header

46 U.S.C. § 70503(a) and
46 U.S.C. § 70506(b)

These offenses have to do with
certain vessels (to comply with
the Coast Guard Authorization
Act) and likely won't apply here.

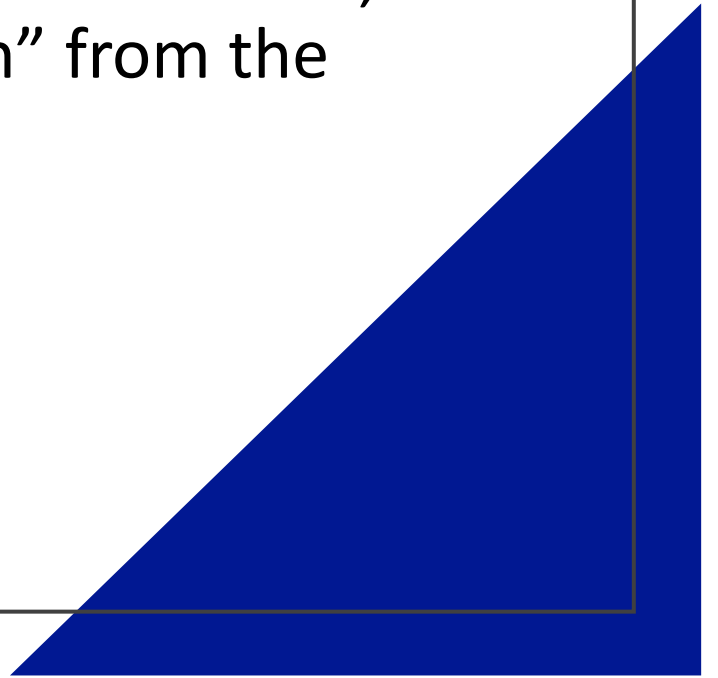
Certain inchoate and accessory offenses

(d) 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.

This section has been moved from the commentary to the text of the guideline (in order to address a circuit conflict regarding the authoritative weight afforded to certain commentary to §4B1.2).

Guideline v. Commentary

Similarly, this amendment moves the definitions of “extortion,” “forcible sex offense,” and “prior felony conviction” from the commentary to the text of the guideline.



Hobbs Act Robbery is back!

(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.



7. Fake Pills



Why did the Commission Act?



DEA expressed concern about the proliferation of fake pills containing fentanyl.

In 2022, the DEA seized over 50 million fake pills.

70% of these pills contained fentanyl.

15% increase in overdose deaths.

What does the Amendment Do?

The amendment adds a 2-level increase where the defendant:

- represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl/fentanyl analogue;

AND

- acted with willful blindness / conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug

8.

Reduction in Sentencing /
“Compassionate Release”

Reduction in Sentencings



SECTION 3582(C)(1)(A) AUTHORIZED A COURT, UPON MOTION OF THE DIRECTOR OF THE BUREAU OF PRISONS, TO REDUCE A DEFENDANT'S TERM OF IMPRISONMENT IF "EXTRAORDINARY AND COMPELLING REASONS" WARRANT A REDUCTION.



CONGRESS DELEGATED THE TASK OF DESCRIBING "EXTRAORDINARY AND COMPELLING REASONS" TO THE COMMISSION, INCLUDING THE CRITERIA TO BE APPLIED AND A LIST OF SPECIFIC EXAMPLES.

Why did the Commission Act?

The First Step Act (FSA) expanded § 3582(c)(1)(A) to allow a defendant to file a motion.

- Commission starts studying the issue to fill the void of BOP rarely granting motions.
- From FY 2019 through March 2023, over 4,700 motions granted.

What does
the
Amendment
Do?

Revises §1B1.13 to include defendant motion.

Expands list of extraordinary and compelling reasons at §1B1.13 to better account for plain language of § 3582(c)(1)(A) and to reflect what reasons courts used in granting motions.

Extraordinary and Compelling Reasons (USSG§1B1.13)

Expands Medical Circumstances

Modifies Family Circumstances

Adds a Victims of Abuse

Revises Catchall

Adds Unusually Long Sentences

§1B1.10 (Reduction in Term of Imprisonment)



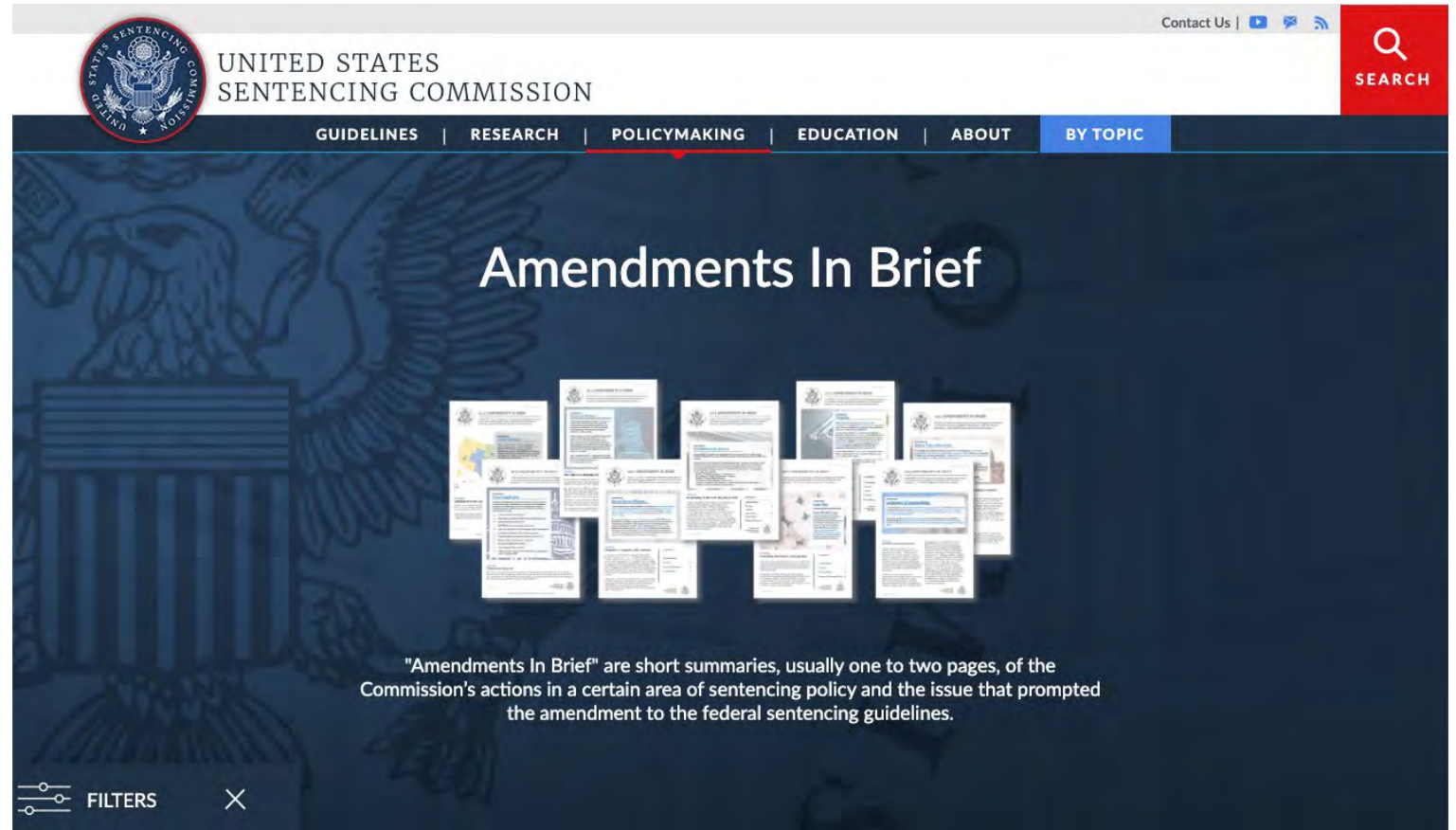
“Status points” and “Zero-Point Offenders” added to the list at §1B1.10.



Delayed
Implementation

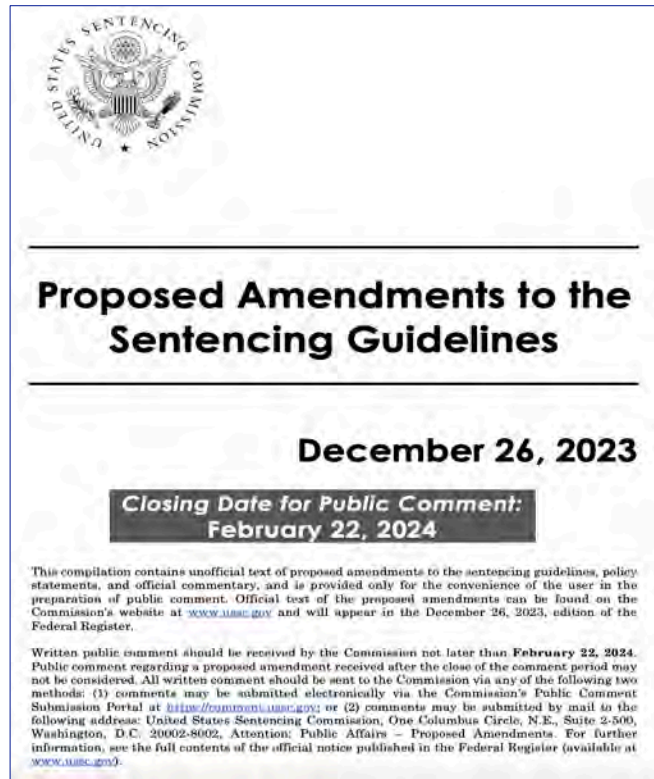
The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court's order is February 1, 2024, or later.

Amendments In Brief



<https://www.ussc.gov/topic/amendments-brief>

New Amendments Subject to Public Comment



https://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf

Proposed Amendments to Sentencing Guidelines

RULES FOR CALCULATING LOSS

YOUTHFUL INDIVIDUALS

ACQUITTED CONDUCT

CIRCUIT CONFLICTS



Q & A
