



## 2023 AMENDMENTS IN BRIEF

In April 2023, the U.S. Sentencing Commission promulgated amendments to the federal sentencing guidelines. For a more detailed discussion of the policy determinations made by the Commission, please refer to the *Reason for Amendment* in the “Reader-Friendly” and Official Text (link in QR code).

### Amendment #814

## Reduction in Sentence Pursuant to Section 3582(c)(1)(A)

The amendment revises §1B1.13 (colloquially referred to as the Commission’s “Compassionate Release” policy statement) to reflect that a defendant is now authorized to file a motion under 18 U.S.C. § 3582(c)(1)(A), making §1B1.13 applicable to both defendant-filed and BOP-filed motions.

The amendment expands the list of “extraordinary and compelling reasons” in five ways to better account for the plain language of section 3582(c)(1)(A) and its legislative history, to reflect the reasons relied upon by many courts after passage of the First Step Act in the absence of a binding policy statement, and to account for recent experiences—including those pertaining to the pandemic:

- (1) adds “Medical Circumstances” subcategories;
- (2) modifies the “Family Circumstances” category;
- (3) adds a “Victim of Abuse” category;
- (4) revises the “Other Reasons” category; and
- (5) adds an “Unusually Long Sentences” category, permitting consideration of non-retroactive changes in law in a narrow set of circumstances.

### THE ISSUE

## Responding to the First Step Act of 2018

Congress passed the First Step Act of 2018 granting defendants the authority to file motions for compassionate release. Without a Commission quorum necessary to amend the guidelines accordingly, nearly every circuit court held that the unamended policy statement was not “applicable” to defendant-filed motions. In circuits where the policy statement did not apply, district courts began identifying their own “extraordinary and compelling” grounds for a sentence reduction—including whether nonretroactive statutory changes could ever be an “extraordinary and compelling” reason and, if so, under what circumstances.

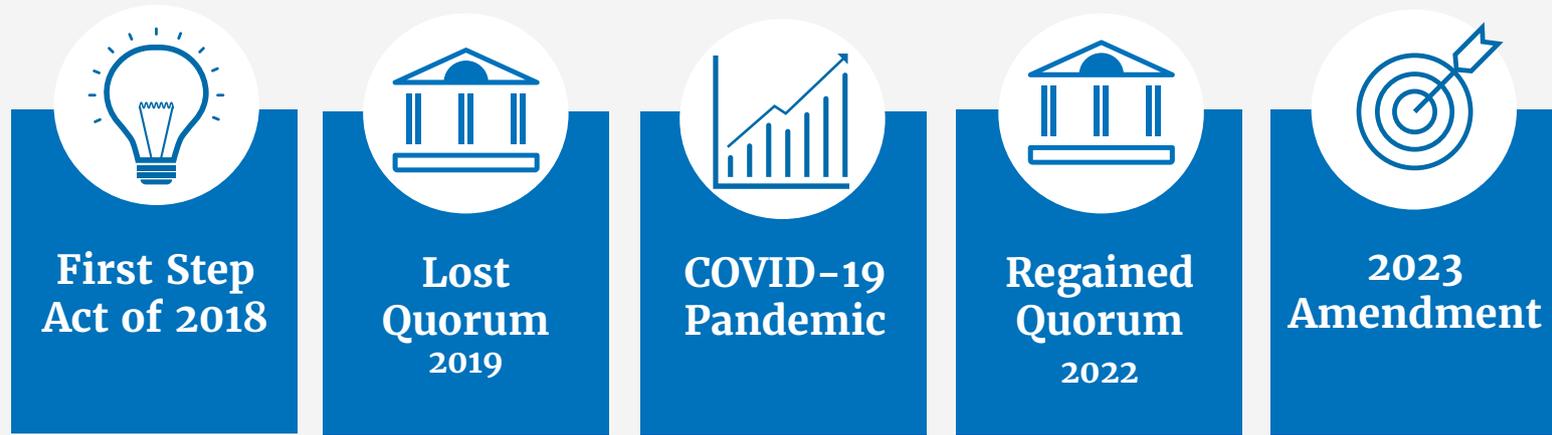
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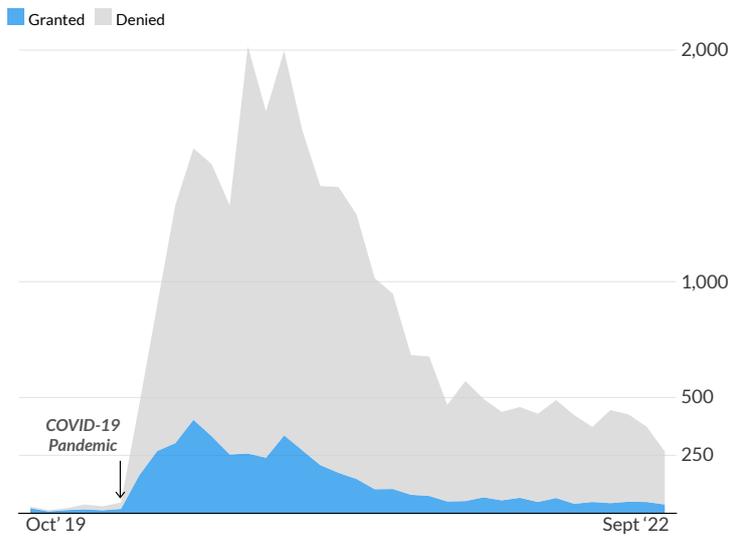
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## TIMELINE



## FACTS & FIGURES



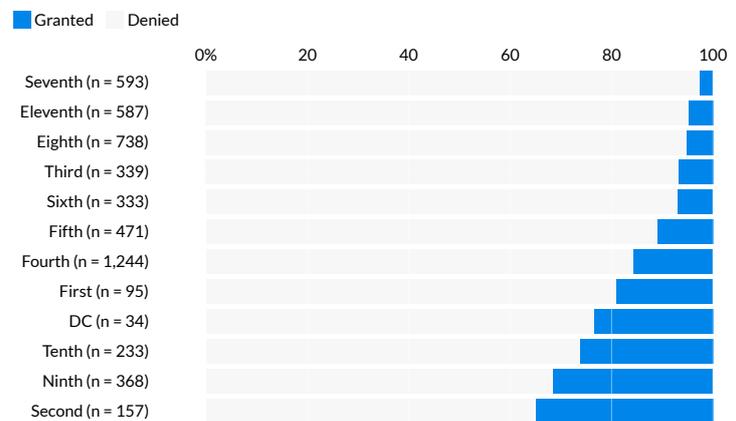
## Grant Rates

In FY 2022, the overall grant rate was 12.2%, but there was substantial variation in grant rates among the circuits (ranging from 2.5% to 35%).

|                                    | FY 2020 | FY 2021 | FY 2022 |
|------------------------------------|---------|---------|---------|
| COVID-19/pandemic                  | 72%     | 62%     | 29%     |
| Terminal illness (Note 1(A)(i))    | 4%      | 2%      | 6%      |
| Other Medical                      | 12%     | 9%      | 16%     |
| Age                                | 2%      | 1%      | 4%      |
| Family Circumstances               | 2%      | 3%      | 6%      |
| Comparable to Note (1)(A)-(C)      | 1%      | 1%      | 7%      |
| Stacking 18 U.S.C. § 924c          | 2%      | 7%      | 15%     |
| 21 U.S.C. § 851 Enhanced Penalties | 0%      | 2%      | 6%      |
| Career Offender Issues             | 1%      | 1%      | 8%      |
| Conviction/Sentencing Errors       | 0%      | 0%      | 3%      |
| Other Sentence                     | 1%      | 2%      | 9%      |
| Other                              | 1%      | 4%      | 6%      |
| Reason Unspecified                 | 16%     | 17%     | 14%     |

## Trends

Motions under Section 3582(c)(1)(A) reached their highest filing levels in the second half of 2020—correlating with developments in the COVID-19 pandemic. Their prevalence has since declined but remains higher than before the pandemic due to defendant-filed motions newly authorized by the First Step Act of 2018.



## Grant Reasons

The percentage of cases in which a sentence-related reason was cited as a reason to grant compassionate release steadily increased year-to-year. Most recent data show that sentence-related reasons are cited as often as reasons in (or comparable to those in) the prior policy statement.

## RATIONALE

# Expanding the List of “Extraordinary and Compelling Reasons”

## ADDITIONAL MEDICAL CIRCUMSTANCES

The new subcategories reflect the medical circumstances not expressly provided in §1B1.13 that were most often cited by courts in granting sentence reduction motions.

§1B1.13(b)(1)

The amendment recognizes serious medical conditions requiring long-term care that is not being provided while in custody and also adds language to address some of the unique and unforeseen circumstances arising from the COVID-19 pandemic. The new reasons are targeted to ensure consideration of the defendant’s individual health circumstances, the level of risk at the defendant’s facility, and the ability to adequately mitigate the defendant’s individualized risk.

## MODIFIED FAMILY CIRCUMSTANCES

First, this modification expands the existing provision relating to the death or incapacitation of the caregiver of a defendant’s minor child to include a child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. Second, the modification adds a new provision for cases in which a defendant’s parent is incapacitated. Finally, the modification adds a second new provision that applies when similar circumstances exist with respect to a person whose relationship with the defendant is similar in kind to that of an immediate family member.

§1B1.13(b)(3)

Relief is available under the two new provisions only if the defendant establishes both the existence of the qualifying relationship and that the defendant is the only available caregiver.

## NEW “VICTIM OF ABUSE” CATEGORY

This provision responds, in part, to the Department of Justice’s recognition that use of Section 3582(c)(1)(A) may be appropriate “where an individual in BOP custody has been determined to have been the victim of sexual assault perpetrated by BOP personnel.”

§1B1.13(b)(4)

The misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless the defendant establishes that such proceedings are unduly delayed or the defendant is in imminent danger.

## MODIFIED “OTHER REASONS” CATEGORY

The Commission determined that, by retaining a broad catchall provision that allows for consideration of reasons similar in gravity to those enumerated in the policy statement, courts would have both discretion and guidance necessary to grant reductions in any appropriate case.

§1B1.13(b)(5)

## NEW “UNUSUALLY LONG SENTENCES” CATEGORY

This amendment responds to a circuit split concerning when, if ever, changes in law may be considered in ruling on a sentence reduction motion under section 3582(c)(1)(A).

§1B1.13(b)(6)

The amendment adopts a tailored approach, permitting the consideration of changes in law only under limited circumstances and only within the framework of “unusually long sentences,” one circumstance that the legislative history to the Sentencing Reform Act expressly identified as an appropriate ground for relief.

**“The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction . . .” – 28 U.S.C. § 994(t)**

## ADDITIONAL RESOURCES

The Reduction in Sentence Amendment makes several changes to §1B1.13 to respond to the changes made by the First Step Act, case law that developed after its enactment, and Commission data analyzing the factors identified by courts in granting sentence reduction motions. The amendment is also informed by extensive public comment and a public hearing with perspectives from all stakeholders in the federal criminal justice system.



### Research & Data Reports

U.S. SENT'G COMM'N, COMPASSIONATE RELEASE  
DATA REPORT (DEC. 2022)

U.S. SENT'G COMM'N, COMPASSIONATE RELEASE:  
THE IMPACT OF THE FIRST STEP ACT AND COVID-19  
PANDEMIC (2022)

U.S. SENT'G COMM'N, THE FIRST STEP ACT OF  
2018: ONE YEAR OF IMPLEMENTATION (2020)



### Comment & Testimony

THOUSANDS OF PUBLIC COMMENT SUBMISSIONS ON  
PROPOSED AMENDMENTS (MAR. 2023)

U.S. SENT'G COMM'N, TESTIMONY FROM PUBLIC  
HEARING ON PROPOSED AMENDMENTS (FEB. 2023)

- EXECUTIVE BRANCH PERSPECTIVE
- PRACTITIONERS' PERSPECTIVES
- LAW ENFORCEMENT PERSPECTIVES
- JUDICIAL BRANCH PERSPECTIVE
- COMMUNITY PERSPECTIVES
- ADVISORY GROUP PERSPECTIVES
- FORMERLY INCARCERATED INDIVIDUALS' PERSPECTIVES
- ACADEMIC PERSPECTIVES

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### Amendment #815

## Crime Legislation

In addition to amendments separately addressing the First Step Act and Bipartisan Safer Communities Act, this multi-part amendment responds to the following recently enacted legislation largely by amending Appendix A (Statutory Index) to reference new offenses established by the Acts:

- FDA Reauthorization Act of 2017
- Allow States and Victims to Fight Online Sex Trafficking Act
- FAA Reauthorization Act of 2018
- SUPPORT for Patients and Communities Act
- Amy, Vicky, and Andy Child Pornography Victim Assistance Act
- Foundations for Evidence-Based Policymaking Act
- National Defense Authorization Act for Fiscal Year 2020
- Representative Payee Fraud Prevention Act
- Stop Student Debt Relief Scams Act
- Protecting Lawful Streaming Act
- William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

### THE ISSUE

## Commission Quorum

After four years, the Commission was faced an abbreviated amendment cycle and a backlog of policy work. The Commission lost a voting quorum shortly after enactment of the First Step Act, preventing the Commission from responding to congressional directives and amending the federal sentencing guidelines in light of new legislation.



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### Amendment #816

## Sexual Abuse Offenses

The amendment first creates Appendix A references for new offenses created by the [Violence Against Women Act \(VAWA\) Reauthorization Act of 2022](#) at [18 U.S.C. § 250](#) concerning sexual misconduct while committing civil rights offenses and [18 U.S.C. § 2243\(c\)](#) concerning sexual abuse of an individual in federal custody.

The amendment also [increases the base offense level](#) at §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) for cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision [from 14 to 22](#). It also addresses the presence of [aggravating factors](#) in sexual abuse offenses by providing a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse.

### THE ISSUE

## Response to Congress, DOJ concerns

Congress passed the Violence Against Women Act Reauthorization Act in 2022, establishing two new crimes. The first, at 18 U.S.C. § 250(a), prohibits any person from engaging in, or causing another to engage in, sexual misconduct, including certain attempts, while committing any civil rights offense. The second at 18 U.S.C. § 2243(c) prohibits law enforcement officers from knowingly engaging in a sexual act with an individual under arrest or supervision, in detention, or in federal custody.

Separately, in its annual letter to the Commission, the Department of Justice urged the Commission to address concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision.

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## COMMENT & TESTIMONY

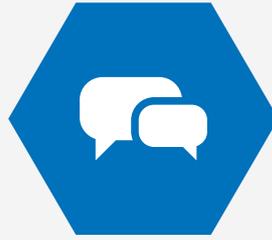
### Part A: New Offenses Established by VAWA Reauthorization Act of 2022



#### Congress

“We commend the Commission on proposing amendments to the Guidelines Manual in response to the passage of the Violence Against Women Act (VAWA) Reauthorization Act of 2022, which reauthorizes VAWA through 2027 and modernizes current law to better address the evolving needs of domestic violence and sexual assault survivors.”

–Senators Durbin, Hirono, Booker



#### Department of Justice

“The Department supports the Commission’s proposed amendment to include in §2A3.3 a cross reference to §2A3.1 for offenses with aggravating factors ... [I]t encourages the Commission to also make applicable the Abuse of Position of Trust adjustment under §3B1.3. The Department believes the absence of enhancements or upward adjustments in §2A3.3 leaves the Guidelines range inadequate to address more egregious offenses in the prison setting.”



#### Advisory Groups

The Probation Officers Advisory Group “concur[s] with the proposed amendment to refer convictions under the newly enacted statute at 18 U.S.C. § 250 to USSG §2H1.1, particularly because the manner in which the base offense level underlying that guideline is structured.”

## FACTS & FIGURES

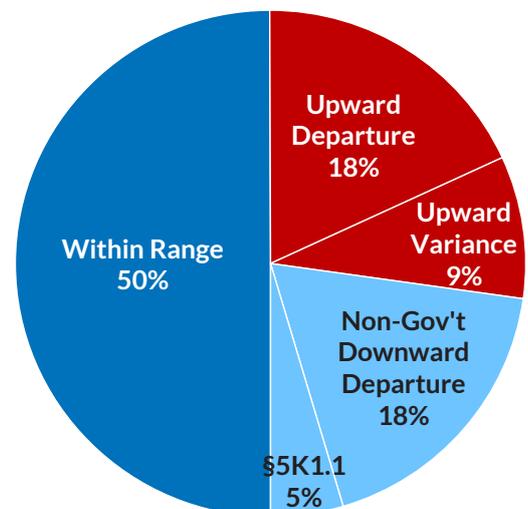
### Part B: Criminal Sexual Abuse of a Ward

A review of offenders sentenced between FY 2012 and FY 2021 indicates a change in offense conduct over the time period—with a greater number of cases involving force, threats, or coercion.

The Commission also observed an increasing rate of upward departures and variances over the last five fiscal years. The rate of upward departures and variances was also substantially higher in §2A3.3 cases than the overall federal caseload (3% in FY 2022).

Relatedly, the average sentence (35 months) was nearly double the average guideline minimum (17 months) in §2A3.3 cases. This, too, is uncommon, as the average sentence imposed is usually below the average guideline minimum.

§2A3.3 Sentences Relative to the Guideline Range, Fiscal Years 2018-2022 (n=22)





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### Amendment #817

## Safety Valve Provision

The amendment implements the provision of the First Step Act **expanding the applicability of the safety valve provision by amending §5C1.2** and its corresponding commentary to **reflect the broader class of defendants who are eligible for safety valve relief under the Act.**

The amendment also **revises §5C1.2(b)** to account for the **expanded class of defendants who qualify for safety valve relief.** Section 5C1.2(b) implemented Congress’s directive requiring that the guideline minimum be at least 24 months for defendants whose statutorily required minimum sentence was at least five years by providing a minimum offense level of 17 for such offenders.

Additionally, the amendment makes conforming changes to §4A1.3, which references the **number of criminal history points permitted under §5C1.2(a)(1).**

### THE ISSUE

#### The Guideline Safety Valve Provisions

The First Step Act broadened the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of offenders eligible for relief from mandatory minimum penalties. At the time that it enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to “carry out the purposes of [section 3553(f)].” Congress also directed that, “[i]n the case of a defendant for whom the statutorily required minimum sentence is 5 years, such guidelines and amendments to guidelines . . . shall call for a guideline range in which the lowest term of imprisonment is at least 24 months.”

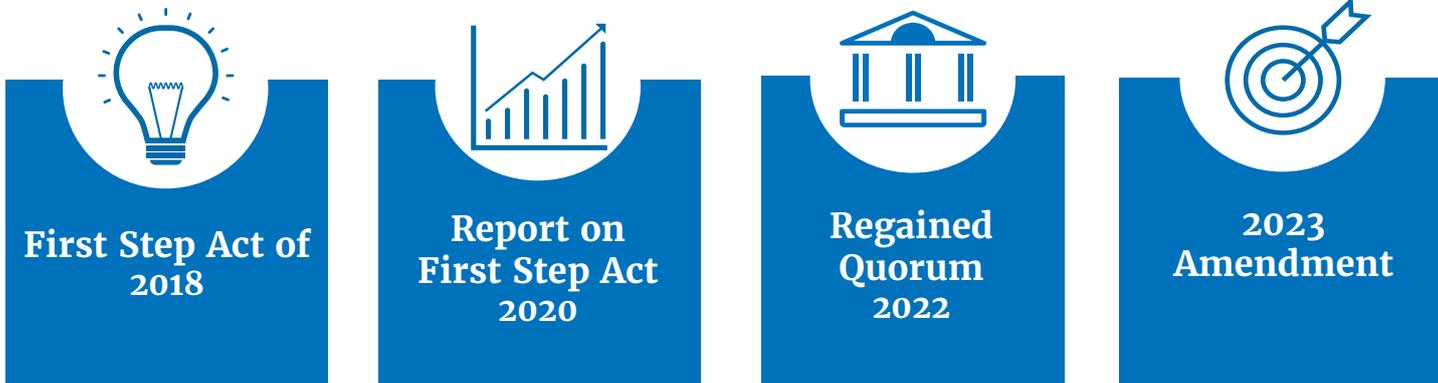


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#### First Step Act’s Changes to Statutory Safety Valve

As originally enacted, the statutory safety valve applied only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, and 963, and to defendants who, among other things, had not more than one criminal history point, as determined under the guidelines. The First Step Act amended section 3553(f)(1) to expand eligibility for the safety valve in two ways. First, the Act extended applicability of the safety valve to maritime cases (adding 46 U.S.C. §§ 70503 and 70506). Second, the act broadened the criminal history eligibility criteria to include defendants who do not have: (1) “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines”; (2) a “prior 3-point offense, as determined under the sentencing guidelines”; and (3) a “prior 2-point violent offense, as determined under the sentencing guidelines.”

## TIMELINE



### Post-First Step Act Statutory Safety Valve

**(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.** — Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), **or section 70503 or 70506 of title 46**, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

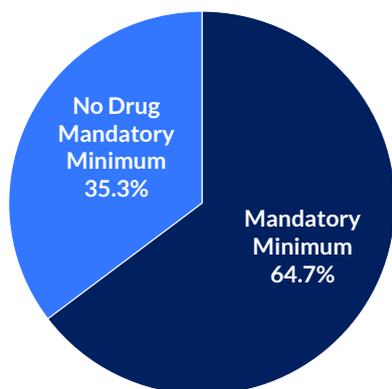
**(1) the defendant does not have—**

- (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;**
- (B) a prior 3-point offense, as determined under the sentencing guidelines; and**
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines;**

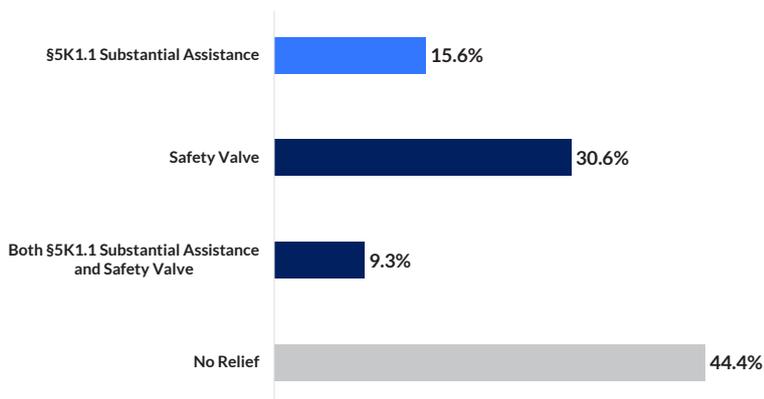
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## FACTS & FIGURES

**Mandatory Minimum Penalties in Drug Trafficking Cases, FY22**



**Relief From Mandatory Minimum Penalties in Drug Trafficking Cases, FY22**



## CIRCUIT CONFLICT

The operation of the word “and” connecting subsections (A) through (C) in section 3553(f)(1)’s expanded criminal history provision is the subject of an evolving circuit conflict that the Supreme Court will resolve in the fall term.





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### Amendment #818

## Fake Pills

The amendment add a **2-level enhancement** at §2D1.1(b)(13) for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing **fentanyl** (Nphenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a **fentanyl analogue**, and acted with **willful blindness or conscious avoidance of knowledge** that such mixture or substance was not the legitimately manufactured drug.

### THE ISSUE

## Fake Pills Containing Fentanyl

In October 2022, the DEA wrote to the U.S. Sentencing Commission about the proliferation of “fake pills” (*i.e.*, illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue.

According to the DEA, these fake pills resemble legitimately manufactured pharmaceutical pills (such as OxyContin, Xanax, and Adderall) but can result in sudden death or poisoning due to the unknown presence and quantities of dangerous substances, such as fentanyl and fentanyl analogues.

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## FACTS & FIGURES

The dangers associated with fentanyl, fentanyl analogues, and fake pills continue to evolve and heighten. In the last fiscal year alone, the Drug Enforcement Administration and Center for Disease Control have reported:

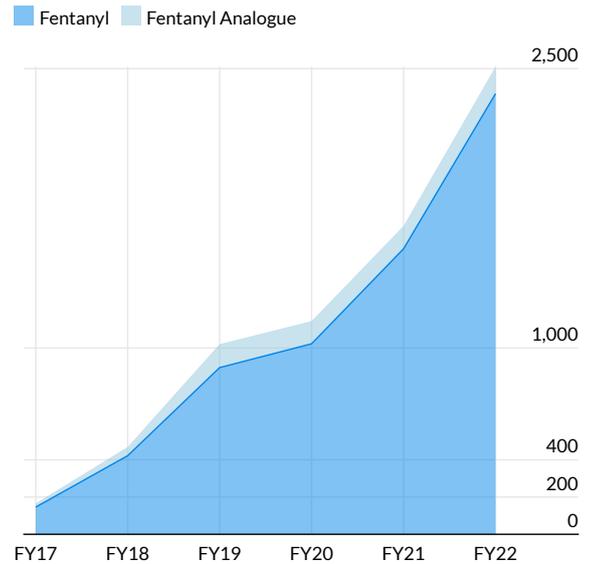
**50.6M**  
fake pills seized

**70%**  
contain fentanyl

**+15%**  
overdose deaths

Commission data also demonstrate that the number of federal fentanyl and fentanyl analogue cases have dramatically increased since the initial promulgation of §2D1.1(b)(13) in 2018.

The new alternative 2-level enhancement makes clear that the government bears the burden to prove by a preponderance of the evidence that the enhancement applies based on the subjective belief and deliberate action of the defendant committing the offense.



## TIMELINE

### The Commission's Policy Work



#### 2018 Amendment

In 2018, the Commission added a 4-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance (which equates to an approximate 50% increase in sentence).



#### Policy Priorities

In October 2022, the DEA wrote to the Commission, "The DEA respectfully submits that the current [guidelines] do not adequately reflect the significant and unique risks that fake pills pose to unwitting victims."



#### Comment & Testimony

"Individuals who deceive their victims into taking deadly substances deserve tougher sentences. The USSC's proposed 2-level enhancement is a positive step towards holding them accountable."  
- Senators Grassley & Feinstein, March 2023 Public Comment Letter



#### 2023 Amendment

The new alternative 2-level enhancement reflects the increased culpability of an individual who acted with willful blindness or conscious avoidance of knowledge that the substance the individual represented or marketed as a legitimately manufactured drug contained fentanyl or a fentanyl analogue.



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### Amendment #819

## Firearms

The amendment responds to the [Bipartisan Safer Communities Act](#), which [directs the Commission](#) to increase certain firearms penalties (e.g., straw purchases, trafficking in firearms, organized crime affiliation).

The amendment adds [§2K2.1](#) references to Appendix A (Statutory Index) for the [new offenses](#) established by the Act and sets the [§2K2.1](#) base offense level to account for these new offenses. The amendment expands the specific offense characteristic at (b)(5) to [increase penalties](#) for [illegally transferring a firearm](#), and creates an additional [2-level increase](#) at (b)(8) for trafficking in connection with knowingly participating in a [criminal organization](#).

The amendment adds a [4-level increase](#) at (b)(4) for certain offenses involving “[ghost guns](#)” (privately made guns not marked with a serial number).

Finally, the amendment creates a [2-level decrease](#) at (b)(9) targeting the [less culpable](#) straw purchasers with no more than one [criminal history](#) point.

### THE ISSUE

## Congressional Directive

Following the Uvalde, Texas shooting, Congress passed the Bipartisan Safer Communities Act, Pub. L. No. 117-159, which included a directive to the Commission to:

- increase penalties for defendants convicted under 18 U.S.C. § 932, 18 U.S.C. § 933, or “other offenses applicable to the straw purchases and trafficking of firearms;”
- increase penalties for defendants convicted under 18 U.S.C. § 932 or § 933 who are affiliated with organized crime; and,
- consider an amendment accounting for straw purchasers with mitigating circumstances.

Separately, the Commission shared concerns with the Department of Justice about “ghost guns”—particularly the increased frequency with which they are used in a crime and the difficulty in tracing these firearms.

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## TIMELINE



**Bipartisan Safer  
Communities  
Act  
2021**



**Comprehensive  
Firearms  
Report  
2022**



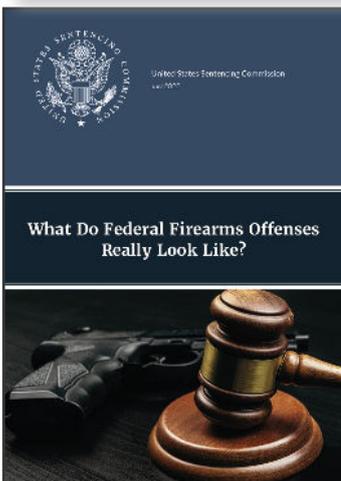
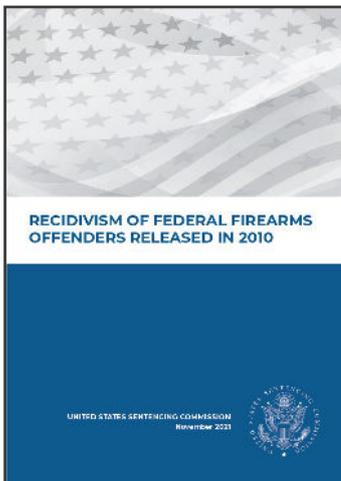
**Regained  
Quorum  
2022**



**2023  
Amendment**

**“ Directive to sentencing commission.**—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this subsection, the United States Sentencing Commission shall review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

## RELATED REPORTS



## PUBLIC COMMENT

### Executive Branch

“As you know, during the pandemic, the country has seen a rise in homicides, aggravated assaults, and firearms offenses more generally, and the Attorney General and I have instituted a number of initiatives to address violent crime. The BSCA is an element of the solution, and a full review of the sentencing guidelines for firearms offenses and the reform of Section 2K2.1 are necessary.”

– Lisa Monaco, Deputy Attorney General, U.S. Department of Justice

### Legislative Branch

“Taken as a whole, this directive reflects our deep concern about the severity and danger of gun trafficking while also acknowledging that mitigating factors should inform each sentencing decision.”

– U.S. Senators Cory A. Booker, Christopher S. Murphy

### Stakeholder Community

“The Act’s focus on straw purchasing and gun trafficking reflects what data has long shown: the diversion of guns into illegal markets is what enables gun violence. Indeed, straw purchasing is the most common channel for guns entering the trafficking pipeline, and corrupt gun retailers account for a higher volume of guns diverted into the illegal market than any other single trafficking channel.”

– Working Group of the Peter Zimroth Center on the Administration of Criminal Law, NYU

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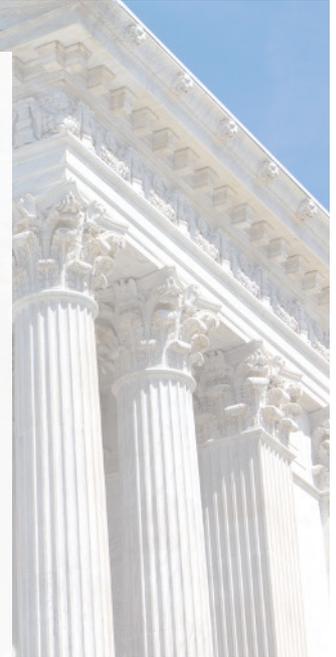
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### Amendment #820

## Acceptance of Responsibility

The amendment defines the term “preparing for trial,” which appears in §3E1.1(b) and Application Note 6 to §3E1.1. The amendment defines “preparing for trial” as “substantive preparations taken to present the government’s case against the defendant to a jury (or judge, in the case of a bench trial) at trial.”

The amendment also deletes hortatory language that the Commission previously added to Application Note 6 providing that the “government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”



### THE ISSUE

## Variations Among Jurisdictions

This amendment responds to circuit conflicts over whether a reduction under subsection (b) of §3E1.1 (Acceptance of Responsibility), which requires a motion from the government, may be withheld or denied if a defendant moves to suppress evidence or raises sentencing challenges. Justices Sotomayor and Gorsuch observed in 2021 that this conflict is both longstanding and has a potentially significant impact on defendants.

Three circuits have permitted the government to withhold a §3E1.1(b) motion based on a suppression motion, while five circuits have held that a reduction may not be denied based on a suppression motion. Similarly, the First, Third, Seventh, and Eighth Circuits have held that the government may withhold a §3E1.1(b)

motion based on sentencing challenges, while the Second and Fifth Circuits have held that it may not. These conflicts have resulted in variation in §3E1.1(b) motion practice across—and even within—judicial districts. In some jurisdictions, defendants receive the additional reduction as a matter of course, even if they assert pre-trial or post-conviction challenges. In others, the §3E1.1(b) motion has been withheld based on motions to suppress, sentencing challenges, or other grounds. Because the sentencing impact of losing one additional level under §3E1.1(b) can be significant, the practice in the latter districts has had a chilling effect, deterring defendants from pursuing certain evidentiary and sentencing challenges.



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## 2023 AMENDMENTS IN BRIEF

In April 2023, the U.S. Sentencing Commission promulgated amendments to the federal sentencing guidelines. For a more detailed discussion of the policy determinations made by the Commission, please refer to the *Reason for Amendment* in the “Reader-Friendly” and Official Text (link in QR code).

### Amendment #821

## Criminal History

Part A of the amendment addresses “**Status Points**,” decreasing them by one point for individuals with seven or more criminal history points and eliminating Status Points for those with six or less criminal history points.

Part B creates a new §4C1.1 guideline that provides a decrease of two offense levels for “**Zero-Point Offenders**” (no criminal history points) whose offense did not involve specific aggravating factors. The amendment revises §5C1.1 to provide guidance regarding the appropriateness of a sentence other than prison for certain first offenders—as directed by 28 U.S.C. § 994(j).

Part C amends the §4A1.3 Commentary to include prior **marijuana possession** sentences as an example of when a downward departure may be warranted for criminal history reasons.

### RETROACTIVITY

In August 2023, the Commission voted to allow retroactive application of **Parts A and B**, extending these reductions to currently incarcerated individuals with a 3-month delay in implementation (meaning orders must have an effective date **no earlier than February 1, 2024** (see p.4 for more information)).

### THE ISSUE

## New Data & A Changing Legal Landscape

While relatively common in federal cases, status points add less predictive value to the criminal history score than the original Commission may have expected.

The Commission’s recidivism studies also found that offenders with zero criminal history points were less likely to be rearrested following their release than other federal offenders. The Commission also observed consistently high departure and variance rate for zero-point offenders.

Meanwhile, many states have reduced or eliminated penalties for marijuana possession but these convictions still impact a federal offender’s criminal history score.

The Commission determined that this research coupled with court feedback warranted refinements to Chapter Four.

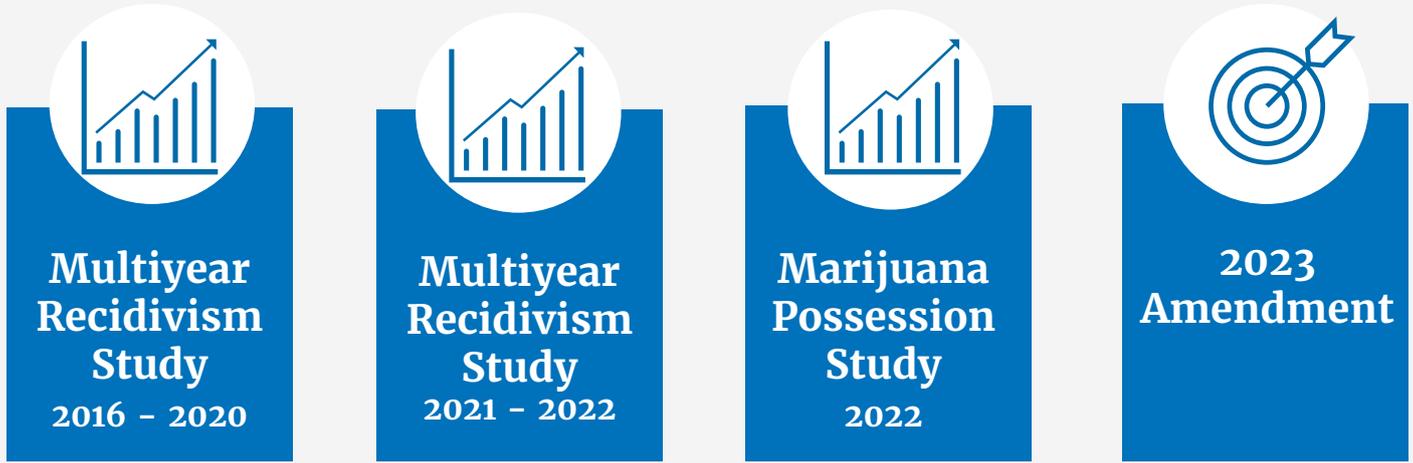
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## TIMELINE

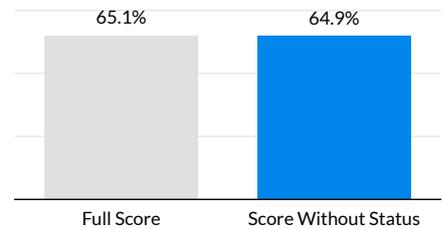


## FACTS & FIGURES

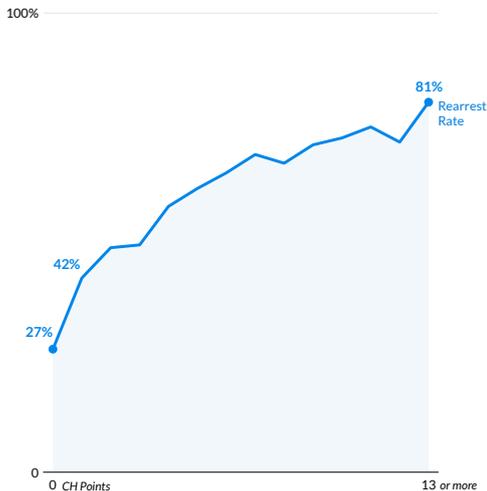
### Predictive Value of Status Points

Over the last five years, status points were applied in 38% of cases—moving 62% of such offenders into a higher criminal history category. At the same time, Commission data demonstrate that status points minimally improve the criminal history score’s successful prediction of rearrest—by just 0.2%.

Successful Prediction of Rearrest by Criminal History Score



Rearrest Rate by Criminal History Points



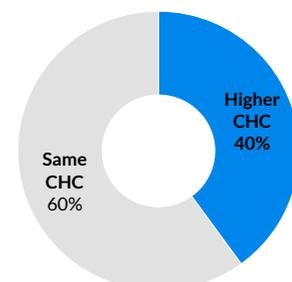
### Zero-Point vs. Other Offenders

In several recidivism studies, the Commission found that zero-point offenders recidivated far less often than other offenders (27% vs. 42% for one-point offenders, and 49% overall). In FY 2021, zero-point offenders accounted for one-third of the federal sentencing caseload. The district courts sentenced just 39% of these offenders within the guideline range—often citing overstatement of criminal history as a reason for the below-range sentence.

### Impact of Marijuana Possession Priors

Marijuana possession priors increased the criminal history score for 8% of all federal offenders sentenced in FY 2021—moving 40% of such offenders into a higher criminal history category. Most marijuana possession priors were for state court convictions resulting in less than 60 days in prison.

Impact of Marijuana Possession Priors



## RATIONALE

### Part A: Limiting the Impact of Status Points

Commission research has found that an offender's criminal history guideline calculation is strongly associated with the likelihood of future recidivism by the defendant but that status points only minimally improve the predictive value of the criminal history score—and less than the original Commission may have expected.

§4A1.1

The amendment retains status points in a more targeted fashion for offenders with seven or more criminal history points. Applying status points to a more targeted group of offenders continues to serve the broader purposes of sentencing while also addressing some of the other concerns raised regarding the impact of status points.

### Part B: Decreasing Offense Levels, Expanding Alternatives for Zero-Point Offenders

The new §4C1.1 provides a targeted decrease of two levels from the offense level determined under Chapters Two and Three for offenders who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors. The eligibility criteria is finely tailored—excluding offenders from eligibility based upon offense seriousness and aggravating factors. The exclusionary criteria were again informed by extensive data analyses and public comment as well as by existing congressional legislation (*e.g.*, the statutory safety valve at 18 U.S.C. § 3553(f) and the Bipartisan Safer Communities Act).

§4A1, §4C1.1, §5C1.1

The amendment also implements Congress's directive at 28 U.S.C. § 994(j) that the Commission ensure 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. The Commission determined that the revised commentary fulfills Congress's intent in promulgating section 994(j) while providing appropriate limitations and guidance through reliance on the criteria set forth in new §4C1.1 and the specific statutory language set forth in section 994(j).

The amendment also considers the Commission's extensive recidivism research and feedback from the district courts—as noted by the consistently high rate of below-range sentences citing criminal history issues. The Commission believes these changes will strengthen the overall sentencing guidelines system.

### Part C: Specifying Marijuana Possession Priors as a Downward Departure Scenario

The amendment responds to shifting trends in many states regarding the treatment of simple possession of marijuana and the continued impact of such prior convictions on a federal offender's sentence.

§4A1.3

The Commission found that in FY 2021, 97% of federal offenders' marijuana possession priors were for state convictions—some from states that have changed their laws to decriminalize, legalize, expunge or seal records for marijuana possession (or some combination thereof). Marijuana possession priors from these states resulted in higher criminal history calculations under the federal sentencing guidelines for 695 offenders.

## Retroactivity

Because Parts A and B of the amendment reduce the sentencing range of future defendants, the Commission was required by law to consider whether judges can extend those reductions to previously sentenced individuals.

In August 2023, the Commission **voted to allow for delayed retroactive application of Parts A and B with an effective date no earlier than February 1, 2024**—reflecting a 3-month delay in implementation to provide all parties with the time needed to review petitions and prepare for successful reentry.

The Commission’s July 2023 analysis estimated the following impact:

- **11,495 incarcerated individuals** will have a lower sentencing range under **Part A** (“Status Points”) with a possible **sentence reduction of 11.7%, on average**.
- **7,272 incarcerated individuals** will be eligible for a lower sentencing range under **Part B** (“Zero-Point Offenders”) with a possible **sentence reduction of 17.6%, on average**.

The Commission received expert testimony and public comment from a wide spectrum of stakeholders, including senators, judges, lawyers, religious leaders, doctors, professors, advocates, victims, families, and incarcerated individuals.

## ADDITIONAL RESOURCES

The Criminal History Amendment makes several changes to Chapter Four: (1) to implement the Congressional directive to the Commission at 28 U.S.C. § 994(j); (2) to respond to shifts in the legal landscape; (3) to reflect new Commission recidivism data; and (4) in consideration of the factors identified by courts when imposing below-range sentences. The amendment is informed by extensive public comment and a public hearing with perspectives of various stakeholders in the federal criminal justice system.



### Research & Data Reports

U.S. SENT’G COMM’N, COMPARISON TO PREVIOUS RETROACTIVE GUIDELINE AMENDMENTS (JULY 2023)

U.S. SENT’G COMM’N, ANALYSIS OF THE IMPACT OF 2023 CRIMINAL HISTORY AMENDMENT (PARTS A AND B) IF MADE RETROACTIVE (MAY 2023)

U.S. SENT’G COMM’N, WEIGHING THE IMPACT OF SIMPLE POSSESSION OF MARIJUANA: TRENDS AND SENTENCING IN THE FEDERAL SYSTEM (JAN. 2023)

U.S. SENT’G COMM’N, REVISITING STATUS POINTS (JUN. 2022)

U.S. SENT’G COMM’N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (SEPT. 2021)

U.S. SENT’G COMM’N, THE CRIMINAL HISTORY OF FEDERAL OFFENDERS (MAY 2018)

U.S. SENT’G COMM’N, CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS (MAR. 2017)



### Comment & Testimony

U.S. SENT’G COMM’N, TESTIMONY FROM PUBLIC HEARING ON RETROACTIVITY OF PARTS A AND B (JULY 2023)

- EXECUTIVE BRANCH PERSPECTIVE
- PRACTITIONERS’ PERSPECTIVES
- ADVISORY GROUP PERSPECTIVES
- LAW ENFORCEMENT PERSPECTIVES
- COMMUNITY PERSPECTIVES
- FORMERLY INCARCERATED INDIVIDUALS’ PERSPECTIVES

THOUSANDS OF PUBLIC COMMENT SUBMISSIONS ON RETROACTIVITY OF PARTS A AND B (JUNE 2023)

U.S. SENT’G COMM’N, TESTIMONY FROM PUBLIC HEARING ON PROPOSED AMENDMENTS (MAR. 2023)

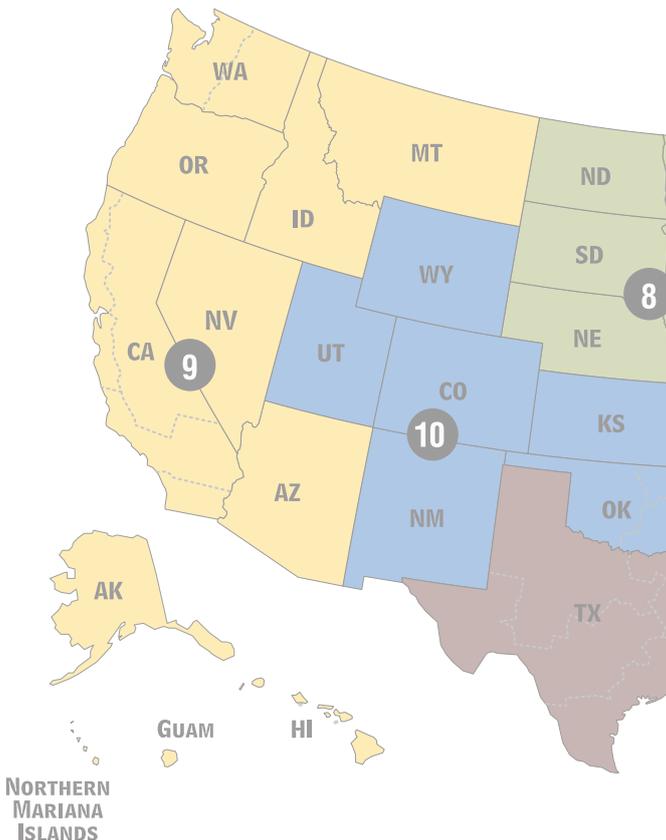
- EXECUTIVE BRANCH PERSPECTIVE
- FEDERAL PUBLIC DEFENDER PERSPECTIVE
- ADVISORY GROUP PERSPECTIVES

THOUSANDS OF PUBLIC COMMENT SUBMISSIONS ON PROPOSED AMENDMENTS (MAR. 2023)



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### Amendment #822

## Career Offender

This amendment clarifies definitions pertaining to the §4B1.2 Career Offender guideline and addresses application issues regarding the meaning of “robbery” and “extortion,” and the treatment of inchoate offenses.

Specifically, the amendment moves, without change, the definitions including certain inchoate and accessory offenses as well as enumerated offenses (i.e., “forcible sex offense” and “extortion”) and “prior felony conviction” from the §4B1.2 Commentary to the guideline itself.

The amendment adds a definition of “robbery” that mirrors the “robbery” definition at 18 U.S.C. § 1951(b)(1), and revises the definition of “controlled substance offense” in §4B1.2(b) to include new maritime-related offenses.

### THE ISSUE

## Application of the Career Offender Guideline

Circuit courts have recently all concluded that Hobbs Act robbery does not fall within the §4B1.2 Career Offender guideline definition of “crime of violence” after the Commission’s 2016 amendment adding the definitions of certain offenses.

Separately, the circuit courts are split over whether definitions of “crime of violence” and “controlled substance offense” found in the §4B1.2 Commentary are authoritative, and whether they include inchoate offenses and offenses arising from accomplice liability.



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