

No. _____

**In the Supreme Court of the United
States**

----- ♦ -----
Anderson Duke,
Petitioner,

v.
UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 20-30489

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDERSON CURTEL DUKE,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:18-CR-343-1

ON PETITION FOR REHEARING EN BANC

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
for the Fifth Circuit

No. 20-30489
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

September 14, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDERSON CURTEL DUKE,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:18-CR-343-1

Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Anderson Curtel Duke appeals the denial of his motion to suppress, along with his conviction by a jury and concurrent 288-month sentences for two counts of possession with intent to distribute fentanyl and a single count of possession with intent to distribute heroin. First, he contends that he did

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

not validly waive his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). We review that question of law de novo and the supporting factual conclusions for clear error. *United States v. Cardenas*, 410 F.3d 287, 292 (5th Cir. 2005).

We reject Duke's argument that he never expressly waived his *Miranda* rights, as a valid waiver may be "implied from all the circumstances." *Berghuis v. Thompkins*, 560 U.S. 370, 383-84 (2010). Duke received the *Miranda* warnings before answering the agents' questions, and the totality of the circumstances reflect that he understood the warnings. *See id.* at 383-84, 386; *United States v. Hearn*, 563 F.3d 95, 104 (5th Cir. 2009).

Alternatively, Duke contends that the waiver of his *Miranda* rights was involuntary, unknowing, and unintelligent because he was mentally impaired due to intoxication, fatigue, and emotional distress. The argument is unavailing. *See United States v. Reynolds*, 367 F.3d 294, 297, 299 (5th Cir. 2004); *Muniz v. Johnson*, 132 F.3d 214, 220 (5th Cir. 1998). We defer to the district court's credibility finding as to agent testimony that Duke was not impaired, as well as the court's finding that Duke remained alert, lucid, and responsive throughout the interview. *See United States v. Wright*, 777 F.3d 769, 773 (5th Cir. 2015). Viewing the evidence in the light most favorable to the Government, we find no clear error in those findings. *See id.*; *United States v. Alvarado-Palacio*, 951 F.3d 337, 340 (5th Cir. 2020). Duke's background and experience also indicate that he understood his *Miranda* rights and the consequences of waiving them. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986); *see also Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

Nor is there merit to the contention that the *Miranda* waiver was involuntary because agents used deceptive and coercive tactics to obtain his cooperation. The customary police tactics cited by Duke, including a truthful assessment that he was facing life in prison, did not constitute the sort of

coercive acts that overcome the will of the accused. *Compare Hopkins v. Cockrell*, 325 F.3d 579, 581, 583-85 (5th Cir. 2003), *with Cardenas*, 410 F.3d at 295, 297; *United States v. Rico*, 51 F.3d 495, 507 (5th Cir. 1995); *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978). While certain statements arguably created a favorable climate for confession by playing on Duke's emotions, *see Self v. Collins*, 973 F.2d 1198, 1205-06 (5th Cir. 1992), they did not override his will, *see Cardenas*, 410 F.3d at 297, or deprive him of the knowledge he needed to understand his *Miranda* rights or the consequences of waiving them, *see Soffar v. Cockrell*, 300 F.3d 588, 596 (5th Cir. 2002) (en banc). Inasmuch as the comments were made after he waived his *Miranda* rights, they did not retroactively render the waiver involuntary. *See id.*

That one of the interrogators responded, "no," when asked if Duke was making his situation worse by talking does not alter the validity of his earlier waiver. *See Soffar*, 300 F.3d at 596-97; *Alvarado-Palacio*, 951 F.3d at 342. Duke validly waived his *Miranda* rights because "the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension." *Burbine*, 475 U.S. at 421 (internal quotation marks and citation omitted).

Next, we consider Duke's challenge to the authentication of photographs depicting evidence seized during the search of his person. We review the district court's ruling for abuse of discretion. *See United States v. Lundy*, 676 F.3d 444, 452 (5th Cir. 2012). The deputy's testimony that he recalled seizing the items during the search satisfied Federal Rule of Evidence 901, which "is not a burdensome standard." *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009); *see FED. R. EVID. 901(b)(1)*. Any flaws in the testimony went to the weight of the evidence, not its admissibility. *See United States v. Isiwele*, 635 F.3d 196, 200 (5th Cir. 2011).

In addition, Duke contends that the evidence was insufficient to prove the intent to distribute under 21 U.S.C. § 841(a)(1). Giving substantial deference to the jury's verdict and viewing the evidence in the light most favorable to the Government, we conclude that a rational jury could have found the element based on Duke's own admissions and the testimony of an associate who assisted him with drug sales. *See United States v. Delgado*, 672 F.3d 320, 330 (5th Cir. 2012) (en banc); *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996), *abrogated on other grounds by United State v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc).

Finally, we consider Duke's contention that the district court erred by applying the career offender enhancement in U.S.S.G. § 4B1.1. His claim that an attempted marijuana distribution offense does not constitute a "controlled substance offense" under U.S.S.G. § 4B1.2(b) is foreclosed by *United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997), which remains binding "absent an intervening change in law," *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018). To the extent Duke asserts in his reply brief that the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019), supplies such a change, he waived the argument by failing to raise it in his original brief, *see United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005). Because Duke's challenge to the career offender enhancement is unavailing, we agree with his concession that his alternative sentencing claims are moot.

AFFIRMED.

UNITED STATES DISTRICT COURT

Western District of Louisiana

Monroe Division

UNITED STATES OF AMERICA

v.

ANDERSON CURTEL DUKE

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:18-CR-00343-1

USM Number: 20894-035

Michael L DuBos

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) 3, 4 and 5 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841A	Controlled Substance - Sell, Distribute, Or Dispense - Possession With The Intent To Distribute Fentanyl	06/19/2018	3s
21:841A	Controlled Substance - Sell, Distribute, Or Dispense - Possession With The Intent To Distribute Fentanyl	06/19/2018	4s
21:841A	Controlled Substance - Sell, Distribute, Or Dispense - Possession With The Intent To Distribute Heroin	06/19/2018	5s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

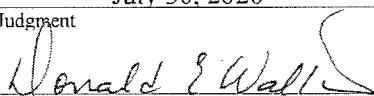
The defendant has been found not guilty on count(s) 1 _____

Count(s) 2, 7, 8 and 9 is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 30, 2020

Date of Imposition of Judgment



Signature of Judge

DONALD E. WALTER, United States District Judge

Name of Judge

Title of Judge

August 3, 2020

Date

DEFENDANT: ANDERSON CURTEL DUKE APPENDIX C
CASE NUMBER: 3:18-CR-00343-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 288 month(s) as to count(s) 3, 4 and 5, concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANDERSON CURTEL DUKE
 CASE NUMBER: 3:18-CR-00343-1

APPENDIX C

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: six (6) years as to each count concurrently

MANDATORY CONDITIONS (MC)

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
5. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
6. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
7. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
8. You must participate in an approved program for domestic violence. (*check if applicable*)
9. The passport restriction imposed at the time of initial release is hereby suspended, and defendant's passport is ordered released to defendant's attorney. (*check if applicable*)
10. The passport restriction imposed at the time of initial release is continued, and defendant's passport is ordered transferred to the U. S. Department of State. (*check if applicable*)
11. You must comply with the standard conditions that have been adopted by this court as well as any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION (SC)

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U. S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT:
CASE NUMBER:

ANDERSON CURTEL DUKE
3:18-CR-00343-1

APPENDIX C

SPECIAL CONDITIONS OF SUPERVISION (SP)

1. Because the presentence report and/or other reliable sentencing information indicates a high risk of future substance abuse, the defendant shall participate in a program, inpatient or outpatient, for the treatment of drug and/or alcohol addiction, dependence, or abuse which may include, but not limited to urine, breath, saliva, and skin testing should a screening and/or assessment indicate treatment is needed. The defendant shall comply with the rules and regulations of the treatment agency and allow the probation officer, in consultation with the agency, to adjust the modality, duration, and intensity of treatment as needed. The defendant shall further submit to drug and/or alcohol testing techniques, in addition to those performed by the treatment agency, during and after formal treatment services.
2. The defendant shall abstain from alcohol use during his term of supervised release.

DEFENDANT: ANDERSON CURTEL DUKE APPENDIX C
 CASE NUMBER: 3:18-CR-00343-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$300.00	\$0.00	\$0.00	\$0.00	\$0.00

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and/or penalties and it is ordered that:
 - the interest and/or penalty requirement is waived for the fine restitution.
 - the interest and/or penalty requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299..

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ANDERSON CURTEL DUKE APPENDIX C
 CASE NUMBER: 3:18-CR-00343-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 300.00 due immediately, balance due

not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The Court orders that any federal income tax refund payable to the defendant from the Internal Revenue Service will be turned over to the Clerk of Court and applied toward any outstanding balance with regard to the outstanding financial obligations ordered by the Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, or, unless ordered otherwise, criminal debt payment may be made online at www.lawd.uscourts.gov/fees. Scroll down and click the Criminal Debt (Restitution and Fines) hyperlink to proceed to the secure online payment form.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several
 Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The Court gives notice this case involves other defendants who may be held jointly and several liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D
U.S.S.G. PROVISIONS

§4B1.1. CAREER OFFENDER

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level*
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 4B1.1 396 || Guidelines Manual (November 1, 2021) § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

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

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) has as an element the use, attempted use, or threatened use of physical force 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(c).
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (c) 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.

APPENDIX D
U.S.S.G. PROVISIONS

Application Note 1 to §4B1.2

1. Definitions.—For purposes of this guideline—

“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“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.

“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.

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).)

“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

APPENDIX D
U.S.S.G. PROVISIONS

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)

APPENDIX D
U.S.S.G. PROVISIONS

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

(a) Base Offense Level:

(1) 33, if the object of the offense would have constituted first degree murder; or

(2) 27, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) the victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

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

- (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (4) 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level 32.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

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- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels. §2D1.1 144 || Guidelines Manual (November 1, 2021)
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.
- (13) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels.
- (14) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
 - (C) If—
 - (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
 - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk

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of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(15) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels.

(16) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, increase by 2 levels.

(17) If the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant 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;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

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(C) the defendant had minimal knowledge of the scope and structure of the enterprise, decrease by 2 levels. (18) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels. [Subsection (c) (Drug Quantity Table) is set forth after subsection (e) (Special Instruction).]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

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§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.

(b) Specific Offense Characteristics

- (1) If the offense involved twenty-five pounds or more of explosive materials, increase as follows: WEIGHT OF EXPLOSIVE MATERIAL INCREASE IN LEVEL
 - (A) At least 25 but less than 100 lbs. add 1
 - (B) At least 100 but less than 250 lbs. add 2
 - (C) At least 250 but less than 500 lbs. add 3
 - (D) At least 500 but less than 1000 lbs. add 4
 - (E) 1000 lbs. or more add 5.
- (2) If the offense involved any explosive material that the defendant knew or had reason to believe was stolen, increase by 2 levels. *Provided*, that the cumulative offense level determined above shall not exceed level 29.
- (3) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with another felony offense; or possessed or transferred any explosive material 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.

(c) Cross Reference

- (1) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with the commission or attempted commission of another offense, or possessed or transferred any explosive material 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.

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§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

- (a) **Base Offense Level:** The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.
- (b) **Specific Offense Characteristics**
 - (1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.
 - (2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.
 - (3) (A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.
(B) If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.
- (c) **Cross Reference**
 - (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.
- (d) **Special Instruction**
 - (1) Subsection (b) shall not apply to:
 - (A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5): 18 U.S.C. § 81; 18 U.S.C. § 930(c); 18 U.S.C. § 1362; 18 U.S.C. § 1363; 18 U.S.C. § 1992(a)(1)–(a)(7), (a)(9), (a)(10); 18 U.S.C. § 2339A; 18 U.S.C. § 2340A; 49 U.S.C. § 46504; 49 U.S.C. § 46505; and 49 U.S.C. § 60123(b).
 - (B) Any of the following offenses: 18 U.S.C. § 32; and 18 U.S.C. § 2332a.

Amendment 528 of the U.S.S.G.

The Commentary to §4B1.1 captioned "Background" is amended by deleting:

"28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy).",

and inserting in lieu thereof:

"Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct' 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ('The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.' S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy); id. at 26, 515 (brief summary of amendment); id. at 26, 517-18 (statement of Senator Kennedy).".

Application Note 1 of the Commentary to §4B1.2 is repromulgated without change.

Reason for Amendment: This amendment repromulgates Application Note 1 of the Commentary to §4B1.2 (Definition of Terms Used in Section 4B1.1) and inserts additional background commentary in §4B1.1 (Career Offender) explaining the Commission's rationale and authority for its implementation of this guideline. The amendment responds to a decision by the United States Court of Appeals for the District of Columbia Circuit in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). In Price, the court invalidated application of the career offender guideline to a defendant convicted of a drug conspiracy because 28 U.S.C. § 994(h), which the Commission cites as the mandating authority for the career offender guideline, does not expressly refer to inchoate offenses. The court indicated that it did not foreclose Commission authority to include conspiracy offenses under the career offender guideline by drawing upon its broader guideline promulgation authority in 28 U.S.C. § 994(a). See also United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994), vacated (Sept. 2, 1994); United States v. Bellazerius, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994). Other circuits have rejected the Price analysis and upheld the Commission's definition of "controlled substance offense." For example, the Ninth Circuit considered the legislative history to 994(h) and determined that the Senate Report clearly indicated that 994(h) was not the sole enabling statute for the career offender guidelines. United States v. Heim, 15 F.3d 830 (9th Cir.), cert. denied, 115 S. Ct. 55 (1994). See also United States v. Hightower, 25 F.3d 182 (3d Cir.), cert. denied, 115 S. Ct. 370 (1994); United States v. Damerville, 27 F.3d 254 (7th Cir.), cert. denied, 115 S. Ct. 445 (1994); United States v. Allen, 24 F.3d 1180 (10th Cir.), cert. denied, 115 S. Ct. 493 (1994); United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Linnear, 40 F.3d 215 (7th Cir. 1994); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995); United States v. Piper, 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995).

5 U.S.C. § 553 – Rule Making

- (a) This section applies, according to the provisions thereof, except to the extent that there is involved--
 - (1) a military or foreign affairs function of the United States; or
 - (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
 - (1) a statement of the time, place, and nature of public rule making proceedings;
 - (2) reference to the legal authority under which the rule is proposed; and
 - (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
- (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--
 - (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
 - (2) interpretative rules and statements of policy; or
 - (3) as otherwise provided by the agency for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

**28 U.S.C. § 991. United States Sentencing Commission;
establishment and purposes.**

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to--

- (1) establish sentencing policies and practices for the Federal criminal justice system that--
 - (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
 - (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
 - (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
- (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994. Duties of the Commission

- (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System--
 - (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including--
 - (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
 - (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
 - (C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;
 - (D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and
 - (E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;
 - (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of--
 - (A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;
 - (B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;
 - (C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;
 - (D) the fine imposition provisions set forth in section 3572 of title 18;
 - (E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and
 - (F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and
 - (3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.
- (b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish

a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents¹ of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

- (1) the grade of the offense;
- (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
- (4) the community view of the gravity of the offense;
- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents¹ of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

- (1) age;
- (2) education;
- (3) vocational skills;
- (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
- (5) physical condition, including drug dependence;

- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;
- (9) role in the offense;
- (10) criminal history; and
- (11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

- (e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.
- (f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in [section 991\(b\)\(1\)](#), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.
- (g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in [section 3553\(a\)\(2\) of title 18, United States Code](#), shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.
- (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--
 - (1) has been convicted of a felony that is--
 - (A) a crime of violence; or
 - (B) an offense described in section 401 of the Controlled Substances Act ([21 U.S.C. 841](#)), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act ([21 U.S.C. 952\(a\)](#), [955](#), and [959](#)), and chapter 705 of title 46; and
 - (2) has previously been convicted of two or more prior felonies, each of which is--
 - (A) a crime of violence; or
 - (B) an offense described in section 401 of the Controlled Substances Act ([21 U.S.C. 841](#)), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act ([21 U.S.C. 952\(a\)](#), [955](#), and [959](#)), and chapter 705 of title 46.

- (i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant--
 - (1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;
 - (2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;
 - (3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;
 - (4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or
 - (5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ([21 U.S.C. 841](#) and [960](#)), and that involved trafficking in a substantial quantity of a controlled substance.
- (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, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.
- (k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.
- (l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect--
 - (1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of--
 - (A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and
 - (B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and
 - (2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.
- (m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences

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imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of §4, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including--

- (1) modernization of existing facilities;
- (2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and
- (3) use of existing Federal facilities, such as those currently within military jurisdiction.

- (r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.
- (s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in--
 - (1) the community view of the gravity of the offense;
 - (2) the public concern generated by the offense; and
 - (3) the deterrent effect particular sentences may have on the commission of the offense by others.
- (t) 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, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.
- (u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.
- (v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.
- (w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include--
 - (A) the judgment and commitment order;
 - (B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);
 - (C) any plea agreement;
 - (D) the indictment or other charging document;
 - (E) the presentence report; and
 - (F) any other information as the Commission finds appropriate.

APPENDIX F

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

- (2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.
- (3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.
- (4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.