NO._______

In The
Supreme Court of the United States

DEAN TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Statutory directives to administrative agencies have one permissible interpretation: "[T]he one the court, after applying all relevant interpretive tools, concludes is best." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). One such statutory directive is 28 U.S.C. § 994(h), which requires the United States Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term" for certain recidivist offenders engaged in violent crime or drug trafficking. Congress identified the "categor[y]" of eligible drug traffickers as those convicted of certain enumerated federal drug crimes with two prior felony convictions for "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. 955, and 959), and chapter 705 of title 46." 28 U.S.C. §§ 994(h)(1)(B), (h)(2)(B).

The Commission implemented 28 U.S.C. § 994(h) through the Career Offender Guideline. Under this Guideline, an offense level and criminal history category yielding a range near the crime's statutory maximum is dictated for defendants convicted of "a controlled substance offense" with two prior felony convictions for a "controlled substance offense." U.S.S.G. §§ 4B1.1(a)-(b). A "controlled substance offense" is defined as "an offense under federal or state law" 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[,]" U.S.S.G. § 4B1.2(b)(1).

The question presented, on which the circuits are divided, is: Whether prior drug convictions eligible for the career offender sentencing enhancement in 28 U.S.C. § 994(h) must involve a "controlled substance" as defined in the federal Controlled Substances Act, 21 U.S.C. § 801 et seq.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dean Terry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The panel decision of the court of appeals is available in the Westlaw database at 2024 WL 888343, and reprinted in the Appendix to the Petition ("Pet.App.") at A1-A4. The Fourth Circuit's order denying en banc review is reprinted at Pet.App. A13. The relevant proceedings in the district court are unpublished and that court's judgment is reprinted at Pet.App. A6-A12.

JURISDICTION

The court of appeals entered judgment on March 1, 2024, and denied rehearing en banc on April 2, 2024. Pet.App. A5, A13. Chief Justice Roberts granted petitioner's motion to extend the time for filing a petition for a writ of certiorari up to and including July 31, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The following provisions are set forth in the appendix: 28 U.S.C. § 994, 21 U.S.C. § 802, and Sentencing Guidelines §§ 2K2.1, 4B1.1, and 4B1.2, with accompanying Commentary.

STATEMENT OF THE CASE

A. Legal Background

Before the Sentencing Reform Act of 1984 ("SRA"), "the disparity of sentences in federal criminal cases" was "a seriously urgent problem[,]" *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958) (Stewart, J.). Empirical studies showed unconscionable disparities. *See generally* S.Rep. No. 98-225, 41-44 (1983) ("Senate Report"). For example, in the 1970s, the Second Circuit district judges were given identical case files for an extortion crime and asked what sentence they would impose, which returned answers ranging from 3-to-20 years. *Id.* Congress sought to remedy the "unjustified" and "shameful" "variation among sentences imposed by different judges upon similarly situated offenders" by passing the Sentencing Reform Act of 1984. *Mistretta v. United* States, 488 U.S. 361, 366 (1989) (quoting Senate Report at 41-44)

The Sentencing Reform Act's "basic statutory goal" was a federal criminal justice "system that diminishes sentencing disparity[,]" *United States v. Booker*, 543 U.S. 220, 250 (2005). To achieve sentencing uniformity, the SRA established the United States Sentencing Commission as an independent agency and directed it to promulgate guidelines to channel the discretion of sentencing judges. 28 U.S.C. §§ 991, 994, and 995(a)(1). The Commission was instructed to pay "particular attention to...reducing unwarranted sentence disparities" in fulfilling its duties. 28 U.S.C. § 994(f). The Act also made the Guidelines' sentencing range binding on district judges, except in strictly limited cases. 18 U.S.C. § 3553(b)(1). This mandatory-Guidelines provision was held unconstitutional by this Court, but a remedy was tailored to still honor Congress' decision to reject indeterminate-sentencing of the past and promote sentencing parity. *United States v. Booker*, 543 U.S. 220, 243-68 (2005). Post-*Booker*, the Guidelines remain the guiding star of federal sentencing and "anchor the district court's discretion." *Molina-Martinez v. United States*, 578 U.S. 189, 198-200 (2016).

Congress' directives to the Commission included a requirement that it promulgate a guideline targeting certain recidivist violent criminals and drug traffickers. 28 U.S.C. § 994(h). Specifically, the Commission was to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who were both convicted of an enumerated offense and had two prior felony convictions for an enumerated offense. *Id.* The offenses enumerated by Congress are: (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[,]" 28 U.S.C. § 994(h). The enumerated federal drug crimes all share the same definition of "controlled substance[,]" which is that term's definition in the Controlled Substances Act. 21 U.S.C. § 802(6). (defining "controlled substance" for offenses in section 401 of the Controlled Substances Act); 21 U.S.C. § 951(b) (adopting § 802(6)'s definition for Controlled Substances Import and Export Act); 46 U.S.C. § 70502(a) (same for chapter 705 of title 46). This definition is "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6).

The Commission implemented § 994(h)'s recidivist directive through the Career Offender Guideline, U.S.S.G. § 4B1.1. *United States v. Labonte*, 520 U.S. 751, 753 (1997); *see also* U.S.S.G. § 4B1.1, comment (backg'd). Under this Guideline, defendants who are convicted of a "controlled substance offense" and have two prior felony convictions for "controlled substance offense(s)" are automatically placed in the most serious criminal history category and assigned an offense level that will yield a range at or near the convicted offense's statutory maximum. U.S.S.G. § 4B1.1.

The Career Offender Guideline defines a "controlled substance offense" without defining what qualifies as a controlled substance. U.S.S.G. § 4B1.2(b). A "controlled substance offense" includes violations of 46 U.S.C. §§ 70503(a), 70506(b) and a felony offense under federal or state law 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 an intent to manufacture, import, export, distribute, or dispense. U.S.S.G. § 4B1.2(b).

The Courts of Appeals are divided on whether the federal definition for "controlled substance" at 21 U.S.C. § 802(6) limits the Career Offender Guideline's scope. *See Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (Sotomayor, J., respecting the denial of certiorari) (recognizing this circuit split). The split has existed for over four years. *Compare United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018) (adopting the federal Controlled Substance Act's definition for a controlled substance in interpreting U.S.S.G. § 4B1.2(b)) *with United States v. Ruth*, 966 F.3d 642, 651-54 (7th Cir. 2020) (rejecting Second Circuit approach and instead adopting an ordinary meaning of "controlled substance" for U.S.S.G. § 4B1.2(b)). The Sentencing Commission lacked a quorum to address the split in its infancy, *see Guerrant*, 142 S. Ct. at 640-41, but it no longer does and has not addressed the split in its last two cycles of amendments to the Guidelines. *See* 88 FR 28254-01 (amendments for cycle ending in May of 2023); 88 FR 89142-01 (amendments for cycle ending in May of 2024).

B. Factual Background

Dean Terry was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Pet. App. A6-A12. He had two prior felony convictions under New York law for distributing cocaine. ROA 84-85.[1] New York law defines "cocaine" more broadly than "cocaine" under federal law. *United States v. Minter*, 80 F.4th 406, 409-13 (2d Cir. 2023). Specifically, the Controlled Substances Act "includes only stereoisomers—optical and geometric—in its definition of cocaine[,]" whereas New York includes both stereo isomers *and* constitutional isomers. *Id.* at 410-11. The New York legislature amended its definition of cocaine in the 1970s specifically to eliminate a chemistry-based defense by regulating any isomer of cocaine. *Id.* at 411-12.

[1] "ROA" refers to record on appeal in the Fourth Circuit.

The district court, over Terry's objection, classified his prior New York cocaine convictions as "controlled substance offenses" under the Guidelines. ROA 62, 79. This meant that Terry's base offense level jumped from 14 to 24. ROA 93-94. The district court calculated a Guidelines range of 100-to-120 months in prison and imposed a 108-month sentence. ROA 68, 95. Terry's Guidelines range would be 37-to-46 months imprisonment, if his prior New York convictions are not "controlled substance offenses." ROA 94.

Terry timely appealed his sentence, arguing that his sentence was unreasonable and that the Fourth Circuit's precedent defining "controlled substance" under the Guidelines to include any drug regulated by federal or state law, *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020), was incorrect and should be overruled. Dkt. 18, 21-31.[2] The Court affirmed Terry's sentence in an unpublished per curiam decision. A1-A4. Terry timely petitioned for the Fourth Circuit to rehear his case en banc to reconsider its *Ward* decision. Dkt. 39. The petition was denied. A13.

REASONS FOR GRANTING THE WRIT

Only this Court can resolve the best reading of 28 U.S.C. § 994(h)'s dictate on the breadth of the Career Offender Guideline. This breadth is the subject of a deep, entrenched circuit split over whether a prior state conviction, to fall under the Guideline, must involve a "controlled substance" as that term is defined in 21 U.S.C. § 802(6). Circuits on both sides have stubbornly adhered to their positions by

[2] "Dkt." Refers to the docket in *United States v. Terry*, (4th Cir. No. 23-4134).

declining recent invitations to reconsider the divisive question in en banc proceedings. Pet. A13 (C.A.4), *United States v. Chaires*, Case No. 20-4162 (C.A.2).

This petition is an ideal vehicle for resolving the entrenched circuit split, which has significant consequences for hundreds, if not thousands, of federal criminal defendants every year. The question presented has clear sentencing consequences—the existence of a "controlled substance offense" dictates the guidelines range for multiple provisions that cover a variety of common federal crimes. But the issue's importance extends beyond the sentencing proceeding to a defendant's decision on whether or not to even plead guilty and the length of a postconviction imprisonment term for violating any supervised release term. Whether defendants should expect to be sentenced to around 3 years or 9 years in federal prison should not turn on the happenstance of their sentencing judge's geographic location. Yet, as it stands, defendants in California, New York, and Texas who committed the same federal crime as Terry with the same criminal history can reasonably expect a sentence that is roughly one-third the length Terry must serve.

As Judge Sullivan recently observed, "the Commission's indecision and [this] Court's reluctance" to resolve the split has left "district courts—and criminal defendants—[to] proceed as best they can under a confusing and contradictory patchwork of authorities across the circuits." *United States v. Chaires*, 88 F.4th 172, 186 (2d Cir. 2023) (concurrence). But this Court's recalcitrance also means that arbitrary sentencing disparities proliferate across the country year-after-year as courts adhere to an impermissible interpretation of 28 U.S.C. § 994(h). The question presented cries out for this Court's resolution.

A. The Decision Below Is Incorrect.

Congress directed the Commission to promulgate the soon-to-be-Career-Offender-Guideline with prior convictions for "an offense described in...21 U.S.C. 841...21 U.S.C. 952(a), 955, and 959, and chapter 705 of title 46[,]" triggering its enhancement. 28 U.S.C. § 994(h)(2)(B). This text, examined through the traditional tools of statutory interpretation, demonstrates that Congress unambiguously limited qualifying predicate state drug convictions to offenses that mirror the enumerated federal crimes' substantive elements, which includes the involvement of a "controlled substance" as defined by the Controlled Substances Act.

The Fourth Circuit, however, holds that any state crime involving a drug regulated by law, federal or state, can qualify as a predicate for the career offender enhancement. *Ward*, 972 F.3d at 372-74. In reaching this conclusion, the court violated the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme[,]" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The court adopted its approach without even citing 28 U.S.C. § 994(h), let alone considering its boundaries for the career offender sentencing enhancement. *See generally Ward*, 972 F.3d at 367-75.

The Career Offender Guideline implements the specific statutory directive at 28 U.S.C. § 994(h), *Labonte*, 520 U.S. 753, so, of course, that statute limits the

Commission's ability to make a different policy choice from that made by Congress. *Compare Utility Air Regulatory Group*, 573 U.S. at 325 (agency exceeded its authority by promulgating a rule with a different threshold than the threshold set by statute). The Commission's rulemaking authority is limited "to carry[ing] carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976). It is "bound" by "the means [Congress] has deemed appropriate, and prescribed" for the Career Offender Guideline. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994). The boundaries laid out by Congress in 28 U.S.C. § 994(h) for the career offender enhancement's scope cannot be overruled by the Commission—or ignored by courts in deciding the scope for the guideline implementing that statutory directive.

The Fourth Circuit's any-drug-regulated-by-law approach is not the best interpretation of 28 U.S.C. § 994(h)'s boundaries. And "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright Enterprises*, 144 S. Ct. at 2266. Rather, the best—and only permissible—construction is that 28 U.S.C. § 994(h) limits the career offender sentencing enhancement's application to certain drug crimes involving a "controlled substance" as that term is defined in the Controlled Substances Act at 21 U.S.C. § 802(6).

Section 994(h)(2)(B) instructs the Commission to promulgate a near-maximum recidivist guideline "for categories of defendants" with two prior convictions for "a crime of violence[,]" 28 U.S.C. § 994(h)(2)(A), or "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[,]" 28 U.S.C. § 994(h)(2)(B). The plain meaning of "described[,]" along with traditional interpretive tools all lead to the conclusion that Congress directed the Career Offender Guideline's drug trafficking scope be limited to certain drug offenses involving a controlled substance as that term is defined in the federal Controlled Substances Act, 21 U.S.C. § 802(6).

Congress using "an offense described in" phrasing for § 994(h)(2)(B) limits qualifying convictions to substantive matches with the enumerated crimes that follow. For criminal offenses, the central features are the substantive elements. *See Mathis v. United States*, 579 U.S. 500, 504 (2016) ("Elements are the constituent parts of a crime's legal definition" (quotations and citation omitted)). A state crime will therefore "describe" "an offense...in...21 U.S.C. 841...21 U.S.C. 952(a), 955, and 959, and chapter 705 of title 46[,]" 28 U.S.C. § 994(h)(2)(B), if it includes the substantive elements of a referenced federal crime.

A substantive element of § 994(h)(2)(B)'s referenced federal crimes is the presence of a "controlled substance[,]" as defined in 21 U.S.C. § 802(6). Each enumerated offense listed in 28 U.S.C. § 994(h)(2)(B) employs the federal Controlled Substance Act's definition for "controlled substance." 21 U.S.C. § 802(6) (the Controlled Substances Act's definition of "controlled substance"); 21 U.S.C. § 951(b) (adopting § 802(6) for the Controlled Substances Import and Export Act); 46 U.S.C. § 70502(a) (adopting § 802(6) for the Maritime Drug Law Enforcement chapter). Section 802(6) of Title 21 defines a controlled substance as a "drug or other substance" included in one of the five federal schedules. 21 U.S.C. § 802(6). Accordingly, a state conviction for a crime involving a drug missing from the federal drug schedules does not substantively match "an offense described in" 28 U.S.C. § 994(h)(2)(B).

This Court interpreted language materially identical to that in 28 U.S.C. § 994(h)(2)(B) as requiring a categorical match of substantive elements. *See Torres v. Lynch*, 578 U.S. 452 (2016). In *Torres*, the Court examined a statutory provision that classified prior convictions as an aggravated felony if they were for "an offense described in [specified parts of federal criminal code]." *Id.* at 453-460. The courts of appeals had diverged over how closely a state crime must track the enumerated federal crime to qualify as an aggravated felony. *Id.* at 456 & n.1. The Court interpreted this provision to encompass state crimes that "correspond to a specified federal offense in all ways" except for the omission of an interstate-commerce element. *Id.* at 454. This interpretation accorded with "describe['s" ordinary meaning and reflected the judicial practice of examining the non-jurisdictional elements under statutes that call for comparison of state and federal crimes. *Id.* at 468-69 (discussing 18 U.S.C. § 3559(f) and the Assimilative Crimes Act).

Traditional statutory construction principles confirm that the "controlled substance" definition in 21 U.S.C. § 802(6) limits the Career Offender's scope.

Under the *expressio unius est exclusio alterius* canon, section 994(h)(2)(B)'s enumerated list of specific federal crimes is exclusive and exhaustive. This canon "has force [ ] when the items expressed [in a statutory listing or grouping] are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003). By listing only federal drug offenses that all share a common definition of "controlled substance[,]" Congress excluded drug offenses that did not involve a controlled substance under that definition, *i.e.,* a drug absent from the federal schedules.

Indeed, the federal Controlled Substances Act definition must apply to avoid absurd results. The federal Controlled Substances Act includes an express carveout for socially acceptable drugs like alcohol and tobacco. *See* 21 U.S.C. § 802(6) ("controlled substance...does not include distilled spirits, wine, malt beverages, or tobacco"). If all that matters is that a particular state law prohibits distributing a drug whose manufacture, possession, and use is regulated by that state, as the Fourth Circuit approach holds, then the career offender sentencing enhancement intended for serious drug traffickers can be triggered for crimes merely involving distributing alcohol or importing cigarettes. *See e.g.,* Va. Code Ann. § 18.2-10(f) (felony offense to sell counterfeit cigarettes); *Malaske v. State*, 2004 OK CR 18, ¶ 4, 89 P.3d 1116, 1117 (felony offense to furnish alcohol to a minor supplied basis for felony murder conviction), Alaska Stat. Ann. § 04.16.200 (felony to import alcohol to certain municipalities). This result is "contrary to the goal of the Sentencing Guidelines to seek 'reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.'" *Leal-Vega*, 680 F.3d at 1167 (quoting U.S.S.G. Ch. One, Pt.A).

Untethering prior state drug offenses from the elements of § 994(h)(2)(B)'s enumerated federal crimes is also contrary to the judicial presumption that Congress does not make application of a federal law dependent on state law. *See Jerome v. United States*, 318 U.S. 101, 104 (1943). This presumption has been relied on by the Supreme Court in interpreting a federal recidivism statute to adhere to Congress' "general approach of using uniform categorical definitions to identify predicate offenses[,]" *Taylor v. United States*, 495 U.S. 575, 591 (1990).

Section 994(h)(2)(b)'s statutory directive is best read to limit the career offender sentencing enhancement to drug trafficking convictions that involve a "controlled substance" as that term is defined in the federal Controlled substances Act, 21 U.S.C. § 802(6). Both the courts and the Commission are bound to effectuate that best reading of the statutory directive. The Fourth Circuit failed to do so.

B. There Is A Direct And Entrenched Circuit Split Over The Breadth Of 28 U.S.C. § 994(h)'s Implementing Guideline.

In addition to the Fourth Circuit, six other circuits follow the any-drug-regulated-by-law approach to the career offender sentencing enhancement—the Third, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. *United States v. DuBois*, 94 F.4th 1284, 1296 (11th Cir. 2024); *United States v. Jones*, 81 F.4th 591, 598-99 (6th Cir. 2023); *United States v. Lewis*, 58 F.4th 764, 768-71 (3d Cir. 2023); *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021); *United States v. Henderson*, 11 F.4th 713, 718-19 (8th Cir. 2021); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020). Like the Fourth, none so much as cite 28 U.S.C. § 994(h), except for the Tenth in summarily rejecting an argument that the Career Offender Guideline could be limited by 28 U.S.C. § 994(h). *See Jones*, 15 F.4th at 1294-95.

In stark contrast, the Second and Ninth Circuits interpret "controlled substance" in the Career Offender Guideline to incorporate that term's federal definition in the Controlled Substances Act, 21 U.S.C. § 802(6). *See United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018). In so defining "controlled substance," prior state convictions will not trigger Guidelines enhancements for a "controlled substance offense" if the underlying state law involves drugs absent from the federal drug schedules.

The Fifth and First Circuits have not directly addressed the issue but do have precedent supporting precedent the 21 U.S.C. § 802(6) limitation. *See United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015); *United States v. Crocco*, 15 F.4th 20 (1st Cir. 2021). The Fifth Circuit, in *Gomez-Alvarez*, found that to qualify as a "drug trafficking offense" under U.S.S.G. § 2L1.2, the prior conviction must be for a substance covered by the federal Controlled Substances Act. 781 F.3d at 793-94. Section 2L1.2's definition for "drug trafficking offense[,]" however, mirrors the "controlled substance offense" definition in the Career Offender Guideline, *id.* at 791, so the Fifth Circuit views the two "interchangeably[,]" *United States v. Arayatanon*, 980 F.3d 444, 454 n.8 (5th Cir. 2020). Similarly, the First Circuit has stated that the "federally based approach is appealing[,]"while any-drug-regulated-by-state-law approach is "fraught with peril[,]" but declined to resolve the issue under plain-error review. *Crocco*, 15 F.4th at 23-25.

The two approaches are in direct conflict. The Second and Ninth Circuits do not classify a conviction for a state law offense involving a drug outside 21 U.S.C. § 802(6)'s coverage as a "controlled substance offense," whereas the Third, Fourth Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits do. Because a district court commits "significant procedural error" by "improperly calculating[ ] the Guidelines range[,]" *Gall v. United States*, 552 U.S. 38, 51 (2007), whether or not a defendant's sentence is legal or not is dependent on where he or she was sentenced. Take, for example, a defendant with a prior state conviction where the underlying law prohibits a form of cocaine absent from the federal drug schedules coverage, like Petitioner Terry's. If the district judge classifies the prior as a "controlled substance[,]" the sentence is affirmed in the Seventh Circuit but reversed in the Second Circuit. *Compare Ruth*, 966 F.3d at 647, 651-54 *with Chaires*, 88 F.4th 172 at 175.

The split over whether the career offender sentencing enhancement extends to recidivist offenders with prior convictions involving drugs omitted from 21 U.S.C. § 802(6)'s definition of "controlled substance" is entrenched. Circuits on each side of the split have recently declined invitations to reconsider the issue en banc. The Fourth Circuit did so in this very case. And the Second Circuit did the same in *Chaires*, even after Judge Sullivan beseeched his colleagues to grant further review. See *United States v. Chaires*, Case No. 20-4162, Dkt. 187 (issuing Court's judgment mandate in March of 2024).

The conflict over the best interpretation as to 28 U.S.C. § 994(h)'s sentencing enhancement is clear, direct ,and entrenched.

C. The Question Presented Is Exceptionally Important.

The best interpretation of 28 U.S.C. § 994(h), i.e., the permissible scope of the career offender sentencing enhancement, is a question of exceptional importance that this Court should resolve. The Career Offender Guideline's "controlled substance offense" provision affects hundreds, if not thousands of federal criminal defendants every year, at every stage of their case.

Whether or not a "controlled substance offense" extends only to controlled substances as defined by 21 U.S.C. § 802(6) dictates the Guidelines range for some of the most common federal crimes and most significant sentencing enhancements. For example, whether a prior conviction is a "controlled substance offense" determines the base offense level for violating all but one section of 18 U.S.C. § 922(g). *See* U.S.S.G. § 2K2.1(a) (assigning graduated base offense levels based on weapon characteristics and prior criminal history); U.S.S.G. App. A (Section 2K2.1 provides the guideline for crimes under 18 U.S.C. § 922, except possessing a dangerous weapon in a school zone or federal facility). In Fiscal Year 2023, there were over 8,000 convictions under 18 U.S.C. § 922(g)—this accounts for over 12% of federal criminal prosecution. U.S.S.C., *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses* (June 2024).[3] Indeed, according to Sentencing Commission data for fiscal year 2023, there were 1,825 defendants sentenced under § 2K2.1 with a prior state

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[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY23.pdf

drug trafficking conviction and about 20% were in circuits that followed or favored the 21 U.S.C. § 802(6) meaning for "controlled substance" while 79% were in circuits that that follow the any-drug-regulated-by-law approach.[4]

The "controlled substance offense" provision also determines whether a defendant is subject to a career offender enhancement that dictates a "near maximum" sentencing range. U.S.S.G. § 4B1.1(a). Last fiscal year, there were over 1300 career offenders. U.S.S.C., *Quick Facts: Career Offenders* (May 2024).[5] Although variances have become prominent under this Guideline, two-thirds of those defendants still received at least 10 years' imprisonment. *Id.*

The controversy directly affects a defendant's Guidelines range and, in doing so, also affects a defendant's decision to plead guilty and the ultimate sentence, including possible re-imprisonment for violating supervised release conditions. District courts may no longer be bound to sentence within the Guidelines range, but the Guidelines range remains the "the starting point and the initial benchmark" anchoring sentencing discretion. *Peugh v. United States*, 569 U.S. 530, 535 (2013). Empirical data shows that the Guidelines continue "to substantially influence the sentences imposed in federal cases overall[,]" particularly so in firearms cases.

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[4] Specifically, of the 1,825 such defendants, 374 were in the First, Second, Fifth, and Ninth Circuits, whereas 1,436 were sentenced in the Third, Fourth, Sixth, Seventh, Eighth, Tenth, or Eleventh Circuits. This data was extracted from the U.S. Sentencing Commission's "Individual Datafiles" and "Criminal History of Sentenced Individuals" datafiles from fiscal year 2023. Both of these datasets are publicly available for download on the Commission's website. U.S. Sent'g Comm'n, Commission Datafiles, https://www.ussc.gov/research/datafiles/commission-datafiles.

[5] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY23.pdf

U.S.S.C., *The Influence of The Guidelines on Federal Sentencing* (Dec. 2020).[6] Defendants are also influenced by their probable Guidelines ranges when deciding whether or not to plead guilty. *Id.* at 545. And the Commission ranks supervised release violations by grades, with the most serious grade assigned to committing certain offenses, including a "controlled substance offense[,]" U.S.S.G. § 7B1.1(a)(1).

Only this Court can resolve the circuit split by determining the best meaning of 28 U.S.C. § 994(h)'s Congressional directive. Section 994(h), like all statutes, has a "best meaning" and it is "the duty of the judicial department" to discern that construction. *Loper Bright Enterprises*, 144 S. Ct. at 2271, 2273. The courts of appeals have come to different conclusions on this statute's proper implementation through the Career Offender Guidelines. Resolving such disagreements is "[a] principal purpose" for using this Court's "certiorari jurisdiction," *Braxton v. United States*, 500 U.S. 344, 347 (1991).

The Court should not deny this petition simply because the Sentencing Commission has rulemaking powers that could change the current Career Offender Guideline. This Court has previously indicated that circuit splits over Guidelines provisions may not warrant certiorari jurisdiction. *See generally Braxton*, 500 U.S. at 347-49. But this sentiment concerned a division on U.S.S.G. § 1B1.2(a), which is a guideline containing general guidance on how to apply the Guidelines Manual, not a substantive guideline fulfilling a Congressional directive like the Career Offender Guideline. Indeed, this Court has previously exercised certiorari jurisdiction to

[6] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf

resolve a circuit split involving this very statute and its implementing Guideline—*Labonte*. In that case, this Court reviewed a circuit split over whether the Career Offender Guideline could define "offense statutory maximum" as a defendant's maximum authorized prison term without any applicable statutory enhancements and resolved it by finding 28 U.S.C. § 994(h)'s "plain language" required including applicable enhancements. 520 U.S. at 752-62.

The possibility of an amended regulation addressing a litigant's complaints cannot justify the issuing agency evading this Court's review. An agency confronted with a legal challenge to its regulation can almost always, if not always, amend that regulation. For example, the Secretary of Commerce was generally empowered to "promulgate such regulations...as may be necessary to discharge" its responsibilities under the National Fishery Management Program, 16 U.S.C. § 1855(d), but this Court nevertheless reviewed the promulgated regulation and reiterated that "the final interpretation of the laws" is the courts' wheelhouse. *Loper Bright Enterprises*, 144 S.Ct. at 2257.

While there are undoubtedly a myriad of permissible Career Offender Guidelines that the Commission could explore in the future, there is only one "best" construction of 28 U.S.C. § 994(h) and the Commission is obligated to adopt it. *Id.* at 2266. Given the disparate constructions to § 994(h)'s implementing guideline adopted by the federal courts of appeal, this Court alone can finally declare 28 U.S.C. § 994(h)'s best construction.

D. This Case Is An Ideal Vehicle For Addressing The Question Presented.

This petition is an ideal vehicle for resolving the question presented. There are no jurisdictional problems or factual disputes. Terry preserved the issue both in the district court and on appeal. ROA 37-47, 93. The question presented is outcome determinative. As a result of the Fourth Circuit's decision, Terry's 108-month sentence was arrived at with a properly calculated Guidelines range and thus affirmed as a procedurally reasonable. Had the Fourth Circuit decided that the Guidelines' reference to "controlled substance" applied that term's federal definition in 21 U.S.C. § 802(6)," Terry's 108-month sentence would be reversed. The district court stated it would not re-impose the same 108-month sentence if Terry's priors were not "controlled substance offense(s)." *See* ROA 98 (on the Statement of Reasons accompanying the judgment, the court declined to check the box indicating that it would impose the same 108-month sentence, even if its Guidelines calculation was incorrect).

The decision to plead guilty or the number of years a defendant is incarcerated should not be dictated by the sentencing court's geographic location. This is precisely the arbitrary and shameful disparity that Congress sought to redress by enacting the SRA. The circuits are divided on the best meaning of 28 U.S.C. § 994(h)'s implementing guideline, which this Court can (and should) resolve.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, and to the extent the Court deems it appropriate here, the Court should grant the petition, vacate the judgment, and remand for the Fourth Circuit to reconsider in light of *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024).

Respectfully submitted,

John G. Baker
FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

/s/ Melissa S. Baldwin______________
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Counsel for Petitioner

NO.________

In The

Supreme Court of the United States

DEAN TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4134

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEAN TERRY,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Kenneth D. Bell, District Judge. (3:22-cr-00123-KDB-DCK-1)

Submitted: February 14, 2024 Decided: March 1, 2024

Before THACKER and BENJAMIN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: John G. Baker, Federal Public Defender, Melissa S. Baldwin, Assistant Federal Public Defender, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Dena J. King, United States Attorney, Anthony J. Enright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dean Terry pleaded guilty without a plea agreement to a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Based on his relevant conduct and criminal history, Terry received a base offense level enhancement for having two prior felony convictions for controlled substance offenses, and his Sentencing Guidelines range amounted to 100 to 120 months' imprisonment. Terry objected to his base offense level enhancement. Citing the Second Circuit's decision in *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), *aff'd on reh'g*, 60 F.4th 720 (2d Cir. 2023), he argued that his predicate New York state convictions for third-degree sale and attempted sale of a controlled substance should not qualify as controlled substance offenses under the Guidelines because the relevant New York statute criminalizes more drugs than appear on the federal Controlled Substances Act schedules. The district court overruled Terry's objection, noting that *Gibson* directly conflicts with our decision in *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020). Finding that Terry's New York state convictions did qualify as controlled substance offenses, the court sentenced him to 108 months' imprisonment, in the middle of the applicable Guidelines range. On appeal, Terry asserts that his sentence is procedurally unreasonable because the court failed to address his arguments for a lower sentence. He further contends that his sentence is substantively unreasonable because the court relied on an improper rationale to impose a disparate sentence. We affirm.

"We review the reasonableness of a sentence under 18 U.S.C. § 3553(a) using an abuse-of-discretion standard, regardless of 'whether [the sentence is] inside, just outside, or significantly outside the Guidelines range.'" *United States v. Nance*, 957 F.3d 204, 212

(4th Cir. 2020) (alteration in original) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). We are obliged to first "evaluate procedural reasonableness, determining whether the district court committed any procedural error, such as improperly calculating the Guidelines range, failing to consider the § 3553(a) factors, or failing to adequately explain the chosen sentence." *Id.* (citing *Gall*, 552 U.S. at 51). "[T]he district court must address or consider all non-frivolous reasons presented for imposing a different sentence and explain why [it] has rejected those arguments. Importantly, in a routine case, where the district court imposes a within-Guidelines sentence, the explanation need not be elaborate or lengthy." *United States v. Fowler*, 58 F.4th 142, 153 (4th Cir. 2023) (internal quotation marks and citation omitted). "[D]istrict courts have extremely broad discretion when determining the weight to be given each of the § 3553(a) factors." *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011). And "[w]hen a district court has fully addressed the defendant's central thesis during sentencing, it need not address separately each supporting data point marshalled for a downward variance." *Fowler*, 58 F.4th at 153-54 (internal quotation marks omitted).

"If . . . the district court has not committed procedural error," we then "assess the substantive reasonableness of the sentence." *Nance*, 957 F.3d at 212. Substantive reasonableness review "takes into account the totality of the circumstances to determine whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)." *Id.* (internal quotation marks omitted). "Any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable. Such a presumption can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors." *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014) (citation omitted).

Upon review, we conclude that the sentence is both procedurally and substantively reasonable. Terry argued for a lower sentence based on the alleged disparity in sentences under the Second Circuit's and Fourth Circuit's differing interpretations of the Guidelines. After listening to both parties' arguments, the district court explicitly discussed how *Ward* bound the court regarding Terry's base offense level enhancement for prior controlled substance offenses and considered any resulting sentencing disparity in its analysis along with the other § 3553(a) factors. The court thus "considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). Therefore, we discern no error in the court's explanation for Terry's sentence. We are satisfied that the sentence is otherwise procedurally reasonable. *See United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019). And while Terry argues that his sentence is substantively unreasonable, he fails to rebut the presumption of reasonableness accorded his within-Guidelines sentence.

Accordingly, because Terry's sentence is both procedurally and substantively reasonable, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: March 1, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4134
(3:22-cr-00123-KDB-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEAN TERRY

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
	)	(For Offenses Committed On or After November 1, 1987)
V.	)	
	)	
DEAN TERRY	)	Case Number: DNCW322CR000123-001
	)	USM Number: 08408-510
	)	
	)	Peter Adolf
	)	Defendant's Attorney

THE DEFENDANT:

■ Pleaded guilty to count(s) 1.
☐ Pleaded nolo contendere to count(s) which was accepted by the court.
☐ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18 U.S.C. § 922(g), 18 U.S.C. § 924(a)(2)	Possession of a Firearm by a Convicted Felon	06/15/2021	1

The Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

☐ The defendant has been found not guilty on count(s).
☐ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the Defendant shall 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 monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 2/28/2023

Kenneth D. Bell
United States District Judge

Date: March 1, 2023

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHT (108) MONTHS.

■ The Court makes the following recommendations to the Bureau of Prisons:

1. Placed in a facility as close to Albany, NY as possible, consistent with the needs of BOP.
2. Participation in any available educational and vocational opportunities.
3. Participation in any available mental health treatment programs as may be recommended by a Mental Health Professional.
4. Participation in any available substance abuse treatment program and, if eligible, receive benefits of 18:3621(e)(2).

■ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

- ☐ As notified by the United States Marshal.
- ☐ At _ on _.

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

- ☐ As notified by the United States Marshal.
- ☐ Before 2 p.m. on _.
- ☐ As notified by the Probation 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 Marshal

Defendant: Dean Terry
Case Number: DNCW322CR000123-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 (unless omitted by the Court).
4. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the discretionary conditions that have been adopted by this court and any additional conditions ordered.

5. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
6. The defendant shall report to the probation officer in a manner and frequency as directed by the Court or probation officer.
7. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
8. The defendant shall answer truthfully the questions asked by the probation officer. However, defendant may refuse to answer a question if the truthful answer would tend to incriminate him/her of a crime. Refusal to answer a question on that ground will not be considered a violation of supervised release.
9. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives). If advance notification is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
10. The defendant shall allow the probation officer to visit him/her at any time at his/her home or any other reasonable location as determined by the probation office, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
11. The defendant shall work full time (at least 30 hours per week) at lawful employment, actively seek such gainful employment or be enrolled in a full time educational of vocational program unless excused by the probation officer. The defendant shall notify the probation officer within 72 hours of any change regarding employment or education.
12. The defendant shall not communicate or interact with any persons he/she knows is engaged in criminal activity, and shall not communicate or interact with any person he/she knows to be convicted of a felony unless granted permission to do so by the probation officer.
13. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
14. The defendant shall 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).
15. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without first getting the permission of the Court.
16. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any psychoactive substances (including, but not limited to, synthetic marijuana, bath salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.
17. The defendant shall participate in a program of testing for substance abuse. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).
18. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.
19. The defendant shall submit to a search if the Probation Officer has a reasonable suspicion that the defendant has committed a crime or a violation of a condition of supervised release. Such a search may be conducted by a U.S. Probation Officer, and such other law enforcement personnel as the probation officer may deem advisable, without a warrant or the consent of the defendant. Such search may be of any place where evidence of the above may reasonably be expected to be found, including defendant's person, property, house, residence, vehicle, communications or data storage devices or media or office.
20. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.
21. The defendant shall support all dependents including any dependent child, or any person the defendant has been court ordered to support.
22. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.
23. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

ADDITIONAL CONDITIONS:

24. The defendant shall participate in a mental health evaluation and treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, and intensity). The defendant shall take all mental health medications as prescribed by a licensed health care practitioner.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	RESTITUTION	FINE
$100.00	$0.00	$0.00

☐ The determination of restitution is deferred until. Upon such a determination an *Amended Judgment in a Criminal Case (AO 245C)* will be entered. Failing such a determination by, restitution amount becomes $0.00 without further Order of the Court.

INTEREST

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

■ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

■ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $0.00 due immediately, balance due
☐ Not later than___________
☐ In accordance ☐ (C), ☐ (D) below; or

B ■ Payment to begin immediately (may be combined with ☐ (D) below); or

C ☐ Payment in equal **monthly** installments of **$50.00** to commence **60 days** after the date of this judgment; or

D ☐ In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, payments shall be made in equal **monthly** installments of **$50.00** to commence **60 days** after release from imprisonment to a term of supervision. The U.S. Probation Officer shall pursue collection of the amount due, and may request to modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

■ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Consent Order document 15 entered 10/6/2022:

Document No. 15 is incorporated into this judgment.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. **All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 1301, Charlotte, NC 28202**, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _______months, commencing on ____________________.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) ____________________________________ Date: _________________
Defendant

(Signed) ____________________________________ Date: _________________
U.S. Probation Office/Designated Witness

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

FILED: April 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4134
(3:22-cr-00123-KDB-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEAN TERRY

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted Unconstitutional as Applied by United States v. Martin, E.D.Mich., Nov. 02, 2015

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part K. Offenses Involving Public Safety
2. Firearms

USSG, § 2K2.1, 18 U.S.C.A.

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

Currentness

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

(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

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

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if--

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

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

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

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

(7) 12, except as provided below; or

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

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

Number of Firearms	Increase in Level
(A) 3-7	add 2
(B) 8-24	add 4
(C) 25-99	add 6
(D) 100-199	add 8
(E) 200 or more	add 10.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

(3) If the offense involved--

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

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

(4) If (A) any firearm was stolen, increase by 2 levels; or (B)(i) any firearm had an altered or obliterated serial number; or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, increase by 4 levels.

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

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

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

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

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

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

(6) If the defendant--

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

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

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(8) If the defendant--

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

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

increase by 2 levels.

(9) If the defendant--

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

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

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

decrease by 2 levels.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply--

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

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

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2001; November 1, 2004; November 1, 2005; November 1, 2006; November 1, 2007; November 1, 2010; November 1, 2011; November 1, 2014; November 1, 2015; November 1, 2016; November 1, 2023.)

PROPOSED AMENDMENT OF SUBSEC. (B)(4)(B)(I)

<Effective November 1, 2024, absent contrary Congressional action, subsec. (b)(4)(B)(i) is amended to read as follows:>

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

COMMENTARY

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

<***Application Notes:***>

<**1. Definitions.--**For purposes of this guideline:>

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

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

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

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

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

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

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

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

<**4. Application of Subsection (a)(7).--**Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.>

<**5. Application of Subsection (b)(1).--**For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.>

<**6. Application of Subsection (b)(2).--**Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)-(a)(5), subsection (b)(2) is not applicable.>

<**7. Destructive Devices.--**A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.>

<Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also, §§ 5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).>

<**8. Application of Subsection (b)(4)**>

<**(A) Interaction with Subsection (a)(7).--**If the only offense to which § 2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).>

<Similarly, if the offense to which § 2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7),

do not apply the enhancement in subsection (b)(4)(B)(i). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).>

<**(B) Defendant's State of Mind.**--Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.>

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

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

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

<**11. Upward Departure Provisions.--**An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable (“plastic”) firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).>

<**12. Armed Career Criminal.--**A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See § 4B1.4.>

<**13. Application of Subsection (b)(5).--**>

<**(A) Definitions.--**For purposes of this subsection:>

<“Crime of violence” and “controlled substance offense” have the meaning given those terms in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).>

<“Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. §§ 921(a)(33)(A).>

<The term “criminal justice sentence” includes probation, parole, supervised release, imprisonment, work release, or escape status.>

<The term “defendant,” consistent with § 1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.>

<**(B) Upward Departure Provision.--**If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.>

<**(C) Interaction with Other Subsections.--**In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.>

<**14. Application of Subsections (b)(6)(B) and (c)(1).--**>

<**(A) In General.--**Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.>

<**(B) Application When Other Offense is Burglary or Drug Offense.--**Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.>

<**(C) Definitions.--**>

<“Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.>

<“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.>

<**(D) Upward Departure Provision.--**In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.>

<**(E) Relationship Between the Instant Offense and the Other Offense.--**In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See § 1B1.3(a)(1)-(4) and accompanying commentary.>

<In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.>

<For example:>

<**(i) Firearm Cited in the Offense of Conviction.** Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.>

<Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. See § 1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to § 1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See § 1B1.3(a)(4) ("any other information specified in the applicable guideline").>

<**(ii) Firearm Not Cited in the Offense of Conviction.** Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.>

<**Subsection (b)(6)(B).** In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". See § 1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to § 1B1.3).>

<If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See § 1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.>

<On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.>

<**Subsection (c)(1).** Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.>

PROPOSED COMMENTARY

[Proposed Commentary effective November 1, 2024, absent contrary Congressional action.]
<***Statutory Provisions:*** 18 U.S.C. §§ 922, (a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).>

<***Application Notes:***>

<**1. Definitions.--**For purposes of this guideline:>

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

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

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

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

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

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

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

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

<**4. Application of Subsection (a)(7).--**Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.>

<**5. Application of Subsection (b)(1).--**For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.>

<**6. Application of Subsection (b)(2).--**Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)-(a)(5), subsection (b)(2) is not applicable.>

<**7. Destructive Devices.--**A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.>

<Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also, §§ 5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).>

<**8. Application of Subsection (b)(4)**>

<**(A) Interaction with Subsection (a)(7).--**If the only offense to which § 2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).>

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

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

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

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

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

<**11. Upward Departure Provisions.--**An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).>

<**12. Armed Career Criminal.--**A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See § 4B1.4.>

<**13. Application of Subsection (b)(5).--**>

<**(A) Definitions.--**For purposes of this subsection:>

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

<"Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. §§ 921(a)(33)(A).>

<The term "criminal justice sentence" includes probation, parole, supervised release, imprisonment, work release, or escape status.>

<The term "defendant," consistent with § 1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.>

<**(B) Upward Departure Provision.--**If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.>

<**(C) Interaction with Other Subsections.--**In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.>

<**14. Application of Subsections (b)(6)(B) and (c)(1).--**>

<**(A) In General.--**Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.>

<**(B) Application When Other Offense is Burglary or Drug Offense.--**Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a

drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.>

<**(C) Definitions.--**>

<“Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.>

<“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.>

<**(D) Upward Departure Provision.--**In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.>

<**(E) Relationship Between the Instant Offense and the Other Offense.--**In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See § 1B1.3(a)(1)-(4) and accompanying commentary.>

<In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.>

<For example:>

<**(i) Firearm Cited in the Offense of Conviction.** Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.>

<Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful possession of the same shotgun on October 15. See § 1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to § 1B1.3). The use of the shotgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See § 1B1.3(a)(4) (“any other information specified in the applicable guideline”).>

<**(ii) Firearm Not Cited in the Offense of Conviction.** Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.>

<**Subsection (b)(6)(B).** In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. See § 1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to § 1B1.3).>

<If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See § 1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.>

<On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.>

<**Subsection (c)(1).** Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.>

Notes of Decisions (788)

Federal Sentencing Guidelines, § 2K2.1, 18 U.S.C.A., FSG § 2K2.1
As amended to 3-15-22.

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted Unconstitutional as Applied by U.S. v. MacKinnon, 1st Cir.(Mass.), Mar. 16, 2005

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Four. Criminal History and Criminal Livelihood (Refs & Annos)
Part B. Career Offenders and Criminal Livelihood

USSG, § 4B1.1, 18 U.S.C.A.

§ 4B1.1. Career Offender

Currentness

(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 § 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).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§ 3E1.1 Reduction	Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1992; November 1, 1994; November 1, 1995; November 1, 1997; November 1, 2002; November 1, 2011; August 1, 2016; November 1, 2023.)

COMMENTARY

<***Application Notes:***>

<**1. Definitions.--**"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in § 4B1.2.>

<**2. "Offense Statutory Maximum."--**"Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.>

<**3. Application of Subsection (c).--**>

<**(A) In General.--**Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under § 4B1.1(a).>

<**(B) Subsection (c)(2).--**To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.>

<**(C) "Otherwise Applicable Guideline Range".--**For purposes of subsection (c)(2)(A), "otherwise applicable guideline range" for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:>

<**(i)** If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§ 4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).>

<**(ii)** If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under § 4B1.1(a) and (b).>

<**(D) Imposition of Consecutive Term of Imprisonment.--**In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of § 5G1.2 (Sentencing on Multiple Counts of Conviction).>

<**(E) Example.--**The following example illustrates the application of subsection (c)(2) in a multiple count situation:>

<The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under § 4B1.1(a). Under § 4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with § 5G1.2(e).>

<**4. Departure Provision for State Misdemeanors.--**In a case in which one or both of the defendant's "two prior felony convictions" is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in § 4A1.3(b)(3)(A).>

<***Background:*** *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)).>

<Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming § 3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under § 3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under § 3E1.1 applies).>

Notes of Decisions (403)

Footnotes

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Federal Sentencing Guidelines, § 4B1.1, 18 U.S.C.A., FSG § 4B1.1
As amended to 3-15-22.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted Held Unconstitutional by United States v. Meadows, W.D.Tex., July 09, 2019

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Four. Criminal History and Criminal Livelihood (Refs & Annos)
Part B. Career Offenders and Criminal Livelihood

USSG, § 4B1.2, 18 U.S.C.A.

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

Currentness

(a) Crime of Violence.--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) Controlled Substance Offense.--The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

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

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

(d) Inchoate Offenses Included.--The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) Additional Definitions.--

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

(2) Extortion.--“Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

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

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

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1991; November 1, 1992; November 1, 1995; November 1, 1997; November 1, 2000; November 1, 2002; November 1, 2004; November 1, 2007; November 1, 2009; November 1, 2015; August 1, 2016; November 1, 2023.)

COMMENTARY

<***Application Notes:***>

<**1. Further Considerations Regarding “Crime of Violence” and “Controlled Substance Offense”.**--For purposes of this guideline-- >

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

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

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

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

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

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

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

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

Notes of Decisions (793)

Federal Sentencing Guidelines, § 4B1.2, 18 U.S.C.A., FSG § 4B1.2
As amended to 3-15-22.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Prior Version Held Unconstitutional as Applied by U.S. v. Roberts, S.D.N.Y., Sep. 09, 2002

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part A. Introductory Provisions (Refs & Annos)

21 U.S.C.A. § 802

§ 802. Definitions

Effective: December 2, 2022
Currentness

As used in this subchapter:

(1) The term "addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

(2) The term "administer" refers to the direct application of a controlled substance to the body of a patient or research subject by--

(A) a practitioner (or, in his presence, by his authorized agent), or

(B) the patient or research subject at the direction and in the presence of the practitioner,

whether such application be by injection, inhalation, ingestion, or any other means.

(3) The term "agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; except that such term does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman, when acting in the usual and lawful course of the carrier's or warehouseman's business.

(4) The term "Drug Enforcement Administration" means the Drug Enforcement Administration in the Department of Justice.

(5) The term "control" means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.

(6) The term “controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

(7) The term “counterfeit substance” means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

(8) The terms “deliver” or “delivery” mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

(9) The term “depressant or stimulant substance” means--

(A) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or

(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(C) lysergic acid diethylamide; or

(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(10) The term “dispense” means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term “dispenser” means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term “distribute” means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term “distributor” means a person who so delivers a controlled substance or a listed chemical.

(12) The term “drug” has the meaning given that term by section 321(g)(1) of this title.

(13) The term “felony” means any Federal or State offense classified by applicable Federal or State law as a felony.

(14) The term "isomer" means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term "isomer" means any optical, positional, or geometric isomer. As used in schedule II(a)(4), the term "isomer" means any optical or geometric isomer.

(15) The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice. The term "manufacturer" means a person who manufactures a drug or other substance.

(16)(A) Subject to subparagraph (B), the terms "marihuana" and "marijuana" mean all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The terms "marihuana" and "marijuana" do not include--

(i) hemp, as defined in section 1639*o* of Title 7; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

(18) The term "opiate" or "opioid" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

(19) The term "opium poppy" means the plant of the species Papaver somniferum L., except the seed thereof.

(20) The term "poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(21) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

(22) The term "production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(23) The term "immediate precursor" means a substance--

(A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

(B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and

(C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

(24) The term "Secretary", unless the context otherwise indicates, means the Secretary of Health and Human Services.

(25) The term "serious bodily injury" means bodily injury which involves--

(A) a substantial risk of death;

(B) protracted and obvious disfigurement; or

(C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(26) The term “State” means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(27) The term “ultimate user” means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

(28) The term “United States”, when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States.

(29) The term “maintenance treatment” means the dispensing, for a period in excess of twenty-one days, of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.

(30) The term “detoxification treatment” means the dispensing, for a period not in excess of one hundred and eighty days, of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period.

(31) The term “Convention on Psychotropic Substances” means the Convention on Psychotropic Substances signed at Vienna, Austria, on February 21, 1971; and the term “Single Convention on Narcotic Drugs” means the Single Convention on Narcotic Drugs signed at New York, New York, on March 30, 1961.

(32)(A) Except as provided in subparagraph (C), the term “controlled substance analogue” means a substance--

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include--

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

(33) The term "listed chemical" means any list I chemical or any list II chemical.

(34) The term "list I chemical" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter and is important to the manufacture of the controlled substances, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following:

(A) Anthranilic acid, its esters, and its salts.

(B) Benzyl cyanide.

(C) Ephedrine, its salts, optical isomers, and salts of optical isomers.

(D) Ergonovine and its salts.

(E) Ergotamine and its salts.

(F) N-Acetylanthranilic acid, its esters, and its salts.

(G) Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(H) Phenylacetic acid, its esters, and its salts.

(I) Phenylpropanolamine, its salts, optical isomers, and salts of optical isomers.

(J) Piperidine and its salts.

(K) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(L) 3,4-Methylenedioxyphenyl-2-propanone.

(M) Methylamine.

(N) Ethylamine.

(O) Propionic anhydride.

(P) Isosafrole.

(Q) Safrole.

(R) Piperonal.

(S) N-Methylephedrine.

(T) N-methylpseudoephedrine.

(U) Hydriodic acid.

(V) Benzaldehyde.

(W) Nitroethane.

(X) Gamma butyrolactone.

(Y) Any salt, optical isomer, or salt of an optical isomer of the chemicals listed in subparagraphs (M) through (U) of this paragraph.

(35) The term "list II chemical" means a chemical (other than a list I chemical) specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following chemicals:

(A) Acetic anhydride.

(B) Acetone.

(C) Benzyl chloride.

(D) Ethyl ether.

(E) Repealed. Pub.L. 101-647, Title XXIII, § 2301(b), Nov. 29, 1990, 104 Stat. 4858.

(F) Potassium permanganate.

(G) 2-Butanone (or Methyl Ethyl Ketone).

(H) Toluene.

(I) Iodine.

(J) Hydrochloric gas.

(36) The term "regular customer" means, with respect to a regulated person, a customer with whom the regulated person has an established business relationship that is reported to the Attorney General.

(37) The term "regular importer" means, with respect to a listed chemical, a person that has an established record as an importer of that listed chemical that is reported to the Attorney General.

(38) The term "regulated person" means a person who manufactures, distributes, imports, or exports a listed chemical, a tableting machine, or an encapsulating machine or who acts as a broker or trader for an international transaction involving a listed chemical, a tableting machine, or an encapsulating machine.

(39) The term "regulated transaction" means--

(A) a distribution, receipt, sale, importation, or exportation of, or an international transaction involving shipment of, a listed chemical, or if the Attorney General establishes a threshold amount for a specific listed chemical, a threshold amount, including a cumulative threshold amount for multiple transactions (as determined by the Attorney General, in consultation with the chemical industry and taking into consideration the quantities normally used for lawful purposes), of a listed chemical, except that such term does not include--

(i) a domestic lawful distribution in the usual course of business between agents or employees of a single regulated person;

(ii) a delivery of a listed chemical to or by a common or contract carrier for carriage in the lawful and usual course of the business of the common or contract carrier, or to or by a warehouseman for storage in the lawful and usual course of the business of the warehouseman, except that if the carriage or storage is in connection with the distribution, importation, or exportation of a listed chemical to a third person, this clause does not relieve a distributor, importer, or exporter from compliance with section 830 of this title;

(iii) any category of transaction or any category of transaction for a specific listed chemical or chemicals specified by regulation of the Attorney General as excluded from this definition as unnecessary for enforcement of this subchapter or subchapter II;

(iv) any transaction in a listed chemical that is contained in a drug that may be marketed or distributed lawfully in the United States under the Federal Food, Drug, and Cosmetic Act, subject to clause (v), unless--

(I) the Attorney General has determined under section 814 of this title that the drug or group of drugs is being diverted to obtain the listed chemical for use in the illicit production of a controlled substance; and

(II) the quantity of the listed chemical contained in the drug included in the transaction or multiple transactions equals or exceeds the threshold established for that chemical by the Attorney General;

(v) any transaction in a scheduled listed chemical product that is a sale at retail by a regulated seller or a distributor required to submit reports under section 830(b)(3) of this title; or

(vi) any transaction in a chemical mixture which the Attorney General has by regulation designated as exempt from the application of this subchapter and subchapter II based on a finding that the mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance and that the listed chemical or chemicals contained in the mixture cannot be readily recovered; and

(B) a distribution, importation, or exportation of a tableting machine or encapsulating machine.

(40) The term "chemical mixture" means a combination of two or more chemical substances, at least one of which is not a list I chemical or a list II chemical, except that such term does not include any combination of a list I chemical or a list II chemical with another chemical that is present solely as an impurity.

(41)(A) The term "anabolic steroid" means any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone), and includes

(i) androstanediol--

(I) 3β,17β-dihydroxy-5α- androstane; and

(II) 3α,17β-dihydroxy-5α- androstane;

(ii) androstanedione (5α-androstan-3,17-dione);

(iii) androstenediol--

(I) 1-androstenediol (3β,17β-dihydroxy-5α-androst-1-ene);

(II) 1-androstenediol (3α,17β-dihydroxy-5α-androst-1-ene);

(III) 4-androstenediol (3β,17β-dihydroxy-androst-4-ene); and

(IV) 5-androstenediol (3β,17β-dihydroxy-androst-5-ene);

(iv) androstenedione--

(I) 1-androstenedione ([5α]-androst-1-en-3,17-dione);

(II) 4-androstenedione (androst-4-en-3,17-dione); and

(III) 5-androstenedione (androst-5-en-3,17-dione);

(v) bolasterone (7α,17α- dimethyl-17β-hydroxyandrost-4-en-3-one);

(vi) boldenone (17β-hydroxyandrost-1,4,-diene-3-one);

(vii) calusterone (7β, 17α-dimethyl-17β-hydroxyandrost-4-en-3-one);

(viii) clostebol (4-chloro-17β-hydroxyandrost-4-en-3-one);

(ix) dehydrochloromethyltestosterone (4-chloro-17β-hydroxy-17α-methyl-androst-1, 4-dien-3-one);

(x) Δ 1-dihydrotestosterone (a.k.a. “1-testosterone”) (17β-hydroxy-5α-androst-1-en-3-one);

(xi) 4-dihydrotestosterone (17β-hydroxy-androstan-3-one);

(xii) drostanolone (17β-hydroxy-2α- methyl-5α-androstan-3-one);

(xiii) ethylestrenol (17α-ethyl-17β-hydroxyestr-4-ene);

(xiv) fluoxymesterone (9-fluoro-17α-methyl-11β, 17β-dihydroxyandrost-4-en-3-one);

(xv) formebolone (2-formyl-17α-methyl-11α, 17β-dihydroxyandrost-1,4-dien-3-one);

(xvi) furazabol (17α-methyl-17β-hydroxyandrostano[2,3-c]-furazan);

(xvii) 13β-ethyl-17β-hydroxygon-4-en-3-one;

(xviii) 4-hydroxytestosterone (4,17β-dihydroxy-androst-4-en-3-one);

(xix) 4-hydroxy-19-nortestosterone (4,17β-dihydroxy-estr-4-en-3-one);

(xx) mestanolone (17α-methyl- 17β-hydroxy-5α-androstan-3-one);

(xxi) mesterolone (1α-methyl-17β-hydroxy-[5α] -androstan-3-one);

(xxii) methandienone (17α-methyl-17β-hydroxyandrost-1,4-dien-3-one);

(xxiii) methandriol (17α-methyl- 3β,17β-dihydroxyandrost-5-ene);

(xxiv) methenolone (1-methyl-17β-hydroxy-5α-androst-1-en-3-one);

(xxv) 17α-methyl-3β, 17β-dihydroxy-5α-androstane;

(xxvi) 17α-methyl-3α, 17β-dihydroxy-5α-androstane;

(xxvii) 17α-methyl-3β, 17β-dihydroxyandrost-4-ene.

(xxviii) 17α-methyl-4-hydroxynandrolone (17α-methyl-4-hydroxy-17β-hydroxyestr-4-en-3-one);

(xxix) methyldienolone (17α-methyl-17β-hydroxyestra-4,9(10)-dien-3-one);

(xxx) methyltrienolone (17α-methyl-17β-hydroxyestra-4,9-11-trien-3-one);

(xxxi) methyltestosterone (17α-methyl-17β-hydroxyandrost-4-en-3-one);

(xxxii) mibolerone (7α, 17α-dimethyl-17β-hydroxyestr-4-en-3-one);

(xxxiii) 17α-methyl-Δ 1-dihydrotestosterone (17β-hydroxy-17α-methyl-5α- androst-1-en-3-one) (a.k.a. "17-α-methyl-1-testosterone");

(xxxiv) nandrolone (17β-hydroxyestr-4-en-3-one);

(xxxv) norandrostenediol--

(I) 19-nor-4-androstenediol (3β, 17β-dihydroxyestr-4-ene);

(II) 19-nor-4-androstenediol (3α, 17β-dihydroxyestr-4-ene);

(III) 19-nor-5-androstenediol (3β, 17β-dihydroxyestr-5-ene); and

(IV) 19-nor-5-androstenediol (3α, 17β-dihydroxyestr-5-ene);

(xxxvi) norandrostenedione--

(I) 19-nor-4-androstenedione (estr-4-en-3,17-dione); and

(II) 19-nor-5-androstenedione (estr-5-en-3,17-dione;

(xxxvii) norbolethone (13β, 17α-diethyl-17β-hydroxygon-4-en-3-one);

(xxxviii) norclostebol (4-chloro-17β-hydroxyestr-4-en-3-one);

(xxxix) norethandrolone (17α-ethyl-17β-hydroxyestr-4-en-3-one);

(xl) normethandrolone (17α-methyl-17β-hydroxyestr-4-en-3-one);

(xli) oxandrolone (17α-methyl-17β-hydroxy-2-oxa-[5α]- androstan-3-one);

(xlii) oxymesterone (17α-methyl-4,17β-dihydroxyandrost-4-en-3-one);

(xliii) oxymetholone (17α-methyl-2-hydroxymethylene-17β-hydroxy- [5α]-androstan-3-one);

(xliv) stanozolol (17α-methyl- 17β-hydroxy-[5α]-androst-2-eno[3,2-c]-pyrazole);

(xlv) stenbolone (17β-hydroxy-2-methyl-[5α] -androst-1-en-3-one);

(xlvi) testolactone (13-hydroxy-3-oxo-13,17-secoandrosta-1,4-dien-17-oic acid lactone);

(xlvii) testosterone (17β-hydroxyandrost-4-en-3-one);

(xlviii) tetrahydrogestrinone (13β,17α-diethyl-17β-hydroxygon-4,9, 11-trien-3-one);

(xlix) trenbolone (17β-hydroxyestr-4,9,11-trien-3-one);

(l) 5α-Androstan-3,6,17-trione;

(li) 6-bromo-androstan-3,17-dione;

(lii) 6-bromo-androsta-1,4-diene-3,17-dione;

(liii) 4-chloro-17α-methyl-androsta-1,4-diene-3,17β-diol;

(liv) 4-chloro-17α-methyl-androst-4-ene-3β,17β-diol;

(lv) 4-chloro-17α-methyl-17β-hydroxy-androst-4-en-3-one;

(lvi) 4-chloro-17α-methyl-17β-hydroxy-androst-4-ene-3,11-dione;

(lvii) 4-chloro-17α-methyl-androsta-1,4-diene-3,17β-diol;

(lviii) 2α,17α-dimethyl-17β-hydroxy-5α-androstan-3-one;

(lix) 2α,17α-dimethyl-17β-hydroxy-5β-androstan-3-one;

(lx) 2α,3α-epithio-17α-methyl-5α-androstan-17β-ol;

(lxi) [3,2-c]-furazan-5α-androstan-17β-ol;

(lxii) 3β-hydroxy-estra-4,9,11-trien-17-one;

(lxiii) 17α-methyl-androst-2-ene-3,17β-diol;

(lxiv) 17α-methyl-androsta-1,4-diene-3,17β-diol;

(lxv) Estra-4,9,11-triene-3,17-dione;

(lxvi) 18a-Homo-3-hydroxy-estra-2,5(10)-dien-17-one;

(lxvii) 6α-Methyl-androst-4-ene-3,17-dione;

(lxviii) 17α-Methyl-androstan-3-hydroxyimine-17β-ol;

(lxix) 17α-Methyl-5α-androstan-17β-ol;

(lxx) 17β-Hydroxy-androstano[2,3-d]isoxazole;

(lxxi) 17β-Hydroxy-androstano[3,2-c]isoxazole;

(lxxii) 4-Hydroxy-androst-4-ene-3,17-dione[3,2-c]pyrazole-5α-androstan-17β-ol;

(lxxiii) [3,2-c]pyrazole-androst-4-en-17β-ol;

(lxxiv) [3,2-c]pyrazole-5α-androstan-17β-ol; and

(lxxv) any salt, ester, or ether of a drug or substance described in this paragraph.

The substances excluded under this subparagraph may at any time be scheduled by the Attorney General in accordance with the authority and requirements of subsections (a) through (c) of section 811 of this title.

(B)(i) Except as provided in clause (ii), such term does not include an anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the Secretary of Health and Human Services for such administration.

(ii) If any person prescribes, dispenses, or distributes such steroid for human use, such person shall be considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of subparagraph (A).

(C)(i) Subject to clause (ii), a drug or hormonal substance (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone) that is not listed in subparagraph (A) and is derived from, or has a chemical structure substantially similar to, 1 or more anabolic steroids listed in subparagraph (A) shall be considered to be an anabolic steroid for purposes of this chapter if--

(I) the drug or substance has been created or manufactured with the intent of producing a drug or other substance that either--

(aa) promotes muscle growth; or

(bb) otherwise causes a pharmacological effect similar to that of testosterone; or

(II) the drug or substance has been, or is intended to be, marketed or otherwise promoted in any manner suggesting that consuming it will promote muscle growth or any other pharmacological effect similar to that of testosterone.

(ii) A substance shall not be considered to be a drug or hormonal substance for purposes of this subparagraph if it--

(I) is--

(aa) an herb or other botanical;

(bb) a concentrate, metabolite, or extract of, or a constituent isolated directly from, an herb or other botanical; or

(cc) a combination of 2 or more substances described in item (aa) or (bb);

(II) is a dietary ingredient for purposes of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); and

(III) is not anabolic or androgenic.

(iii) In accordance with section 885(a) of this title, any person claiming the benefit of an exemption or exception under clause (ii) shall bear the burden of going forward with the evidence with respect to such exemption or exception.

(42) The term "international transaction" means a transaction involving the shipment of a listed chemical across an international border (other than a United States border) in which a broker or trader located in the United States participates.

(43) The terms "broker" and "trader" mean a person that assists in arranging an international transaction in a listed chemical by--

(A) negotiating contracts;

(B) serving as an agent or intermediary; or

(C) bringing together a buyer and seller, a buyer and transporter, or a seller and transporter.

(44) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

(45)(A) The term "scheduled listed chemical product" means, subject to subparagraph (B), a product that--

(i) contains ephedrine, pseudoephedrine, or phenylpropanolamine; and

(ii) may be marketed or distributed lawfully in the United States under the Federal, Food, Drug, and Cosmetic Act as a nonprescription drug.

Each reference in clause (i) to ephedrine, pseudoephedrine, or phenylpropanolamine includes each of the salts, optical isomers, and salts of optical isomers of such chemical.

(B) Such term does not include a product described in subparagraph (A) if the product contains a chemical specified in such subparagraph that the Attorney General has under section 811(a) of this title added to any of the schedules under section 812(c) of this title. In the absence of such scheduling by the Attorney General, a chemical specified in such subparagraph may not be considered to be a controlled substance.

(46) The term "regulated seller" means a retail distributor (including a pharmacy or a mobile retail vendor), except that such term does not include an employee or agent of such distributor.

(47) The term "mobile retail vendor" means a person or entity that makes sales at retail from a stand that is intended to be temporary, or is capable of being moved from one location to another, whether the stand is located within or on the premises of a fixed facility (such as a kiosk at a shopping center or an airport) or whether the stand is located on unimproved real estate (such as a lot or field leased for retail purposes).

(48) The term "at retail", with respect to the sale or purchase of a scheduled listed chemical product, means a sale or purchase for personal use, respectively.

(49)(A) The term "retail distributor" means a grocery store, general merchandise store, drug store, or other entity or person whose activities as a distributor relating to ephedrine, pseudoephedrine, or phenylpropanolamine products are limited almost exclusively to sales for personal use, both in number of sales and volume of sales, either directly to walk-in customers or in face-to-face transactions by direct sales.

(B) For purposes of this paragraph, entities are defined by reference to the Standard Industrial Classification (SIC) code, as follows:

(i) A grocery store is an entity within SIC code 5411.

(ii) A general merchandise store is an entity within SIC codes 5300 through 5399 and 5499.

(iii) A drug store is an entity within SIC code 5912.

(50) The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocol to such protocol, to communicate information of all kinds by wire or radio.

(51) The term "deliver, distribute, or dispense by means of the Internet" refers, respectively, to any delivery, distribution, or dispensing of a controlled substance that is caused or facilitated by means of the Internet.

(52) The term "online pharmacy"--

(A) means a person, entity, or Internet site, whether in the United States or abroad, that knowingly or intentionally delivers, distributes, or dispenses, or offers or attempts to deliver, distribute, or dispense, a controlled substance by means of the Internet; and

(B) does not include--

(i) manufacturers or distributors registered under subsection (a), (b), (e), or (f) of section 823 of this title who do not dispense controlled substances to an unregistered individual or entity;

(ii) nonpharmacy practitioners who are registered under section 823(g) of this title and whose activities are authorized by that registration;

(iii) any hospital or other medical facility that is operated by an agency of the United States (including the Armed Forces), provided such hospital or other facility is registered under section 823(g) of this title;

(iv) a health care facility owned or operated by an Indian tribe or tribal organization, only to the extent such facility is carrying out a contract or compact under the Indian Self-Determination and Education Assistance Act;

(v) any agent or employee of any hospital or facility referred to in clause (iii) or (iv), provided such agent or employee is lawfully acting in the usual course of business or employment, and within the scope of the official duties of such agent or employee, with such hospital or facility, and, with respect to agents or employees of health care facilities specified in clause (iv), only to the extent such individuals are furnishing services pursuant to the contracts or compacts described in such clause;

(vi) mere advertisements that do not attempt to facilitate an actual transaction involving a controlled substance;

(vii) a person, entity, or Internet site that is not in the United States and does not facilitate the delivery, distribution, or dispensing of a controlled substance by means of the Internet to any person in the United States;

(viii) a pharmacy registered under section 823(g) of this title whose dispensing of controlled substances via the Internet consists solely of--

(I) refilling prescriptions for controlled substances in schedule III, IV, or V, as defined in paragraph (55); or

(II) filling new prescriptions for controlled substances in schedule III, IV, or V, as defined in paragraph (56); or

(ix) any other persons for whom the Attorney General and the Secretary have jointly, by regulation, found it to be consistent with effective controls against diversion and otherwise consistent with the public health and safety to exempt from the definition of an "online pharmacy".

(53) The term "homepage" means the opening or main page or screen of the website of an online pharmacy that is viewable on the Internet.

(54) The term "practice of telemedicine" means, for purposes of this subchapter, the practice of medicine in accordance with applicable Federal and State laws by a practitioner (other than a pharmacist) who is at a location remote from the patient and is communicating with the patient, or health care professional who is treating the patient, using a telecommunications system referred to in section 1395m(m) of Title 42, which practice--

(A) is being conducted--

(i) while the patient is being treated by, and physically located in, a hospital or clinic registered under section 823(g) of this title; and

(ii) by a practitioner--

(I) acting in the usual course of professional practice;

(II) acting in accordance with applicable State law; and

(III) registered under section 823(g) of this title in the State in which the patient is located, unless the practitioner--

(aa) is exempted from such registration in all States under section 822(d) of this title; or

(bb) is--

(AA) an employee or contractor of the Department of Veterans Affairs who is acting in the scope of such employment or contract; and

(BB) registered under section 823(g) of this title in any State or is utilizing the registration of a hospital or clinic operated by the Department of Veterans Affairs registered under section 823(g) of this title;

(B) is being conducted while the patient is being treated by, and in the physical presence of, a practitioner--

(i) acting in the usual course of professional practice;

(ii) acting in accordance with applicable State law; and

(iii) registered under section 823(g) of this title in the State in which the patient is located, unless the practitioner--

(I) is exempted from such registration in all States under section 822(d) of this title; or

(II) is--

(aa) an employee or contractor of the Department of Veterans Affairs who is acting in the scope of such employment or contract; and

(bb) registered under section 823(g) of this title in any State or is using the registration of a hospital or clinic operated by the Department of Veterans Affairs registered under section 823(g) of this title;

(C) is being conducted by a practitioner--

(i) who is an employee or contractor of the Indian Health Service, or is working for an Indian tribe or tribal organization under its contract or compact with the Indian Health Service under the Indian Self-Determination and Education Assistance Act;

(ii) acting within the scope of the employment, contract, or compact described in clause (i); and

(iii) who is designated as an Internet Eligible Controlled Substances Provider by the Secretary under section 831(g)(2) of this title;

(D)(i) is being conducted during a public health emergency declared by the Secretary under section 247d of Title 42; and

(ii) involves patients located in such areas, and such controlled substances, as the Secretary, with the concurrence of the Attorney General, designates, provided that such designation shall not be subject to the procedures prescribed by subchapter II of chapter 5 of Title 5;

(E) is being conducted by a practitioner who has obtained from the Attorney General a special registration under section 831(h) of this title;

(F) is being conducted--

(i) in a medical emergency situation--

(I) that prevents the patient from being in the physical presence of a practitioner registered under section 823(g) of this title who is an employee or contractor of the Veterans Health Administration acting in the usual course of business and employment and within the scope of the official duties or contract of that employee or contractor;

(II) that prevents the patient from being physically present at a hospital or clinic operated by the Department of Veterans Affairs registered under section 823(g) of this title;

(III) during which the primary care practitioner of the patient or a practitioner otherwise practicing telemedicine within the meaning of this paragraph is unable to provide care or consultation; and

(IV) that requires immediate intervention by a health care practitioner using controlled substances to prevent what the practitioner reasonably believes in good faith will be imminent and serious clinical consequences, such as further injury or death; and

(ii) by a practitioner that--

(I) is an employee or contractor of the Veterans Health Administration acting within the scope of that employment or contract;

(II) is registered under section 823(g) of this title in any State or is utilizing the registration of a hospital or clinic operated by the Department of Veterans Affairs registered under section 823(g) of this title; and

(III) issues a controlled substance prescription in this emergency context that is limited to a maximum of a 5-day supply which may not be extended or refilled; or

(G) is being conducted under any other circumstances that the Attorney General and the Secretary have jointly, by regulation, determined to be consistent with effective controls against diversion and otherwise consistent with the public health and safety.

(55) The term "refilling prescriptions for controlled substances in schedule III, IV, or V"--

(A) means the dispensing of a controlled substance in schedule III, IV, or V in accordance with refill instructions issued by a practitioner as part of a valid prescription that meets the requirements of subsections (b) and (c) of section 829 of this title, as appropriate; and

(B) does not include the issuance of a new prescription to an individual for a controlled substance that individual was previously prescribed.

(56) The term "filling new prescriptions for controlled substances in schedule III, IV, or V" means filling a prescription for an individual for a controlled substance in schedule III, IV, or V, if--

(A) the pharmacy dispensing that prescription has previously dispensed to the patient a controlled substance other than by means of the Internet and pursuant to the valid prescription of a practitioner that meets the applicable requirements of subsections (b) and (c) of section 829 of this title (in this paragraph referred to as the "original prescription");

(B) the pharmacy contacts the practitioner who issued the original prescription at the request of that individual to determine whether the practitioner will authorize the issuance of a new prescription for that individual for the controlled substance described in subparagraph (A); and

(C) the practitioner, acting in the usual course of professional practice, determines there is a legitimate medical purpose for the issuance of the new prescription.

(57) [1] The term "suspicious order" may include, but is not limited to--

(A) an order of a controlled substance of unusual size;

(B) an order of a controlled substance deviating substantially from a normal pattern; and

(C) orders of controlled substances of unusual frequency.

(57) [1] The term "serious drug felony" means an offense described in section 924(e)(2) of Title 18 for which--

(A) the offender served a term of imprisonment of more than 12 months; and

(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

(58) The term "serious violent felony" means--

(A) an offense described in section 3559(c)(2) of Title 18 for which the offender served a term of imprisonment of more than 12 months; and

(B) any offense that would be a felony violation of section 113 of Title 18, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.

CREDIT(S)

(Pub.L. 91-513, Title II, § 102, Oct. 27, 1970, 84 Stat. 1242; Pub.L. 93-281, § 2, May 14, 1974, 88 Stat. 124; Pub.L. 95-633, Title I, § 102(b), Nov. 10, 1978, 92 Stat. 3772; Pub.L. 96-132, § 16(a), Nov. 30, 1979, 93 Stat. 1049; Pub.L. 98-473, Title II, § 507(a), (b), Oct. 12, 1984, 98 Stat. 2071; Pub.L. 98-509, Title III, § 301(a), Oct. 19, 1984, 98 Stat. 2364; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-570, Title I, §§ 1003(b), 1203, 1870, Oct. 27, 1986, 100 Stat. 3207-6, 3207-13, 3207-56; Pub.L. 99-646, § 83, Nov. 10, 1986, 100 Stat. 3619; Pub.L. 100-690, Title VI, § 6054, Nov. 18, 1988, 102 Stat. 4316; Pub.L. 101-647, Title XIX, § 1902(b), Title XXIII, § 2301, Title XXXV, § 3599I, Nov. 29, 1990, 104 Stat. 4852, 4858, 4932; Pub.L. 103-200, §§ 2(a), 7 to 9(a), Dec. 17, 1993, 107 Stat. 2333, 2340; Pub.L. 103-322, Title IX, § 90105(d), Title XXXIII, § 330024(a), (b), (d)(1), Sept. 13, 1994, 108 Stat. 1988, 2150; Pub.L. 104-237, Title II, §§ 204(a), 209, Title IV, § 401(a), (b), Oct. 3, 1996, 110 Stat. 3102, 3104, 3106, 3107; Pub.L. 104-294, Title VI, §§ 604(b)(4), 607(j), Oct. 11, 1996, 110 Stat. 3506, 3512; Pub.L. 105-115, Title I, § 126(c)(3), Nov. 21, 1997, 111 Stat. 2328; Pub.L. 106-172, §§ 3(c), 5(a), Feb. 18, 2000, 114 Stat. 9, 10; Pub.L. 106-310, Div. B, Title XXXVI, § 3622(a), Oct. 17, 2000, 114 Stat. 1231; Pub.L. 107-273, Div. B, Title IV, § 4002(c)(1), Nov. 2, 2002, 116 Stat. 1808; Pub.L. 108-358, § 2(a), Oct. 22, 2004, 118 Stat. 1661; Pub.L. 109-162, Title XI, § 1180, Jan. 5, 2006, 119 Stat. 3126; Pub.L. 109-177, Title VII, §§ 711(a)(1), (2)(A), 712(a)(1), Mar. 9, 2006, 120 Stat. 256, 257, 263; Pub.L. 110-425, § 3(a), Oct. 15, 2008, 122 Stat. 4821; Pub.L. 113-260, § 2(a), Dec. 18, 2014, 128 Stat. 2929; Pub.L. 114-198, Title III, § 303(a)(2), July 22, 2016, 130 Stat. 722; Pub.L. 115-271, Title III, §§ 3202(c), 3292(a), Oct. 24, 2018, 132 Stat. 3945, 3956; Pub.L. 115-334, Title XII, § 12619(a), Dec. 20, 2018, 132 Stat. 5018; Pub.L. 115-391, Title IV, § 401(a)(1), Dec. 21, 2018, 132 Stat. 5220; Pub.L. 117-215, § 2(b), Title I, § 103(b)(1)(A), Dec. 2, 2022, 136 Stat. 2258, 2262.)

Notes of Decisions (160)

Footnotes

1 So in original. Two pars. (57) have been enacted.

21 U.S.C.A. § 802, 21 USCA § 802
Current through P.L. 118-70. Some statute sections may be more current, see credits for details.

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted Recognized as Unconstitutional by In re Clayton, 11th Cir., July 18, 2016

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part III. Court Officers and Employees (Refs & Annos)
Chapter 58. United States Sentencing Commission (Refs & Annos)

28 U.S.C.A. § 994

§ 994. Duties of the Commission

Effective: October 6, 2006
Currentness

(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 incidents [1] 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 incidents [1] 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 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 Congress, 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.

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.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2019; amended Pub.L. 99-217, § 3, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99-363, § 2, July 11, 1986, 100 Stat. 770; Pub.L. 99-570, Title I, §§ 1006(b), 1008, Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 6(b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub.L. 100-182, §§ 16(b), 23, Dec. 7, 1987, 101 Stat. 1269, 1271; Pub.L. 100-690, Title VII, §§ 7083, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4417, 4419; Pub.L. 103-322, Title II, § 20403(b), Title XXVIII, § 280005(c)(4), Title XXXIII, § 330003(f)(1), Sept. 13, 1994, 108 Stat. 1825, 2097, 2141; Pub.L. 108-21, Title IV, § 401(h), (k), Apr. 30, 2003, 117 Stat. 672, 674; Pub.L. 109-177, Title VII, § 735, Mar. 9, 2006, 120 Stat. 271; Pub.L. 109-304, § 17(f)(1), Oct. 6, 2006, 120 Stat. 1708.)

APPLICATION OF SENTENCING GUIDELINES

See Blakely v. Washington, 124 S.Ct. 2531 (2004); U.S. v. Booker, U.S. v. Fanfan, 125 S.Ct. 738 (2005).

Notes of Decisions (238)

Footnotes

1 So in original. Probably should be "incidence".

28 U.S.C.A. § 994, 28 USCA § 994

Current through P.L. 118-70. Some statute sections may be more current, see credits for details.