

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN R. PATTISON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In a criminal matter where the District Court more than doubled the agreed upon Guidelines range, whether this Court should resolve the Circuit split as to what “similar” uncharged prior conduct under U.S.S.G. §4A1.3(a)(2)(E) means and whether the carefully delineated §4A1.3(a)(2) list was meant to be an exclusive itemization of examples despite the use of the word, “may,” as these issues continue to impact defendants who were sentenced pursuant to this upward departure prior to the November 2025 amendments to the Sentencing Guidelines.

PARTIES TO THE PROCEEDING (Rule 14.1(b))

The two parties to the proceeding in the court whose judgement is sought to be reviewed are Stephen Pattison, who was the defendant below, and the United States of America, who were the plaintiff.

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PETITION FOR WRIT OF CERTIORARI

Stephen R. Pattison respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The decision of the Second Circuit is available at *United States v. Pattison*, 2026 U.S. App. Lexis 13513, 2026 W.L. 1294023 (2d Cir. 2026), and is attached as pages 1A through 1E of the appendix to this petition.

JURISDICTION

The judgment of the Second Circuit was entered on May 11, 2026.

This petition is being filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

U.S. SENTENCING GUIDELINES POLICY STATEMENT INVOLVED

Prior to its repeal on November 1, 2025, U.S.S.G. §4A1.3(a) provided:

(a) Upward Departures.—

(1) Standard for Upward Departure.—

If reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) Types of Information Forming the Basis for Upward Departure.—

The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) Prohibition.—

A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) Determination of Extent of Upward Departure.—

(A) In General.—

Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) Upward Departures from Category VI.—

In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

The pertinent Application Notes to U.S.S.G. § 4A1.3(a) provided:

1. Definitions.—

For purposes of this policy statement, the terms “depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Upward Departures.—

(A) Examples.—

An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

- (i) A previous foreign sentence for a serious offense.
- (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
- (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
- (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) Upward Departures from Criminal History Category VI.—

In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. ...

PROCEDURAL HISTORY AND STATEMENT OF FACTS

1. Initial District Court proceedings

On June 10, 2021, Mr. Pattison was alleged in a one-count indictment to have possessed two firearms (a shotgun and rifle) and ammunition after having been convicted of a crime punishable by a term of imprisonment exceeding a year.¹ *See*, 18 U.S.C. §§ 922(g)(1); 924(a)(2); A 11-12; PSR ¶¶ 35-38.² The shotgun and rifle were seized pursuant to a search warrant at Mr. Pattison’s residence in rural Hilton, New York.

On November 8, 2021, the petitioner pleaded guilty to the sole count of the indictment pursuant to a written plea agreement, dated that same day. A 11-25. The agreement indicated petitioner’s criminal history category (“CHC”) was IV, with a Guidelines range of 46 to 57 months, A 19, 38-29, 43-44, consistent with the revised PSR filed prior to the initial sentencing.³

¹ The petitioner’s prior conviction was a 2016 Missouri state adjudication for domestic assault. A 15-16, 33-36, 55. (Page numbers in the Appendix will be referred to as “A __.”) The instant allegations related to events in October and November 2020, occurring while petitioner was subject to a pending Missouri parole violation warrant. A 35-36, 55.

² Paragraph numbers in the revised presentence investigation report, dated Aug. 29, 2024, will be referred to as “PSR __.”

³ A waiver of appeal was referenced on the record at the time of the plea, which only encompassed prison sentences not exceeding 57 months. A 19, 21, 41.

A two-level enhancement was imposed under U.S.S.G. §3C1.1, for Mr. Pattison attempting to facilitate others in providing inaccurate sworn information to law enforcement regarding his possession of the two firearms (which formed the basis of the instant allegations). A 16-17, 36-39. A three-level reduction was imposed for the petitioner accepting responsibility.⁴ As the total offense level was 19 and Mr. Pattison's CHC was IV, the Probation Office found the Guidelines range to be between 46 and 57 months.⁵

At the time of the initial sentencing, on May 23, 2022, the District Court believed Mr. Pattison's CHC did not adequately reflect the seriousness of the instant offense based on his racial attitudes, his purported disrespect for the law and his failure to comply with previous terms of supervision. A 85-86. The court opined that while the Guidelines range was between 46 and 57 months, A 65-66, 88, U.S.S.G. §4A1.3 compelled two-level upward departures to a CHC of VI and an offense level of 21, thus landing Mr. Pattison in a hypothetical Guidelines range of 77 to 96 months. A 67, 88-90, 94. The government requested a 120-month sentence. A 68-73.

Mr. Pattison was ultimately sentenced to 96 months (i.e., 8 years), A 90, 98, more than doubling the minimum time for the agreed-upon range.

⁴ See U.S.S.G. §§ 3E1.1(a) and (e); A 18; see Jan. 21, 2022 PSR ¶¶ 111-112.

⁵ See *again* Jan. 21, 2022 PSR ¶¶ 113, 129.

2. Remand and resentencing

On January 18, 2024, the U.S. Court of Appeals for the Second Circuit remanded, via summary order, based on the District Court's failure to provide reasonable notice under Federal Rule of Criminal Procedure 32(h) of its contemplated U.S.S.G. §4A1.3(a) upward departure.⁶

On remand, the District Court provided written notice on February 22, 2024, that it again was contemplating a U.S.S.G. §4A1.3 upward departure. A 8, 109-110, 209-211. A new PSR was ordered. The final revised PSR, dated August 29, 2024, deemed Mr. Pattison's base offense level to be 20.⁷ With 2 points added for obstruction of justice and 3 points deducted for acceptance of responsibility, petitioner's total offense level was again calculated to be 19. PSR ¶¶ 113, 134. The report ultimately concluded the petitioner's Guidelines range to be *reduced* to 37 to 46 months, PSR ¶ 134, as a 2023 Guidelines amendment to U.S.S.G. §4A1.1, did away with so-called "status" points under certain circumstances.⁸ A 44, 210; PSR ¶ 135. Indeed, the parties

⁶ See *U.S. v. Pattison*, 2024 U.S. App. Lexis 1143, at *3-4, 2024 W.L. 191373 (2d Cir., Jan. 18, 2024); A 8, 105-108, 209.

⁷ See A 17; PSR ¶ 104; U.S.S.G. §2K2.1(a)(4)(A).

⁸ See U.S. Sentencing Commission, "2023 Amendments in Brief," effective Nov. 1, 2023 (addressing Part A of Amendment 821 regarding "status" points), accessible at:

https://www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB_821.pdf

(visited May 27, 2025).

and the court agreed at resentencing that as Mr. Pattison's offense level was 19 and his CHC was now III, his new (*and now lower*) Guidelines range was 37 to 46 months. A 132, 210, 214, 216, 256, 267.

In the latest PSR, the Probation Office again noted Mr. Pattison's Facebook postings regarding white supremacy and threats of violence. PSR ¶¶ 43-82. Many of these allegations were objected to by the petitioner.

At Mr. Pattison's September 5, 2024 resentencing, the government presented new information regarding his conduct while incarcerated. A 133-135. Petitioner had participated in a gang and race-motivated assault wherein a Caucasian inmate was slashed in the face with a homemade razor blade. Photos were provided of the victim, who was a gang member said to have previously provided a weapon to an inmate (who was a person of color). A 133-135, 141, 258-259. As it had prior to the initial sentencing, the government sought the maximum prison term of 120 months.⁹

Defense counsel argued prior to resentencing that, among other things, the court's previous upward departure (in 2022) to 96 months was a rare sentence, well outside both local and national norms. A 159-160, 275-276.¹⁰

The District Court adopted the PSR Guidelines range of 37 to 46 months, A 281,

⁹ A 129, 131, 135, 140-142, 144-145, 214, 256-263.

¹⁰ Just as he had done at the time of the initial sentencing, A 57-58, Mr. Pattison also objected to the relevance and reliability of various PSR assertions attributed to him on Facebook. *See, e.g.*, A 113-114, 213, 216-217, 220. Petitioner asked for a sentence consistent with the agreed-upon 37 to 46 month range, as set out in the latest PSR. A 114, 214, 277.

but observed that Mr. Pattison had possessed guns while on parole (from which he fled). A 281-283. The court also noted the 2023 prison assault was race-related and committed after petitioner had received a long sentence. A 284, 288.

The District Court again considered the racial component of petitioner's Facebook postings noted in the PSR (which described racial animosity and threats towards protestors in 2020), as well as his prior misdemeanor matters. A 284-287. The court also considered petitioner's conviction in Missouri, wherein he received three years in custody and then parole. A 284-285, 289.¹¹ According to the court, the initial 96-month sentence did not work, as petitioner subsequently committed a prison assault. A 289-290. So the court doubled Mr. Pattison's CHC from III to VI and increased his offense level from 19 to 23. A 290. The new range would be 92 to 115 months. A 290.

Mr. Pattison ultimately received an above-Guidelines prison sentence of 108 months (i.e., 9 years), to be followed by 3 years of supervised release, A 164, 291, 297, this time more than doubling the maximum Guidelines range of 37 to 46 months provided in the latest PSR (at ¶ 134).

¹¹ Petitioner's prior convictions, including his assault and prison sentence from Missouri, were, of course, already accounted for in his Guidelines calculation. A 169; PSR ¶ 120.

3. Latest appellate proceedings

The United States Court of Appeals for the Second Circuit entertained this appeal pursuant to 28 U.S.C. § 1291. On May 11, 2026, the court, in pertinent part, concluded:

[P]attison argues that the district court abused its discretion when it imposed an upwards departure on his criminal history category under U.S.S.G. § 4A1.3 (repealed 2025). Section 4A1.3 of the Guidelines authorized district courts to impose an upwards departure on a defendant's criminal history category if “reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” *Id.* § 4A1.3(a)(1). That “reliable information” “may include . . . [p]rior similar adult criminal conduct not resulting in a criminal conviction.” *Id.* § 4A1.3(a)(2)(E). Here, the district court imposed an upwards departure on Pattison's criminal history category primarily because, before Pattison’s sentencing, he slashed another inmate across the face with a contraband weapon made from razor blades. Because this conduct also involved the illicit possession of a weapon, it was “similar” to Pattison’s conviction for unlawful possession of weapons, so the district court did not abuse its discretion in imposing an upwards departure on Pattison’s criminal history category. ...

United States v. Pattison, 2026 U.S. App. Lexis 13513, at *2-3.¹²

¹² The Second Circuit also rejected Mr. Pattison’s arguments that the District Court failed to consider §4A1.3(a)(4)(A) requiring a comparison of his sentence to those of similar defendants, as well as the unreliability, irrelevance and subjective information utilized in the PSR. *See* A 1A through 1E.

REASONS FOR GRANTING THE PETITION

A. The Federal Courts of Appeals are split as to the proper interpretation of prior “similar” adult criminal conduct under U.S.S.G. §4A1.3(a)(2)(E) and whether the specific §4A1.3(a)(2) itemization of conduct constituted an exhaustive list despite the use of the word, “may.” This Court’s intervention is warranted to secure uniformity among the Circuits.

Prior to its repeal in 2025, U.S.S.G. §4A1.3(a)(1) permitted an upward departure “[i]f reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.” The information a District Court was permitted to consider under §4A1.3(a)(2)(E) included “[p]rior similar adult criminal conduct not resulting in a criminal conviction.” (emphasis added)

The Commission provided important guardrails for sentencing courts utilizing §4A1.3. For instance, district courts were prohibited from considering a defendant’s prior arrest record for purposes of an upward departure. *See* U.S.S.G. §4A1.3(a)(3). In addition to (a)(2)(E), examples of *permissible* circumstances for a §4A1.3 upward departure included a previous foreign sentence for a serious offense and receipt of a prior consolidated sentence of ten years for a series of serious assaults. *See* U.S.S.G. §4A1.3 appl. note 2(A). None of the codified examples apply at bar.

The District Court relied heavily on post-offense prison conduct and prior social media postings to justify more than doubling the agreed-upon maximum Guidelines range. Mr. Pattison argued before the Second Circuit that as the uncharged conduct at

issue included information that was both dissimilar, §4A1.3(a)(2)(E)¹³ and unreliable, §4A1.3(a)(1),¹⁴ and as the increased term was never considered in light of other analogous defendants' sentences, §4A1.3(a)(4)(A),¹⁵ the District Court's tunnel vision on part of §4A1.3(a)(1) to justify its drastic departure was erroneous and constituted an abuse of discretion.¹⁶

In support of its §4A1.3 departure, the District Court zeroed in on a prison assault involving an internal racial / gang issue, as well as racially charged social media posts, mostly on Facebook. A 252, 281. The court at resentencing described the Facebook statements as “germane” and the prison assault as “most relevant” to its above-Guidelines sentence. A 281.¹⁷

Petitioner's offense of conviction involved a rifle and a shotgun stored inside a residence.¹⁸ In great contrast to the prison incident and social media posts, the

¹³ Defense counsel specifically objected under §4A1.3(a)(2), both at resentencing and in her pleadings. See A 165-166, 272-274 (addressing both the §4A1.3(a)(2) text and its accompanying commentary).

¹⁴ This provision is not the focus of this Petition.

¹⁵ This provision is also not the focus of this Petition.

¹⁶ While the court provided lip service for alternatively justifying this drastic sentence increase as an upward variance under § 3553(a), *e.g.*, A 253, 255, 290-291, the vast majority of the court's analysis was squarely focused on §4A1.3(a)(1). See *e.g.*, A 109-110 (§4A1.3(a)(1) written notice); A 214-215, 253 (analysis conducted during resentencing).

¹⁷ The court's consideration of §4A1.3, however, ended with (a)(1), which of course only provides the *beginning* of the District Court's required legal analysis.

¹⁸ PSR ¶¶ 4, 28, 35-38.

firearms conviction at bar had little to do with any racial violence.¹⁹ In sum, the October 2023 prison incident was not sufficiently “similar” to the offense of conviction. But that’s not how the Second Circuit viewed it:

Because this conduct also involved the illicit possession of a weapon, it was “similar” to Pattison’s conviction for unlawful possession of weapons, so the district court did not abuse its discretion in imposing an upwards departure on Pattison’s criminal history category.

Pattison, 2026 U.S. App. Lexis 13513, at *3-4; *but see United States v. Nixon*, 130 F.4th 420, 428-431 (4th Cir. 2025) (vacating upward departure under §4A1.3 based on dissimilar post-offense prison conduct).²⁰

On appeal, the government sought an interpretation that §4A1.3(a)(2)’s introductory “may include” language turns the five *carefully worded* prior conduct examples into generic suggestions.²¹ Indeed, the Commission went to the trouble of providing these examples:

¹⁹ While the probation report, at PSR ¶¶ 67, 69 and 70, refers to Facebook comments purportedly connected to the seized guns, the only allegations of these guns being obtained in connection with shooting people of color were in paragraph 71, which referred to an October 2020 hyperbole-laden conversation contemplating protestors aggressively approaching petitioner’s residence.

²⁰ *See also United States v. Holmes*, 2026 U.S. App. Lexis 16303, at *3-4, 2026 W.L. 1623431 (4th Cir., June 5, 2026) (explaining *Nixon* does not preclude a district court from considering dissimilar conduct with regards to other components of sentencing); *United States v. Kennedy*, 2026 U.S. App. Lexis 15261, at *2-5, 2026 W.L. 149088 (4th Cir., May 28, 2026) (distinguishing *Nixon* where prior dissimilar convictions are at issue).

²¹ *See* government brief, 2d Cir. File No. 24-2580, dkt. 35, at pp. 27-28.

- (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).
- (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
- (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
- (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
- (E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(emphasis added). The Sentencing Commission intended to significantly curtail a district court’s discretion, including an attempt to limit the breadth of potential qualifying priors under §4A1.3(a)(2)(E) to similar criminal conduct not adjudicated as such in court. Very specific. If the Commission wasn’t intending on reigning in a District Court’s discretion, why not just say “*any* prior criminal acts, whether charged or not”? ²² As the Fourth Circuit opined:

The Sentencing Commission... carefully structured the upward departure Guidelines to ensure that, unless the uncharged conduct is related to the offense of conviction or almost identical in nature, ²³ the government must bring an

²² See generally Scalia, A., and Garner, B., “Reading Law: The Interpretation of Legal Texts,” Thompson West (2012), Semantic Canon 10 (“Negative-Implication Canon”), pp. 107-111 (addressing canon that the expression of one thing implies the exclusion of others); see also *id.* at pp. 296-302 (Private-Right Canon 49: “Rule of Lenity,” addressing ambiguity in a statute defining a crime or imposing a penalty being resolved in the defendant’s favor).

²³ The Second Circuit disagrees. See *United States v. Brennan*, 395 F.3d 59, 71-72 (2d Cir. 2005) (recognizing the Guidelines did not define “similar” and that “prior conduct need not have been an identical type.”), citing *United States v. Mayo*, 14 F.3d 128, 131-132 (2d Cir. 1994).

indictment and secure a conviction before it may use that conduct in a sentence for a different crime. *See United States v. Robertson*, 568 F.3d 1203, 1213 (10th Cir. 2009) (explaining the Guidelines’ rationale that repeatedly engaging in the “same criminal behavior” indicates “an increased likelihood that the offense will be repeated yet again.”). It is only in limited circumstances that the Commission has determined that the benefits of properly capturing the sentence for a given offense outweigh the costs to what would otherwise be a defendant’s constitutional rights. Outside of the enumerated exceptions, this Court must jealously guard the Commission’s chosen delicate balance.

Nixon, 130 F.4th at 430 (emphasis added).

Instead of addressing the similarity issue of (a)(2)(E), the government on appeal cited to five decisions from sister circuits in support of the proposition that §4A1.3(a)(2) presents a *non*-exclusive list of potential prior convictions to be considered,²⁴ only one of which has precedential value (in that Circuit at least). *See United States v. Beltramea*, 785 F.3d 287, 289-290 (8th Cir. 2015) (where, unlike our matter, the court considered the slight distinction between a prior civil default judgment -- based on both fraudulent *and* non-fraudulent claims -- and the present fraud-based conduct); *see also United States v. Daniels*, 574 F. App’x 437, 438 (5th Cir. 2014) (unpublished) (addressing unpreserved §4A1.3 argument); *United States v. Till*, 2023 U.S. App. Lexis 33274, at *12-13, 2023 W.L. 8651266, at *5 (6th Cir. Dec. 14, 2023) (unpublished); *United States v. Joseph*, 755 F. App’x 779, 785 (10th Cir. 2018) (unpublished) (also addressing unpreserved §4A1.3 argument); *United States v. Sanders*, 744 F. App’x 641, 642-643 (11th Cir. 2018) (unpublished) (also addressing unpreserved §4A1.3

²⁴ *See again* government brief, 2d Cir. File No. 24-2580, dkt. 35, at pp. 27-28.

argument).

As argued, the Fourth Circuit, in a published decision last year, got it right on both the (a)(2) exhaustive issue, as well as the (a)(2)(E) issue. *See again Nixon*, 130 F.4th at 430-431. There, like at bar, the District Court erroneously imposed an §4A1.3(a)(2) upward departure for a firearm possession conviction based on a dissimilar uncharged post-offense prison assault. *Nixon*, supra at 428-435. As the court observed, “[w]hile Nixon’s actions while incarcerated were reprehensible, they cannot be considered “similar criminal conduct” under 4A1.3(a)(2)(E).” *Id.* at 431. This Court should ultimately follow *Nixon*, the most recent published circuit decision cited by both parties.²⁵

To begin with, as observed by the Fourth Circuit, the government should not be permitted to effectively prosecute *carte blanche* for an uncharged crime based on a lesser standard of proof:

The limitation that an upward departure can only be based on uncharged, similar conduct reflects a careful balance between protecting the rights of the accused and ensuring a sentence properly reflects the likelihood of recidivism for an individual defendant. This balance is critical, as “[t]he state poses no greater threat to individual liberty than when it proceeds in a criminal action.” ... Rather than present its case before a jury and prove Nixon’s guilt beyond a reasonable doubt, the government can utilize sentencing—with its lower standard of proof and lack of a jury—to punish

²⁵ The *Nixon* case was cited in all three briefs filed by the parties before the Second Circuit. It was also raised during questioning by the court during oral argument. It is not, however, addressed in the Second Circuit’s decision.

Nixon for his uncharged transgressions. But sentencing is not and cannot be a backdoor around the Constitution.

Nixon, 130 F.4th at 429-430 (internal citation omitted). Along these lines, this Court has recognized that “[t]he sentencing process... must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding. . . .” *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Putting aside what level of proof is warranted for utilizing uncharged conduct in drastically increasing a sentence,²⁶ the sentencing court in our matter abused its discretion in assuming such an expansive view of §4A1.3(a)(2).

²⁶ Since *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and even before, *see, e.g., Williams v. New York*, 337 U.S. 241, 245-251 (1949), the Courts of Appeals have struggled with how to approach the standard of proof under the Due Process Clause where a sentence has been significantly increased by uncharged conduct. *See, e.g., United States v. Watts*, 519 U.S. 148, 156, n.2 (1997) (acknowledging “[a] divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence”). In *McMillan*, this Court held that a finding of fact related to sentencing should generally be resolved by a preponderance of the evidence standard. 477 U.S. at 92. However, this Court warned of the tail wagging the dog scenario where an uncharged accusation propels a greater sentence without the government having to abide by the constitutional safeguards that protects all criminal defendants. *Id.* at 88. This Court recognized in *McMillan* there may be an exception to the general rule of the preponderance standard satisfying Due Process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction. 477 U.S. at 87-91.

Moreover, while not addressed by the Second Circuit, the District Court's position below (*see* A 272-273) ignored the history of §4A1.3 in terms of whether (a)(2) provided a non-exhaustive list of examples, subject to endless expansion by a sentencing court:

The dissent emphasizes the words “may include” at the beginning of that list to engage in an entirely new interpretation of § 4A1.3 and hold that it is not exhaustive. We reject this argument. There was a time when the list of exceptions was believed to be not exhaustive. Before 2003, the list began with the words “may include, but is not limited to, information concerning.” ... Amendment 651 brought the language in § 4A1.3 to its current version. After this change in the language, this Court presented a different rationale to treat the list as not exhaustive: the content of an unrelated application note. This Court reasoned that because an application note in § 1B1.1 informs us that “[t]he term ‘includes’ is not exhaustive,” then the list in § 4A1.3 must not be exhaustive either. ... This reasoning was unsound *ab initio* because the application note specifies that its definition is “not designed for general applicability” and that its “applicability to sections other than those expressly referenced must be determined on a case-by-case basis.” U.S.S.G. § 1B1.1 cmt. 2. Nowhere in the application notes for § 4A1.3 is the definition for “includes” expressly referenced even though those notes expressly reference definitions from other comments. *See* U.S.S.G. § 4A1.3 cmt. 1.

Nixon, 130 F.4th at 430. In other words, the Commission removed “but not limited to” to restrict, not expand, the discretion of a District Court.

The Fourth Circuit in *Nixon* further recognized the dynamics of the word, “may,” in light of this Court’s *Zadvydas* decision:

The Supreme Court has noted that the word “may” has an elusive definition: sometimes it is permissive, yet other times it mandatory. *See Zadvydas v. Davis*, 533 U.S. 678, 697, ... (2001). Here, the Guidelines provide that district courts are allowed to depart if reliable information indicates that the

criminal history category misrepresents the likelihood of recidivism. The next paragraph specifies that “reliable information *may* include” one of five criteria, including similar conduct lacking a conviction. There is no indication that “may” is permissive, nor that this list is *not* exhaustive, as would be made clear by the inclusion of the phrases “including, but not limited to” or “such as.” Further, it is well-established under the *expressio unius* canon of statutory interpretation that “where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.” ... The Guidelines specifically allow courts to consider dissimilar conduct yielding a sentence of more than a year, and similar conduct that lacks a conviction.

Nixon, 130 F.4th at 431 (underlined emphasis added and internal citations omitted). In sum, “may” under §4A1.3(a)(2) is not a permissive term, permitting an endless addition of uncharged acts not delineated by the Commission. This conclusion should inform this Court’s take on what “similar” means under (a)(2)(E).

The Commission’s *specificity* under (a)(2) being meant to restrain the District Court’s discretion was not lost on the *Nixon* court:

The dissent also errs by contending that “when the Sentencing Commission intended to exclude from consideration a particular type of information, it said so.” ... This argument misunderstands the prohibition created by § 4A1.3(a)(3). As this Court has found, this prohibition emphasizes the inability for arrest records to provide information reliable enough to form the basis for the upward departure, and it instead obliges sentencing courts to use more reliable sources to develop facts surrounding the arrests. ... For instance, an arrest record standing by itself is not reliable enough to form the basis for an upward departure based on prior similar adult criminal conduct not resulting in a criminal conviction. But this does not mean that everything save arrest records can be considered as the basis for an upward departure. Under the dissent’s interpretation, and despite the clear enumeration, the Guidelines also allow consideration of any type of conduct at all, rendering the inclusion of five listed criteria

meaningless. We cannot agree that the Guidelines were drafted in such a way.

Nixon, 130 F.4th at 431-432 (emphasis added and internal citations omitted).

Moreover, the Fourth Circuit, in addressing very similar facts to our matter, believed “similar” means what it says:

When reviewing a departure under § 4A1.3(a)(2)(E), we must ensure that there is a direct corollary between the uncharged conduct and the offense of conviction, typically requiring an exact match between at least some part of the related conduct and the uncharged “similar” acts. ... While Nixon's actions while incarcerated were reprehensible, they cannot be considered “similar criminal conduct” under § 4A1.3(a)(2)(E). None of the post-offense conduct relied upon by the district court is similar to the underlying offense: possession of a firearm and a small quantity of marijuana while a passenger in a vehicle. Nor is it similar to any relevant actions surrounding the underlying offense. ... The only post-offense acts that possibly relate to any of this relevant conduct is the possession of sharpened metal rods, which, in this Court’s view, is a stretch at best given the significant differences between firearms and metal rods, and the prison and non-prison contexts. The dissent finds “felon in possession of a gun” and “inmate in possession of a shiv” to be quintessential examples of similarity because in both instances, Nixon possessed a weapon that he was not allowed to have. ... To start, the assumption that any felon with a firearm is planning to or in effect has already engaged in violence is incompatible with our constitutional emphasis on the right to keep and bear arms for self-defense. *See New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 33, 70 ... (2022). Further, this analysis completely ignores that only a sliver of the conduct relied upon for the upward departure was analogous to his firearm charge as possession of a weapon as a prohibited person. Even if every instance of possession of any weapon that one is not allowed to have is *per se* similar, the district court's upward departure would still be based on information from far outside what can be permissibly considered.

Nixon, 130 F.4th at 431-432 (emphasis added and internal citations omitted).

This Court should adopt the *Nixon* rationale and clarify the issues before us:

Here, the government fails to show that there is a common level of similarity between Nixon’s post-offense acts and the actual offense at issue in this case. Nixon’s uncharged post-conviction conduct does not demonstrate a pattern of “repeated convictions” for felon in possession of a firearm offenses. ... Nor does the uncharged conduct involve a similar element to the underlying offense, like a “controlled substance” or a firearm. ... It is true that some of our sister circuits have pushed the boundaries of what constitutes similar conduct.²⁷ But, even if we were to accept the reasoning of these cases, all involved far more commonality between the uncharged conduct and underlying offense than what is presented here. To this Court’s knowledge, no court has ever accepted the argument that illegal possession of a firearm is the same as possession or use of a sharpened metal rod. We decline the government’s invitation to find that any acts involving possession of a weapon are inherently similar. The Sentencing Guidelines permit a district court to consider dissimilar conduct so long as it results in a conviction and sentence of more than one year. U.S.S.G. § 4A1.3(a)(2)(B). But to protect the rights of a defendant, unrelated criminal conduct “not resulting in a criminal

²⁷ The *Nixon* court, *supra* at 433, cited to a number of Circuits that were generous in their interpretation of “similar.” *See, e.g., United States v. Goshea*, 94 F.3d 1361, 1363-64 (9th Cir. 1996) (finding conduct of impersonating a military officer to obtain jobs and access to officer's clubs and military bases substantially similar to conduct of impersonating a military officer to obtain money); *Mayo*, 14 F.3d at 131-32 (2d Cir.) (finding prior arsons designed to fraudulently disadvantage financial institutions in their loan dealings with defendant to be sufficiently similar to the frauds prosecuted in the case at issue); *Robertson*, 568 F.3d at 1214 (10th Cir.) (affirming district court’s consideration of violent criminal conduct involving firearms for a felon in possession of a firearm); *United States v. Bullock*, 35 F.4th 666, 672 (8th Cir. 2022) (affirming similarity of prior criminal firearms charge because both the acquitted conduct and present incident involved firearms).

conviction” can only be considered for an upward departure if that conduct is similar—no matter that conduct’s violent nature, or no matter how “not good” and “very concerning” a court considers the conduct to be. U.S.S.G. § 4A1.3(a)(2)(E); ... The district court’s almost exclusive reliance on dissimilar conduct here renders the sentence procedurally unreasonable.

Nixon, 130 F.4th at 433 (emphasis added and internal citations omitted).

In sum, the post-sentence prison incident in our matter was not sufficiently “similar” to the offense of conviction involving a rifle and a shotgun stored inside a residence. The Commission’s use of the word, “may,” in introducing an explicit list of conduct was not meant to be an invitation to force other terms onto the list. These issues, though part of a repealed Guideline policy, still warrant this Court’s attention. Courts of Appeals are entitled to expect District Courts will conduct a far more circumspect inquiry, specifically under subsection §4A1.3(a)(2)(E), before electing to more than double a defendant’s maximum Guidelines range. This Court should intervene to clarify the law and provide guidance to resolve the Circuits’ split on these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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