

# Federal Sentencing Update

May 11, 2023



# USSC Membership

Requires 7 voting members appointed by President and Approved by the Senate

At least 3 shall be federal judges

No more than 4 members of any party

AG or designee = ex-officio member

Chair of Parole Commission = ex-officio member

# USSC Composition

Lost Quorum after 2018 (before 1st Step and CARES Acts)

Pres. Trump never proposed replacements

Membership slowly dwindled to 1

Result: Absence of guidance on new laws -

Ex: In Oregon, 62% of compassionate release motions granted...in Middle D. Georgia 1.5%

Pres. Biden proposed new Group, who were approved in 2022.

# US Sentencing Commission



# USSC Members

- 1) Chair = Judge Reeves, S.D. Mississippi  
Former civil division AUSA
- 2) VC = Judge Restrepo, 3d Circuit  
Former District Court Judge & AFPD
- 3) VC = Laura Mate  
Former Director SRC (Fed Defenders)
- 4) Judge John Gleeson, E.D.N.Y. 1994-2016 (former AUSA)
- 5) Judge Claria Horn Boom, KY (former AUSA)
- 6) Claire Murray (Former Deputy AG & SAUSA)
- 7) Candice Wong (AUSA – D.C., former Deputy AG)

# Proposed Amendments

## ➤ Top Priorities

- 1<sup>st</sup> Step Act guidance
- CARES Act guidance

## New Amendments

- Published April 5, 2023
- Effective November 1, 2023
  - Unless Congress rejects them

# Guideline Amendments

- 1. Safety Valve-1st Step Implementation
- 2. Acceptance
- 3. **Firearms**
- 4. Criminal History-Status points
- 5. Criminal History-Zero points
- 6. Marijuana departure
- 7. **Fake Pills**

[Note: Orange Items are subject to possible Ex-Post Facto]

# More amendments

- 8. First Step Act and Drug Offenses
  - 9. Crimes of Violence
  - 10. Reduction in Terms of Imprisonment  
(formerly known as Compassionate release)
  - 11. Use of a Computer for Prostitution
  - 12. Drones
- 

# 1. Safety Valve



# 5C1.2

First...

Makes the guideline match the new statute,  
**broadening the class of crimes** for which  
safety valve can be granted

# 5C1.2

Second...

Adds More Explicit Safety Valve Proffer  
Protections

Information disclosed under this section  
“may not be used to enhance the sentence”  
Unless relates to violent offense

18 USC 3553(f)

74. **Use of Information Disclosed under Subsection (a).**—~~Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except, where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.~~ Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).

# 5C1.2

Third...

Syncs 5C1.2 to 18 USC 3553(f)(1) to extend eligibility to Defendants who **don't have**:

1. > 4 criminal history points (not counting 1-point offenses);
2. A 3-point offense; and
3. A 2-point “violent offense”

# Language:

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

# But...what is the meaning of “and”

Pulsifer v. US, 39 F.4<sup>th</sup> 1018, 1022 (8<sup>th</sup> Cir. 2022), *cert. granted*, 2023 WL 2227657 (US Feb. 27, 2023) to resolve circuit split:

- US v. Lopez, 956 F.3d 431 (9<sup>th</sup> Cir. 2021) (excluded only if 4 points, a 3-point conviction **and** 2-point crime of violence)
- But US v. Palomares, 52 F.4<sup>th</sup> 640, 642 (5<sup>th</sup> Cir. 2022) (excluded if 4 points, **or** 3-point conviction **or** 2-point crime of violence)

## 4th: Changes lowest punishment range

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, ~~the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17~~ the applicable guideline range shall not be less than 24 to 30 months of imprisonment.

## 2. Acceptance



# Timely acceptance at 3E1.1(b)

- Offense level at least 16
- Government motion
- Notification of intent to plead guilty permits government to avoid preparing for trial and permits government and court to allocate resources efficiently

# So...Who gets 3 points?

Two existing Circuit splits:

- 1) Can Govt. deny 3<sup>rd</sup> point for motions to suppress?
- 2) Can Govt. deny 3<sup>rd</sup> point for sentencing challenges?  
(yes says 8<sup>th</sup>)

# 2023 Clarification #1: Preparing for “Trial” really means TRIAL

- The term “preparing for trial” means substantive preparations taken to present the government’s case to judge or jury at trial
- Ordinarily taken close to trial, e.g. prep witnesses, witness/exhibit list, motion in limine, voir dire and instructions
- Pretrial proceedings (e.g. suppression motions) ordinarily are not considered “preparing for trial” under this subsection.

# 2023 Clarification #2:

Preparing for trial does NOT include post-conviction matters

- -Sentencing objections
- -Appeal waivers
- -Related issues

# 3. Firearms



# Firearms: Bipartisan Safer Communities Act

- June 25, 2022
- Remember Uvalde
- Upped max sentence to 15 years

# New Straw Purchaser Offenses

#1: 18 U.S.C. 932

1. Knowingly purchasing or conspiring to purchase
2. Any firearm on behalf of (or at request or demand of another)
3. With knowledge or reasonable cause to believe

# 18 USC 932 cont'd

4. Person prohibited under 922(d) (e.g. indicted, fugitive, addict, mental issues, alien, convicted or under domestic violence order, etc), or
- 5a. Intends use, carry, possess, sell, or dispose of firearm in furtherance of felony, terrorism or drug trafficking, or
- 5b. Intends to sell or dispose of firearm to person who meets these criteria

## #2: 18 USC 933

Ships, transports, transfers, etc. firearm to another with knowledge or reasonable cause to believe use, carrying or possession by recipient would be felony;

Receives firearm from another with knowledge receipt would be felony;

Includes attempts and conspiracies

# USSSG 2K2.1 (2023)

- New 932 and 933 offenses added to BOL (14 and 20) at 2K2.1

# Firearms penalties raised

- 18 USC 932 and 933 have 15-year maximums
- **Note – most common existing 922 offenses now also have a 15-year maximum**

# Prohibited transfers under 924(h)

- Transfer with knowledge firearm would be used to commit COV or drug trafficking
- Expands to include ammunition
- With knowledge “or reasonable cause to believe” to commit felony, COV, terrorism, drug trafficking, export controls etc.

- (5) ~~If the defendant engaged in the trafficking of firearms, increase by 4 levels.~~ (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).

# Trafficking, USSG 2K2.1(b)(5) 2023

A: 2 levels if convicted under 18 USC 933

B: 2 levels if transport, dispose, purchase, or receive knowing or having reason to believe will result in receipt of firearm or ammo by prohibited person, or intended to use or dispose unlawfully. Includes attempts and conspiracy

# Trafficking, USSG 2K2.1(b)(5)

C: 5 levels for transfer, sale, disposal, purchase etc. of 2 or more firearms

1. To individual with prior conviction for COV, controlled substance or misdemeanor domestic violence;
2. A person under CJ sentence
3. Or Intended to use or dispose unlawfully
4. Or Attempt and Conspiracy to do the above

# Note: Dating Exception

5 levels don't apply to individual with misdemeanor domestic violence in dating relationship if pardoned or expunged

See 18 USC 921(a)(33)(C)

# +2 if Gang Member Traffics USSG 2K2.1(b)(8)(2023)

A) If defendant receives (b)(5) (trafficking) enhancement and

B) Committed offense in connection with defendant's participation in group, club, organization, or association with 5 or more people Knowing or with willful blindness or conscious avoidance of knowledge group has one of primary purposes commission of criminal offenses

# BUT...take back 2 levels at 2K2.1(b)(9) if:

- A) Get 5-level trafficking bump, but
- B) Defendant doesn't have > 1 criminal history point, and
- C) Motivated by intimate or family relationship Or threats or fear and was otherwise unlikely to such an offense **OR**  
Was unusually vulnerable to being persuaded or induced due to physical or mental condition

# Old Rule for Missing Serial #s at 2K2.1(b)(4)

- 2 levels if firearm stolen
- 4 levels if altered or obliterated serial number regardless of knowledge
- No increase if no evidence ever had serial number (pre-1968 firearms)

# New Rule for Missing Serial #s

- (4) If (A) any firearm (A) 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.

- (B) ~~Knowledge or Reason to Believe~~ **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 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.

# 4. Criminal History Status Points

**Note:** Commission is considering retroactively applying new rules

# A. Status Points

Currently: 37.5% of Defendants get “status” points (for being on paper at time of offense), resulting in higher CH Category 61.5% of the time.

BUT “Commission also found, however, that status points add little to the overall predictive value”

# A (Partial) End to Status Points

## 4A1.1

- ~~(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.~~
- (ed)** Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.
- (e)** Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

## 5. Criminal History

“Adjustment for Certain Zero-Point Offenders”

# 0 Point Offenders (1/3)

New Rule!! Two-level reduction to Offense Level from Chpts 2 & 3 if:

1. No criminal history points
2. No terrorism
3. **Defendant** didn't use violence or credible threat of violence in connection with offense
4. **Offense** did not result in death or SBI

# 0 Point Offenders (2/3)

5. **Offense** of conviction  $\neq$  sex offense (sex abuse, child porn, transportation for sex, sex trafficking)
6. **Defendant** didn't personally cause substantial financial hardship;
7. **Defendant** didn't possess, transfer, etc. firearm or other dangerous weapon (or induce another) in connection with the offense;
8. **Offense** of conviction not covered by 2H1.1 (civil rights)

# 0 points (3/3)

9. **Defendant** did not receive adjustment under 3A1.1(vulnerable victim) or 3A1.5 (serious human rights offense);
10. **Defendant** didn't receive aggravated role enhancement or engage in Continuing Criminal Ent.

# AND 0 Point Alternatives to Prison at 5C1.1 (cmt. N.4)

If in Zone A or B, sentence other than imprisonment “is generally appropriate”

A downward departure to a non-prison sentence may be appropriate if applicable guideline range overstates gravity of the offense because offense is not a COV or otherwise serious offense.

# 6. Marijuana Departures



# Marijuana departure 2023

Now a basis for a departure under 4A1.3(b) if:

- 1) Defendant received criminal history points
- 2) Possession of marijuana was for personal use, and
- 3) Without intent to sell or distribute to another person

Q: What about THC offenses?

# See 4A1.3 Commentary Note 3

## 3. Downward Departures.—

(A) **Examples.**—A downward departure from the defendant's criminal history category may be warranted if, for example, based on any of the following circumstances:

(i) ~~the~~The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) **Downward Departures from Criminal History Category I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

# BUT MISSOURI WRINKLE

What about the recent Legalization legislation?

Article XIV (Nov 8, 2022)

<https://www.sos.mo.gov/CMSImages/Publications/CurrentMissouriConstitution.pdf?v=202212>

# ARTICLE XIV SECTION 2

## Section 7 Additional Protections

### Subsection (6):

Evidence of marijuana alone, without specific evidence indicating that the marijuana is outside of what is lawful for medical or adult use, **cannot be the basis for a search** of a patient or non-patient, including their home, **vehicle** or other property. Lawful marijuana related activities cannot be the basis for a violation of parole, probation, or any type of supervised release.

# ARTICLE XIV SECTION 2

## Section 10. Personal Use

Summary: Buying up to 3 oz and 6 plants is fine.  
If caught with 6 oz or 12 plants, civil penalty for first two offenses, misdemeanor for 3rd or more

# ARTICLE XIV SECTION 2

## Section 10. Personal Use

### Subsection 7 – people in custody

#### EXPUNGEMENTS:

Such expungement from all government records shall be granted for all of the person's applicable marijuana offenses, absent good cause for denial. The effect of such orders shall be to restore such person to the status the person occupied prior to such arrest, plea or conviction and as if such event had never taken place, and the conviction and sentence shall be vacated as legally invalid.

# ARTICLE XIV SECTION 2

## Section 10. Personal Use

### Subsection 7 – people in custody AND

No person for whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, plea, trial, conviction, or expungement in response to any inquiry made of the person for any purpose whatsoever, and no such inquiry shall be made for information relating to an expungement.

# ARTICLE XIV SECTION 2

## Section 10. Personal Use

Subsection 8 – people NOT in custody  
6 months from Dec 8 for misdemeanors  
12 months for felonies

# ARTICLE XIV SECTION 2

An expungement order shall be legally effective immediately and the person whose record is expunged shall be treated in all respects as if he or she had never been arrested, convicted, or sentenced for the offense, and the conviction and sentence shall be vacated as legally invalid. The court shall issue an order to expunge all records and files related to the arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation related to the sentence.

# So...What is happening

Differing results by county

State PD and volunteers can help with filing

May require delayed sentencing

Can affect status points too



# 7. Fake Pills



# Fake Pills at 2D1.1(b)(13)

(13) If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by [2] levels. The term “*drug*,” as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).

# 8. The 1<sup>st</sup> Step Act & Drugs



# Drug enhancements

## 21 USC 851

- Some Minimums reduced
- Serious drug offense defined at 21 USC 802 (requires at least 10 yr. max)
- State offense must involve manufacture, distribution or possession
- Serve > 12 months; release within 15 years

# Serious violent felony

Defined at 18 USC 3559(c)(2)

- Ex post facto limit
- Served > 12 months
- Only some felony assaults
- Residual prong unconstitutionally vague

# First Step Act Recidivism

## 2D1.1

- Increases some drug penalties for recidivism
- BOL 43 for prior “serious drug felony or serious violent felony” 2D1.1(a)(1)(A)
- BOL 43 if for lesser amounts if convicted, death or SBI result and prior.  
2D1.(a)(1)(B)
- Other recidivism changed to “felony drug offense” 2D1.1(a)(3)

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

(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), or (b)(1)(B), ~~or (b)(1)(C)~~, or 21 U.S.C. § 960(b)(1), or (b)(2), ~~or (b)(3)~~, and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a ~~similar offense~~ serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

# 9. Crimes of Violence



# 4B1.2 (d)(3): Definitions of certain Crimes of Violence

(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.

# Robbery predicate 2023

Robbery defined in Guideline includes  
Hobbs Act Robbery

- Unlawful taking of personal property from person or in presence
- Actual or threatened force, violence, fear, etc.
- Sufficient to overcome victim's resistance

# 4B1.2(c): Inchoate Offenses

(c) 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.

# 10. 1<sup>st</sup> Step Act and “Compassionate Release”



# Early Release

## USSSG 1B1.13 (2023)

- Applies to both motions filed by BOP and defendant
- USSSG 1B1.13(a)
- Expands list extraordinary and compelling circumstances

# Early (aka Compassionate Release) Rules

First Step Act:

Defendant can personally file motion for reduction under 18 USC 3582(c)(1)(A) – old rule just allowed Warden to do so

Must request relief from BOP then denial or 30 days from inaction before court filing

# Can Be Granted When:

- 1) A) Extraordinary circumstances, or  
B) Defendant at least 70, has served at least 30 years of a 18 USC 3559(c) Sentence
- 2) Defendant is not a danger and
- 3) Reduction is consistent with policy statement

# Extraordinary Reasons #1 - Medical Circumstances

- A. Terminal illness
- B. Serious physical, medical or mental condition substantially diminishes ability for self care and not expected to recover
- C. Suffering from medical condition that requires long-term or specialized care which is not being provided and without it there is a risk of serious deterioration in health or death

# Extraordinary Reasons #1 - Medical Circumstances (cont)

D.

i) Defendant housed in correctional facility affected or imminent risk (I) ongoing outbreak infectious disease, or (II) officially declared public health emergency;

(ii) due to personal health risk factors and custodial status, increased risk severe medical complications or death, AND

(iii) BOP cannot adequately mitigate risk in timely manner

# Extraordinary Reasons #2 - Defendant's Age USSG 1B1.3(b)(2)

- At least 65; and
- Serious deterioration in physical or mental health because aging process; and
- Served at least 10 years or 75%, whichever is less

# Extraordinary Reasons #3 - Family Circumstances (b)(3)

- A) Death or incapacitation of caregiver of defendant's minor child or child 18 or older incapable self care-mental, physical, medical
- B) Defendant only available caregiver for defendant's spouse or registered partner
- C) Only caregiver for incapacitated parent
- D) Immediate family in similar circumstances

# Extraordinary Reasons #4 - Victim of Abuse (b)(4)

- (A) Victim of sexual abuse, or
- (B) physical abuse resulting in sbi at direction of correctional officer, BOP employee or contractor, or individual who had custody or control over defendant
- Normally must establish with conviction, civil liability or admin UNLESS
- Undue delay or imminent danger

# Extraordinary Reasons #5 - Other Reasons (b)(5)

- Circumstance or combination of circumstance “similar in gravity” to (b)(1)-(4)



# Extraordinary Reasons #6 - Unusually long sentence (b)(6)

- Unusually long sentence and served at least 10 years
- May consider change in law but only where
- Gross disparity between sentence being served and would receive when motion filed
- Consider individual circumstances
- Can't consider non-retroactive Guideline

# Limitations on Change in law (c)

Some limitations on non-retroactive guideline issues. See (b)(6). However, if otherwise extraordinary and compelling reasons, then the judge can also consider changes in the law, including non retroactive guidelines, In determining extent reduction

# Rehabilitation

## 1B1.13(d)

Rehabilitation alone is not basis for reduction, however May consider in combination with other circumstances

Decide whether and extent of reduction

# 11. Online Sex Trafficking 2017

New offense at 18 USC 2421A for Use of Interactive computer service to promote prostitution

Added to USSSG 2G1.1 and 2G1.3 as of Nov 2023.

Adds 4 levels to BOL if convicted under this statute

# 12. Drones 2018

New offense unsafe operation of drones, 18 USC 39B;

Use drone to interfere with fire suppression, 18 USC 40A, and

Involving restrict buildings, 18 USC 1752

All added to transportation interference guideline, USSSG 2A5.2