

Guideline Amendments 2023

PROMULGATED AMENDMENTS IMPACTING
COMPASSIONATE RELEASE, CRIMINAL HISTORY, FIREARMS,
SAFETY VALVE, DRUG OFFENSES, & SEXUAL OFFENSES

Learning Objectives

- ❑ **Identify** the promulgated 2023 amendments
- ❑ **Describe** the purpose of the amendments
- ❑ **Distinguish** between effective dates and retroactive dates of the amendments



First Step Act What & Why?

- “COMPASSIONATE RELEASE”
 - WHO CAN FILE
 - EXPANDED REASONS
 - GUIDANCE
- SAFETY VALVE & DRUG OFFENSES



No More Gatekeeping

BOP OR DEFENDANTS CAN FILE

Extraordinary and Compelling

Medical Circumstances

Family Circumstances




Victim of Abuse

Unusually Long

*Rehabilitation in combination with other circumstances. *Need not have been unforeseen at sentencing.
Judges are in a unique position to determine whether circumstances warrant a reduction.

Safety Valve - §5C1.2

If the defendant does not have:

-  More than 4 Criminal History Points
(excluding 1-point offenses)
-  Prior 3-Point Offense
-  Prior 2-Point Violent Offense

Drug Offenses – Enhanced §2D1.1

Enhanced Mandatory Minimum Penalties

21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2)

Language Change

“Felony Drug Offense” replaced with “Serious Drug Felony” + “Serious Violent Felony”

Higher BOLs at §2D1.1(a)(1) – (a)(4)

“similar offense” replaced with “Serious Drug Felony”, “Serious Violent Felony”, or “Felony Drug Offense” for consistency

Note: 21 U.S.C. §§ 841(b)(1)(C), 841(b)(1)(E), 960(b)(3), and 960(b)(5) – “similar offense” -> “felony drug offense” only

Fake Pills What & Why?

- New Subparagraph



USSG §2D1.1(b)(13)

(b)(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] propenamide) 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] propenamide) 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).

Criminal History What & Why?



- STATUS POINTS
- ZERO-POINT OFFENDERS
- MARIJUANA CONVICTIONS

Status Points

Numeric Title Redesignation

Add 1 Point, Not 2 Points

7 or More Points Required

Status Points - §4A1.1(e)

Current:

USSG §4A1.1(d): Add 2 points if the defendant committed the instant offense while under any criminal justice sentence

Amendment:

USSG §4A1.1(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

(a) 3-point + (b) 2-point + (c) 1-point + (d) COV points \geq 7 points

Zero-Point Offenders



Two-Level Decrease

Implementation

Departures

Zero-Point Offenders - §4C1.1(a)

Reduce Offense Level (Chapters 2 & 3) by 2 Levels if:

-  No Criminal History Points
§4C1.1(a)(1)
-  No Offense Exclusions
§4C1.1(a)(2) – (10)

Offense Exclusions: Convicted of Sex Offense, or Individual Rights violation (§2H1.1); receives Terrorism Adjustment (§3A1.4), Hate Crime Adjustment (§3A1.1), Serious Human Rights Violation Adjustment (§3A1.5), or Aggravating Role (§3B1.1); Offense involved Violence, Substantial Financial Hardship, Dangerous Weapon

Zero-Point Offenders - Implementation

Commentary of USSG §5C1.1

- Removes Application Note 4 addressing “nonviolent first offenders”
- Adds Application Note 10
 - (A) If received adjustment under §4C1.1, and applicable guideline range is in Zone A or B of Sentencing Table, a sentence other than imprisonment is generally appropriate
 - (B) Corresponding departure to a sentence other than imprisonment

Zero-Point Offenders - Departures

§4A1.3(b)(2)(A)

- Adds “unless otherwise specified,” to permit downward departure from the lower limit of the guideline range for Criminal History Category I.

§4C1.1, Application Note 2

- Upward departure may be warranted if a reduction under §4C1.1 substantially under-represents the seriousness of the defendant’s criminal history.

Marijuana Convictions

Additional Departure Provision

§4A1.3, Application Note 3(B)

A departure from the defendant's criminal history category may be warranted if (ii) the defendant received criminal history points from a sentence for possession of marijuana for personal use, without an intent to sell or distribute it to another person.

Career Offender What & Why?



- Inchoate Offenses
- Hobbs Act Robbery
- “Controlled Substance Offense”

Definitions Moved & Refined

USSG §4B1.2(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.

USSG §4B1.2(e)(1) – Forcible Sex Offense

USSG §4B1.2(e)(2) – Extortion

USSG §4B1.2(e)(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.

USSG §4B1.2(b)(2) – [controlled substance offense] is an offense described in 46 U.S.C. §70503(a) or §70506(b).

Firearms What & Why?



- NEW OFFENSES
- INCREASED PENALTIES
- NEW REDUCTIONS
- GHOST GUNS

New Offenses

18 U.S.C. § 932 – Straw Purchasing
Firearms

18 U.S.C. § 933 – Trafficking in Firearms

Applicable Base Offense Level: 14, or 20 if involved a semiautomatic capable of accepting high-capacity magazine

Increased Penalties

Updated Specific Offense Characteristic - §2K2.1(b)(5)(A) – (C)

Apply the Greatest:

+2

§§ 932, 933 Convictions (includes receipt only)

+2

Straw Purchasing or Trafficking Conduct (no minimum number or recipient characteristics)

+5

Multiple Firearms AND Recipient Characteristics

Increased Penalties

New Specific Offense Characteristic - §2K2.1(b)(8)

Add 2 Levels if:

- ✓ If §2K2.1(b)(5) applies
- ✓ Committed in Connection & Participation with Organization of 5 or More Persons
- ✓ Knowing or Willful Blindness
- ✓ Criminal Activity was One of the Primary Purposes

New Reductions

New Specific Offense Characteristic - §2K2.1(b)(9)

Reduce by 2 Levels if:

If §2K2.1(b)(5) applies

&

No More than 1 Criminal History Point

AND

Intimate Familial Relationship or Threats/Fear AND Otherwise Unlikely

OR

Unusually Vulnerable (Mental or Physical)

Ghost Guns

Amended Language - §2K2.1(b)(4)(B)

Current:

If any firearm (A) was stolen, increase by 2 levels; or (B) had an obliterated serial number, increase by 4 levels.

Amendment:

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.



Acceptance – 3rd Point What & Why?

- New Definition
- Clarification

Third Point - §3E1.1(b)

New Definition Added at (b): “Preparing for Trial” = “substantive preparations taken to present the government’s case against the defendant to a jury (or judge, in the case of a bench trial) at trial.”

Clarification: preparations for pretrial proceeds (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered preparing for trial, and post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered preparing for trial.

Note: First, Third, Seventh, and Eighth Circuits have withheld for sentencing challenges; Second and Fifth Circuits have not



Sexual Abuse Offenses What & Why?

- New Offenses
- Guideline Increase

New Offenses

Civil Rights Offenses involving Sexual Misconduct – 18 U.S.C. § 250

Applicable Guideline – USSG §2H1.1

Sexual Abuse of Minor, a Ward, or Individual in Federal Custody – 18 U.S.C. § 2243(c)

Applicable Guideline – USSG §2A3.3

Guideline Increase – 2A3.3

§2A3.3 – Base Offense Level ~~14~~ 18

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2422), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the victim.

Statutory Index

What & Why?

- New Legislation



New Legislation

21 U.S.C. § 333(b)(8) – Counterfeit Drugs - §2N2.1

18 U.S.C. § 2421A(a) – Promoting or Facilitating Prostitution - § 2G1.1 and § 2G1.3

18 U.S.C. § 39B – Unsafe Operation of Unmanned Aircraft - §2A5.2 and §2X5.2

18 U.S.C. § 40A – Operation of Unauthorized Unmanned Aircraft Over Wildfires - §2A2.4

18 U.S.C. § 220 – Illegal Remunerations for Treatment Referrals - §2B1.1 and §2B1.4

18 U.S.C. § 2259(d) – Excessive Attorney Fees - §2X5.2

New Legislation Cont.

44 U.S.C. § 3572 – Confidential Information Protection - §2H3.1

10 U.S.C. § 2733a – Armed Forces Medical Malpractice Attorney Fees - §2X5.2

5 U.S.C. § 8345a and § 8466a – Govt Employee Embezzlement/Conversion of Funds - §2B1.1

20 U.S.C. § 1097(e) – Student Debt Relief Scams - §2B1.1

18 U.S.C. § 3219C – Illicit Digital Transmission Services - §2B5.3

31 U.S.C. § 5335 and § 5336 – Financial Crimes and Reporting - §2S1.3

Miscellaneous What & Why?



- Grouping - §2G1.3 added at §3D1.2(d) exclusions
- Clarification – BOP no longer has Shock Incarceration
- Technical, Stylistic, Non-substantive

Amendments Effective Date?

November 1, 2023

A close-up photograph of a spiral-bound calendar page. The page is white with blue horizontal lines. The number '1' is printed in a large, bold, black font and is circled with a thick red oval. To the right of the '1' is the number '2', also in a large, bold, black font. Below the '1' and '2', the numbers 7, 8, 9, 10, 11, and 12 are visible, arranged in a grid pattern. The spiral binding is visible at the top of the page.

1

2

Retroactivity - §1B1.10

§4A1.1(e) - Status Points and §4C1.1 – Zero-Point Offenders 2-Point Reduction
Delayed Implementation

The court shall not order a reduced term of imprisonment *based on a retroactive application* of Part A or B, Subpart 1 of Amendment 821, unless the effective date of the court's order is February 1, 2024.

Learning Outcomes

You should now be able to:

- Identify** the promulgated 2023 amendments impacting guidelines
- Describe** the purpose of the amendments impacting guidelines
- Distinguish** between the effective dates and retroactive dates of the amendments

Questions?



Resource: ["Reader-Friendly" Amendments | United States Sentencing Commission \(ussc.gov\)](https://www.uscourts.gov/reader-friendly-amendments)

Email: Andrea_Edgar@rip.uscourts.gov and Molly_Picozzi@rip.uscourts.gov