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February 18, 2025

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

**Re: Defender Reply Comment on Proposed 2024–2025
Amendments on Career Offender, Firearms Offenses,
Circuit Conflicts, and Simplification**

Dear Judge Reeves:

Thank you for the opportunity to provide comment and witness testimony on this year’s proposed amendments to the Sentencing Guidelines. Below, we briefly supplement our comment and testimony, to reply to issues discussed in other comments and raised at last week’s hearing, as follows:

Proposal 1: Career offender	2
Proposal 2: Firearms offenses.....	8
Proposal 3: Circuit conflicts.....	13
Proposal 4: Simplification of three-step process.....	17

I. Proposal 1: Career Offender

On the career-offender proposal, Defenders discuss four issues our witness was not able to fully address at last week's hearing: the Department of Justice's argument in favor of using evidence other than *Shepard* documents; POAG's notion that it will often be impossible to determine what sentence an individual served; DOJ's request for new definitions of robbery and extortion; and the impact of the Commission's proposal on accomplice liability and inchoate offenses.

Evidence other than *Shepard* documents. The Department argues that if the Commission adopts a conduct-based methodology, prosecutors should be permitted to use any reliable evidence to prove conduct underlying the prior conviction—including police reports. There are at least three reasons the Commission is right to limit the government's prima facie case to *Shepard* documents. First, we are assessing prior convictions.¹ And only court records document how an individual was charged and convicted, and ultimately what he was convicted of.

Second, permitting prosecutors to go beyond *Shepard* documents in making its prima facie case would trigger mini-trials. The Victims Advocacy Group advocates for allowing prosecutors to use police reports to prove conduct; it claims that this need not spur mini-trials.² But the former necessarily invites the latter: if prosecutors can introduce hearsay accusations through police reports in support of dramatically increased sentencing ranges, we would have to be able to rebut those accusations. As discussed in our comment, these hearings would not present an even playing field for the prosecution and the defense, and they would be administratively burdensome.

¹ For purposes of this discussion, at least, we assume the Commission will take Defenders' advice to limit courts' assessment of conduct to conduct underlying the *offense of conviction*, for all the reasons discussed in our comment and because it appears that other stakeholders agree this should be the focus.

² [VAG Comment on Career Offender](#), at 7–9 (Feb. 3, 2025). This is a shift in position since 2019, when the VAG praised the Commission for limiting evidence to *Shepard* documents, in order to avoid mini-trials. See [VAG Comment on Career Offender](#), at 2 (Feb. 19, 2019).

Third, a system that permits prosecutors to rely on police reports and related evidence would be fundamentally unfair. Police reports document accusations with an eye toward arrest and criminal charges. They do not document defenses, reliability concerns about witnesses, or other problems with the evidence described.³ What's more, defense attorneys—unlike prosecutors—do not have ready access to police reports. And we are the ones who would need to advise a client early in a case whether he is facing a sentencing range of, say, 3–4 years, or 15–20 years, ostensibly based on local police records we might be unable to access for months, if we're able to at all.

Proof of sentence served. POAG and the CLC have both asked that any prior-sentence-length limitation on the “crime of violence” and “controlled substance offense” definitions focus on sentence imposed, rather than sentence served. We have explained, as has PAG, why sentence served is the better measure of seriousness. We take this opportunity to respond to POAG witness Josh Luria's claim that not only would it be difficult for probation officers to get information about when individuals were released from custody,⁴ but also defense counsel should not be allowed to even try to do so, because it would be impossible in many cases and thus create disparities.

Defenders are not so daunted. We have a powerful motivation to get these documents: ethical responsibilities to our clients. And we have access to our clients from the very start of the case; they can share memories of when they were released from prison, which would inform whether to even seek documentation of the release date and would allow us to request needed documents early. Moreover, many of us have practiced in state court, where we regularly obtained and reviewed these records, and we can all work closely with our clients' former counsel and other state actors.⁵ In short, we are confident we can sort this out. If the concern is that courts will be confused about when incarceration ends as a legal matter—Mr. Luria mentioned halfway house, for example—we do not know of such confusion with USSG §4A1.2(e)(1), which looks to when incarceration ended, nor do we

³ See [Statement of Juval Scott on behalf of Defenders](#), at 20 n.93 (Mar. 8, 2023).

⁴ We do not entirely understand this concern, given that—as PAG witness Susan Lin noted—PSRs generally note the release date for each offense, for purposes of calculating Chapter Four timing rules.

⁵ CJA panel attorneys often practice concurrently in state and federal court.

know of problems in the § 851 space, where release dates are relevant to whether certain recidivist enhancements apply.⁶ Also, the Commission can provide guidance on this issue if it wishes.

DOJ’s proposed definitions of robbery and extortion. The Department’s comment proposes new definitions for “robbery” and “extortion.” There were no questions about these proposals at the hearing last week, so Defenders are hopeful that Commissioners are not seriously considering them.⁷ But to be clear, we oppose them.

The Department proposes lowering the mens rea for robbery, based on the idea that the current definition—which the government previously advocated for—does not capture robbery statutes that cover reckless conduct.⁸ First of all, this concern might make sense if we were talking about the categorical approach. But with a conduct-based methodology, if a state robbery statute is categorically overbroad as to mens rea, the government could still seek to prove that a person violated it intentionally.⁹ Second,

⁶ See 21 U.S.C. § 802(58) (“serious drug felony”) & (59) (“serious violent felony”); see also 21 U.S.C. § 851.

⁷ The Department also *potentially* proposes a new “controlled substance offense” definition. It opposes eliminating state drug priors; but as a back-up argument, it suggests that the Commission might both expand and contract the list of federal statutes that the definition cross-references. Without getting into the weeds here, the Department’s recommendations are unhelpful. The point of the Commission’s proposed “controlled substance offense” definition, as Defenders understand it, is to restrict, nearly as much as legally possible (under 28 U.S.C. § 994(h)), the drug offenses triggering the career-offender guideline, to reduce meaningfully a category of cases that judges don’t think usually warrant career-offender sentences. Yet the Department suggests that the Commission might want to remove offenses that Congress listed in § 994(h) and it urges the Commission to add a number of offenses that Congress notably excluded from § 994(h).

⁸ [DOJ Comment on Career Offender](#), at 10–11 (Feb. 3, 2025). The current definition, which was adopted in 2023, does not contain mens rea language.

⁹ In one case where this specific issue was litigated (regarding Maryland robbery) the government emphasized that the defense could not identify a single case where a person had actually committed Maryland robbery recklessly. *[Redacted] v. [Redacted]*, 2022 WL 4546737, at *8–9 (D.D.C. Aug. 29, 2022). The district court found that this was irrelevant under the categorical approach, because it was clear that a hypothetical person *could* commit the offense recklessly. *Id.* at *9–10. But if it is true that no one is actually committing robbery recklessly, with a conduct-based methodology, the Department’s concern becomes a moot point.

neither the Model Penal Code nor the state statutes the Department collects at footnote 21 support the claim the Department seems to be making (that most statutes cover recklessly committed robberies).¹⁰

As for extortion, the Department complains that the existing definition does not cover threats to *property*.¹¹ But we are talking here about the definition of “crime of violence.” It makes perfect sense that in this context, “extortion” would be limited to threats to *persons*. Again, the Department’s concern seems premised on how the categorical approach applies to various statutes. Under a conduct-based methodology, the Department need not be concerned that the current definition “potentially eliminat[es] the federal Hobbs Act extortion statute.”¹² The definition would not eliminate any *statute* at all; it would merely focus on cases where the means of committing extortion under the relevant statute was violent.

Accomplice liability and inchoate offenses. The Department raised concerns in its comment about whether the Commission’s proposed “crime of violence” definition would cover a conviction for a completed violent

¹⁰ The Model Penal Code describes alternative means of committing robbery, one of which requires that in the course of committing a theft, a person “inflicts serious bodily injury on another.” The Department is not suggesting that the Commission create a “serious bodily injury” requirement here. As for the state statutes that the Department lists at footnote 21, these do not line up with the District of D.C.’s assessment of state robbery statutes’ mens rea requirements in *[Redacted]*, which reveal only a small minority of states permitting robbery to be committed recklessly. 2022 WL 4546737, *11–15. And a quick spot check of footnote 21 supports that the Department’s list has problems. *See, e.g.*, Ala. Code §13A-8-41 (aggravated robbery, which incorporates the elements of Ala. Code § 13A-8-43 (third-degree robbery), which appears to require intent); Alaska Stat. § 11.41.500 (incorporating the elements of Alaska Stat. § 11.41.510, which appears to require intent); 11 Del. Code § 832 (incorporating the elements of 11 Del. Code § 831, which appears to require intent). At least one statute the Department has listed, Idaho Stat. § 19-2520B, is not a robbery offense at all; it’s a generally applicable sentence enhancement. Defenders have not developed expertise on these state laws over the past week; there may be state caselaw that would help us better understand the statutes. But it would appear that the statutes listed at footnote 21 do not support the Department’s argument and they may well refute that argument. Again, however, fine distinctions between state robbery statutes would seem beside the point where the Commission is contemplating a conduct-based methodology.

¹¹ [DOJ Comment on Career Offender](#), at 11.

¹² *Id.*

offense (like murder), but under an accomplice theory of liability. DOJ also complained that the new “Covered Inchoate Offenses” section would seem to exclude conspiracy and attempt convictions unless the defendant actually engaged in violent conduct.¹³

Regarding accomplice liability, the Department’s concern is largely the result of the Commission proposal’s inclusion of one part of §1B1.3’s “relevant conduct” definition, but not other parts.¹⁴ Defenders’ revised version of §4B1.2 should resolve this concern by removing entirely the reference to §1B1.3’s language. The Department is also troubled by the proposal’s initial reference to the *defendant’s* conduct, rather than *offense* conduct. But we are talking about theories of accomplice liability that attach by law to an individual criminal defendant, not elements of an offense.¹⁵ And where a person was found to have committed a completed violent offense, federal courts agree that it makes no difference that the jurisdiction of conviction does not distinguish between commission of the offense as a principal or as an accomplice (whether under an aiding-abetting theory or *Pinkerton* conspiracy theory).¹⁶

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ See *United States v. Worthen*, 60 F.4th 1066, 1069–70 (7th Cir. 2023) (explaining that, as is also true under state law, “aiding and abetting under [18 U.S.C.] § 2 is ‘not a separate federal crime’ from the underlying offense, but is instead an alternative theory of liability for the commission of the principal offense. Put more directly, ‘an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery.’”). To some extent, confusion may arise from the fact that §4B1.2 has always referred, all listed together, to attempt, conspiracy, and aiding and abetting, which conflates inchoate offenses with a theory of liability. Historically, these references were in commentary; now they are in guideline text and labeled as “Inchoate Offenses Included.” In 2023, when the Commission was considering moving this language to text, Defenders discouraged the Commission from continuing to conflate these principles: “As for accomplice liability, ‘aiding and abetting’ is already included so there is no need for the Commission to specify ‘aiding and abetting’ for it to be included. Every jurisdiction has expressly abrogated the distinction between principals and aiders and abettors.” See [Statement of Juval Scott on behalf of Defenders](#), at 29.

¹⁶ See, e.g., *United States v. Coats*, 8 F.4th 1228, 1243–45 (11th Cir. 2021); see also *Worthen*, 60 F.4th at 1069–71 (discussing this principle and collecting circuit cases); *Gomez v. United States*, 87 F.4th 100, 109 (2d Cir. 2023) (“The *Pinkerton* theory of liability deems the defendant to have performed the acts of his co-

Turning to inchoate offenses, which are sometimes erroneously confused with accomplice liability, the Department complains that the Commission's proposed language focuses only on the defendant's actual conduct. On this point, the Defenders agree. But we assume this is by design, and it's the right call. The inchoate crimes of attempt and conspiracy are historically, and often still today, treated less seriously than completed crimes.¹⁷ And the conduct covered by these offenses run the gamut. Indeed, the reason that conspiracy offenses generally do not meet the categorical definition of "crime of violence" is that they can cover minimal conduct.¹⁸ But, of course, that's not always true. When someone is convicted of the offense of "conspiracy," he may have agreed to an offense that never really got off the ground, or he may have taken the offense nearly to completion (or all the way). And he may have been the ringleader, or someone who never knew the conspiracy's full scope.

Given the wide range of conduct that is captured by attempt and conspiracy offenses, the fact that we are talking about a definition of "crime of violence," and the fact that courts would now be able to look into specific *conduct*, it makes perfect sense that with inchoate offenses, the Commission would narrow the focus to the individual's conduct.

conspirators. . . . Because under a *Pinkerton* theory the defendant is convicted of the substantive offense—not of conspiring to commit the offense—he has committed a crime of violence if the substantive offense is a crime of violence." (collecting cases)).

¹⁷ [PAG Comment on Career Offender](#), at 7–8 (Feb. 3, 2025); *see also* 18 U.S.C. § 371 (federal conspiracy statute, which comes with a five-year maximum sentence for conspiring to commit any felony); USSG §2X1.1 (guideline for attempt, solicitation, and conspiracy not covered by another specific guideline). Unlike in many states, the federal criminal code does not contain any generally applicable "attempt" statute.

¹⁸ *See, e.g., United States v. Capers*, 20 F.4th 105, 118 (2d Cir. 2021) ("RICO conspiracy is thus a crime that can be committed simply by sitting around a table and agreeing with other individuals to create an organization like the Leland Crew, that would engage in criminal acts like selling narcotics and, indeed, committing various violent crimes, whether or not the organization ever gets off the ground and whether or not the defendant, or any of his co-conspirators, ever commits any of the anticipated crimes. Indeed, unlike the general federal conspiracy law, 18 U.S.C. § 371, a RICO conspiracy does not even require that any of the conspirators commit even a single overt act toward the commission of such crimes.").

II. Proposal 2: Firearm Offenses

On the firearms proposal, Defenders respond to the Commission's request for more particulars on our "stand-alone" SOC suggestion for MCDs and to some commenters' arguments that applying the mens rea requirement of (b)(4)(ii) across all of (b)(4) is unworkable or unwarranted.

A. Machinegun Conversion Devices

The public comments regarding Part A reveal disagreement on the correct approach to MCDs. While DOJ generally supports the amendment, several other commenters raised concerns. POAG, which generally supports Option 2, reported internal disagreement about whether the expanded definition should apply to several SOC's.¹⁹ Three federal judges presented their own alternative ideas, with the goal of reflecting the distinct nature of MCDs, which are harmless unless affixed to an actual firearm.²⁰ Defenders and several advocacy groups urged the Commission not to take any action to increase penalties for MCD offenses at this time.²¹ This disagreement amongst commenters, combined with data cited in our opening comment showing judges think extant sentencing ranges are more than sufficient for MCD offenses and that unwarranted disparities will abound under both

¹⁹ [POAG Comment on Firearms](#), at 7–12 (noting internal disagreement as to whether expanded firearm definition made sense for (b)(5), (b)(6)(B), and (c)(1)).

²⁰ [Judge Ian D. Johnston & Michael R. Snyders' Comment on Firearms](#), at 4 (Feb. 3, 2025) (presenting alternative proposal, urging a "nuanced approach" and noting that MCDs' "danger truly manifests when affixed to a firearm"); [Judge David Counts' Comment on Firearms](#), at PDF 698 (Feb. 3, 2025) (noting that an "alternative to amending 2K2.1 would be to create an entirely new section specifically addressing MCDs, because they are different than firearms"); [Testimony of Judge Ralph Erickson to USSC](#), at 3:37:36 to 3:38:04 (Feb. 12, 2025) (explaining proposal is "not really appropriate. I mean, if the machinegun enhancement [in the BOLs] is not enough, fix the machinegun enhancement, because . . . scoring [a] gun plus the device as 2 firearms, it seems to us to be problematic" and noting unaffixed MCDs are "less dangerous").

²¹ See [PAG Comment on Firearms](#), at 9–12 (Feb. 3, 2025) (opposing both options noting data and young average age of individuals in MCD cases); [TIAG Comment on Firearms](#), at 9–10 (Feb. 3, 2025) (opposing both options and pointing out potential for circuit split); [NACDL Comment on Firearms](#), at 11 (Feb. 3, 2025) (opposing both options).

options,²² indicates the Commission should pause and study MCD offenses further before promulgating new amendments.

At the hearing, Defenders were asked to flesh out our suggestion that, if the Commission feels obligated to act now, it should create a single, standalone SOC for MCDs. We do so, below. Specifically, our suggested SOC would capture aggravated conduct involving MCDs. This would target the “upstream” supply that gun safety experts have urged the Commission to address in the firearms context,²³ while sparing low-level individuals such as the impacted witness at last week’s hearing, Kyler Wallgren.²⁴

(10) If the defendant knowingly manufactured, imported, trafficked, or sold 8 or more machinegun conversion devices,²⁵ increase by 2 levels.

For purposes of this enhancement, a “machinegun conversion device” is any part designed and intended solely and exclusively, or combination of parts designed

²² Defenders have pointed to racial, geographic, and conduct disparities that haunt both options, and we also agree with PAG, who highlighted the lower average age of individuals convicted of offenses involving MCDs. [PAG Comment on Firearms](#), at 12. Given the Commission’s empirical work regarding youthful individuals, we urge avoiding harsher penalties for the mostly younger people convicted of MCD offenses.

²³ See [Statement of Rob Wilcox, Legal Director, Everytown for Gun Safety, on behalf of the Zimroth Center/NYU Law Working Group before the USSC](#), at 1 (Mar. 7, 2023) (discussing BSCA’s goal to “shift federal enforcement further upstream in the illegal trafficking pipeline”).

²⁴ Mr. Wallgren, whose guidelines range was 8–14 months, received a sentence of probation for his limited role in the offense. Notably, under the proposed amendment, his advisory guidelines range would have been much higher. When asked about other sentences in the case, Mr. Wallgren, who cannot associate with his codefendant, was confused about the sentence his codefendant received. His codefendant, who printed the MCDs in his case and arranged their sale via social media to an undercover agent, received a sentence of 36 months’ imprisonment. *United States v. Saldana*, 2:23-cr-00357 (S.D.Tex. Feb. 6, 2024). We note that our proposed amendment would also account for the conduct at issue in *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022).

²⁵ We suggest focusing on the trafficking of 8 or more MCDs because (b)(1)(B) applies a 4-level enhancement if a person possesses 8–24 firearms. The trafficking of 8 or more MCDs reflects a heightened culpability when more than a small number of MCDs is involved, but because MCDs cannot inflict harm on their own, it is not appropriate to apply the same 4-level enhancement to these devices as would be applied to fully operational firearms.

and intended, for use in converting a weapon into a machinegun, as defined in 26 U.S.C. § 5845(b).

Provided, however, that this enhancement shall not apply if the defendant receives a minor or mitigating role adjustment under § 3B1.2.²⁶

B. Mens Rea

Defenders urge the Commission to adopt the proposed mens rea standard in Part B. Some commenters complained that this will make it more difficult to apply the §2K2.1(b)(4) enhancements at issue here. The Commission should not cut corners on fundamental fairness in the name of convenience.²⁷ But also, mens rea is a typical requirement that courts and practitioners deal with every day—not some novel, onerous burden. We respond here to four matters that were raised at last week’s hearing.

First, Defenders disagree that “insurmountable” proof problems will arise under the proposal. The Department’s witness claimed that the “typical felon in possession case” involves an “unplanned encounter” with law enforcement involving “little evidence” of the history of the gun.²⁸ But this characterization seems to lack an empirical basis; a special project by the Commission found that 44% of the §2K2.1 cases it studied stemmed from a “law enforcement investigation,” as opposed to a traffic stop (21%), street

²⁶ If the Commission chooses to amend §2K2.1 to account for MCDs during this cycle, it will be important to study these offenses going forward and adjust its treatment of MCDs over time, as needed, to respond to evolving technology and insights into how these offenses are committed and prosecuted. For instance, 3D printing technology may become so commonplace that the Commission would need to revisit its treatment of MCDs to avoid capturing conduct involved in nearly every case. Also, given the Executive’s renewed commitment to the Second Amendment, the legal status of MCDs may well evolve over time.

²⁷ See 28 U.S.C. §§ 991(b)(1)(B); 994(f) (obligating Commission to ensure “certainty and fairness in sentencing” and to reduce “unwarranted sentencing disparities”); [Testimony of Judge Reggie Walton to USSC](#), at 16–17 (Nov. 13, 2007) (“I don’t believe that [we] can take the position that if a change was adopted to address a fundamental unfairness in the sentencing process, that we, as judges, should say that well, we’re going to be overloaded or we’re going to be worked to a greater extent. . . .”).

²⁸ [Testimony of Paige Messec to USSC](#), at 2:35:30 to 2:36:00 (Feb. 12, 2025).

patrol (7%), or shots fired report (9%).²⁹ And even for cases that do involve “unplanned encounters,” regardless of the lack of ongoing investigation, the government still has to prove mens rea to obtain a conviction in a prohibited possession case.³⁰ Thus, there is no reason that arresting officers can’t ask questions—if they don’t already—about the provenance of the gun (where the individual under arrest has waived the right to silence and counsel), or otherwise investigate that matter. Further, as Defenders and others have pointed out, the government must prove mental state to obtain a conviction under statutes prohibiting possession of firearms that are stolen or have illegible serial numbers. And here, we are dealing with a lower standard of proof.³¹

Second, the fact that we are talking about serious conduct is not a reason to *not* include a mens rea requirement, contrary to what Judge Chang suggested at the hearing, speaking on behalf of the CLC. The general requirement of mens rea for criminal offenses has exceptions for *less* serious offenses, with insignificant penalties: minor regulatory or public welfare program offenses.³² Here, we are talking about serious conduct that can add years to a person’s guideline range. This is a reason for the Commission to focus on people with heightened culpability, not to disregard culpability.³³ Moreover, in arguing for retention of the strict liability enhancements, Judge Chang stated that the prevalence of stolen firearms in offenses has not decreased over time.³⁴ But as Defenders, judges, and stakeholders have

²⁹ USSC, [What Do Federal Firearms Offenses Really Look Like?](#) 33 fig. 27 (July 2022). While it is not stated how many in the sampled subset of cases involved prohibited possession, the report notes that overall, the vast majority of §2K2.1 cases (89%) involved prohibited possession. *Id.* at 2.

³⁰ See generally *Rehaif v. United States*, 588 U.S. 225 (2019).

³¹ The Government is also free to negotiate to include mens rea nature of a firearm as part of its factual basis for a plea agreement.

³² *Rehaif*, 588 U.S. at 232.

³³ Our comment also offered other reasons for adopting the mens rea requirement, including that strict liability enhancements do not further the purposes of punishment and that prohibited persons cannot legally purchase a firearm, such that the §2K2.1(b)(4) enhancements often result in double punishment for the same conduct.

³⁴ [Testimony of Judge Edmond E-min Chang to USSC](#), at 24:45 to 25:10 (Feb. 12, 2025) (discussing that prevalence of stolen firearms and noting “it does not seem like that has abated, I mean if anything it seems to have gotten worse” (cleaned up)).

noted, these strict liability enhancements have no deterrence value, and have indeed long failed to deter such conduct. Finally, the CLC also noted that these empirically deficient enhancements have long lacked scienter, but that is no reason not to adopt Part B.³⁵ The original Commission viewed “the guideline writing process as evolutionary,”³⁶ and it is time for this Commission to adopt Part B to ensure these enhancements evolve to better reflect individual culpability.

Third, Defenders wish to echo the comments Judge Erickson (speaking for TIAG) made in response to POAG’s concerns. While POAG agreed that a “*mens rea* requirement would better reflect the increased culpability of a defendant who knew that a firearm was stolen compared to a defendant who was unaware,” the group was unsure how the willful blindness or conscious avoidance standard should be applied.³⁷ Judge Erickson responded that although it is understandable that probation officers are not so familiar with this standard, judges are familiar with it and routinely instruct juries on it.³⁸ And further, willful blindness is “not a complicated thing to show”—it can be proven with circumstantial evidence.³⁹ Judge Erickson’s testimony highlights that POAG’s concern can easily be resolved through training of probation officers on what this mental state entails, by reference to pattern jury instructions and judicial experience applying this standard to facts.

Finally, the Department’s proposal to shift the *mens rea* burden of proof onto the accused at sentencing is not a reasonable compromise. A rebuttable presumption of *mens rea* contradicts how this important

³⁵ Stakeholders have long criticized the lack of *mens rea* in the Manual. Gerard E Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Fed. Sent. R. 112, 113 (Nov./Dec. 1994) (summarizing critiques of Manual’s failure “to make conscious decisions as to the kind of culpability required with respect to aggravating circumstances that can have a substantial effect on the degree of crime”).

³⁶ USSG Ch. 1, Part A (Introduction) (October, 1987).

³⁷ [POAG Comment on Firearms](#), at 12.

³⁸ [Testimony of Judge Ralph Erickson to USSC](#), at 4:03:35 to 4:04:30 (Feb. 12, 2025); see also, e.g., [Fifth Cir. Pattern Jury Instructions \(Criminal Cases\), 1.42 Deliberate Ignorance](#), at 66 (2024); [Ninth Cir. Model Criminal Jury Instructions, 4.9 Deliberate Ignorance](#), at 79 (2024).

³⁹ [Testimony of Judge Ralph Erickson to USSC](#), at 3:38:55 to 3:39:30.

requirement operates throughout our criminal legal tradition.⁴⁰ And here, it would fail to distinguish between more and less culpable conduct and it would create an exception that swallows the rule.⁴¹

III. Proposal 3: Circuit Conflicts

A. Physical Restraint in Robbery

At last week’s hearing on Part A of the Circuit Conflicts Amendment, the Department’s witness Desiree Grace discussed two hypotheticals from their comment⁴² that demonstrate that Options 1 and 3 create unworkable line-drawing challenges rather than resolve them. Both options’ broad “other means” language would seem to permit judges to apply §2B3.1(b)(4) to the first hypothetical involving freezing out of generalized fear from seeing a gun, undermining the Department’s attempt to differentiate the two. To the extent Commissioner Wong suggested that line-drawing could be based on pointing the gun at a victim coupled with a specific immobilization command, this misapprehends the nature of the circuit split: courts that have broadly construed “physically restrained” have based their analyses not on the specific words spoken but on the principle that physical restraint occurs whenever a victim is held at gunpoint, preventing them from moving and offering no alternative but compliance.⁴³ If the Commission wishes to ensure

⁴⁰ The Heritage Foundation, [Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later](#) (Dec. 13, 2021) (“[A]s a society and under the law, we draw distinctions between conduct—even the same conduct—depending on whether it occurs accidentally or intentionally.”); *see also* *See Diaz v. United States*, 602 U.S. 526, 544 (2024) (Gorsuch, J., dissenting) (“Always, too, the government bears the burden of proving the requisite *mens rea*. Never, we have held, may the government seek to shift the burden of proof to the defendant.” (citations and quotation marks omitted)).

⁴¹ We made this same point two years ago. *See* [Fed. Defender Comments on the USSC’s 2023 Proposed Firearms Amendments](#), at 23 (March 14, 2023) (arguing the Department’s proposed rebuttable presumption would swallow the rule).

⁴² [DOJ Comment on Circuit Conflicts](#), at 33 (Feb. 3, 2025) (comparing hypothetical where bank customers freeze in place out of generalized fear upon seeing a gun displayed in the air (first scenario) with one where a robber specifically orders customers to the ground at gunpoint (second scenario)).

⁴³ *See, e.g., United States v. Deleon*, 116 F.4th 1260, 1264 (11th Cir. 2024) (applying the §2B3.1 enhancement where “Deleon pointed a gun at the cashier and demanded the cashier provide him with money. Though he didn’t say, ‘Your money

that §2B3.1 appropriately distinguishes between generalized gun-pointing and more individualized gun-pointing (perhaps with verbal immobilization commands), Defenders agree with PAG witness Susan Lin that the Commission could clarify the distinction between “otherwise using” and “brandishing” a firearm, since various districts apparently apply these terms differently.⁴⁴

or your life,’ that message surely came through loud and clear, all the same.”); *see also United States v. Wilson*, 198 F.3d 467, 472 (4th Cir.1999) (applying the enhancement where “[a] gun was held to [the carjacking victim’s] head, and she was prevented from leaving her car”); *United States v. Fisher*, 132 F.3d 1327, 1329-30 (10th Cir. 1997) (“[P]hysical restraint occurs whenever a victim is specifically prevented at gunpoint from moving, thereby facilitating the crime.”).

⁴⁴ Compare §2B3.1(b)(2)(B) (applying a 6-level enhancement when a firearm is “otherwise used”) with §2B3.1(b)(2)(C) (applying a 5-level enhancement when a firearm is “brandished or possessed”). At the hearing, Commissioner Wong and Attorney Grace stated that in their districts, pointing a gun at another individual while giving a verbal order would warrant the “brandished” enhancement, but not the “otherwise used” enhancement. *But see United States v. Johnson*, 803 F.3d 610, 617 (11th Cir. 2015) (pointing a firearm at a particular group of bank tellers while demanding money without dye packs constitutes “otherwise used” rather than “brandishing”); *United States v. Paine*, 407 F.3d 958, 963–64 (8th Cir. 2005) (collecting circuit cases finding that pointing a gun at a specific victim, to make a personalized threat, amounts to “otherwise used”; and ultimately holding that the facts of this case—in which the individual had “employed the gun to convey a threat directed at this specific teller which was intended to intimidate her into complying with his demands”—constituted “otherwise used” rather than mere “brandishing”); *United States v. Orr*, 312 F.3d 141, 144–45 (3d Cir. 2002) (“[T]he District Court correctly found that pointing a gun at the head of the assistant manager and ordering her to empty money into a garbage bag was a ‘specific threat’ directed at her and was precisely the type of conduct which satisfies the ‘otherwise used’ requirement.”); *United States v. LaFortune*, 192 F.3d 157, 161–62 (1st Cir. 1999) (“Altering [the] *general display* of weaponry by *specifically leveling* a cocked firearm at the head or body of a bank teller or customer, ordering them to move or be quiet according to one’s direction, is a cessation of ‘brandishing’ and the commencement of ‘otherwise used.’” (citation omitted)); *United States v. Fuller*, 99 F.3d 926, 927 (9th Cir. 1996) (“[T]he defendant used the gun to threaten the teller and to force her to get up off the floor. By pointing the firearm at the teller and explicitly threatening to kill her if she did not stand, the defendant’s conduct exceeded mere ‘brandishing.’” (citations omitted) (collecting circuit cases)); *United States v. Seavoy*, 995 F.2d 1414, 1422 (7th Cir. 1993) (“Robert Seavoy’s pointing of a firearm, combined with an explicit threat, amounted to conduct that was more than ‘brandishing, displaying, or possessing a firearm or other dangerous weapon[.]’” (citations omitted)).

B. Intervening Arrests

As to Part B on the meaning of “intervening arrest,” Defenders were heartened to see that commenters generally support the Commission’s clarifying amendment excluding noncustodial law enforcement encounters from the definition of “intervening arrest.” We reply to two issues raised in public comment and at the hearing.

First, PAG urged the Commission to refine its proposed language to better reflect its intent that “arrest” remain limited to a formal, custodial event, to avoid temporary detentions (*e.g.*, *Terry* stops).⁴⁵ PAG has encouraged the Commission to instead adopt the following definition:⁴⁶

An intervening arrest requires a formal, custodial arrest and is ordinarily indicated by any of the following: informing the accused that s/he is under arrest; transporting the accused to the police station; or booking the accused into jail. A noncustodial encounter with law enforcement, such as a traffic stop where either a citation or summons is issued, is not an intervening arrest.

Defenders like PAG’s proposed revisions. We agree that removing the phrase “placing someone in police custody as part of a criminal investigation” will guard against misinterpreting “intervening arrest” to include a temporary detention resulting from a *Terry* stop, rather than a full-blown arrest.

Second, CLC suggested expanding the definition of “intervening arrest” to include appearance on a court-issued summons for a felony criminal charge.⁴⁷ We disagree. This expansion both complicates and breaks from an

⁴⁵ See *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴⁶ [PAG Comment on Circuit Conflicts](#), at 16 (Feb. 3, 2025).

⁴⁷ [CLC Comment on Circuit Conflicts](#), at 6–7 (Feb. 3, 2025). Likewise, POAG suggests there may be sufficiently serious events, short of a custodial arrest, which put an individual “on notice . . . so as to serve as an equally sufficient intervening event.” [POAG Comment on the Circuit Conflicts](#), at 16 (Feb. 3, 2025). POAG thus proposes to transform the “intervening arrest” rule to an “intervening arrest or event” rule, where, in the absence of a formal arrest, offenses separated by an intervening court appearance would be counted separately. But such an approach would do nothing to mitigate our concerns about expanding the definition of “intervening arrest” because most tickets, citations, and summonses will result in a court appearance. Nor is it clear why a person is on any less “notice” of a criminal

otherwise clear, longstanding rule that focuses on an arrest as the salient event, without good reason to do so. The “intervening *arrest*” rule has been in place since 1991.⁴⁸ Treating a court appearance on a mere summons or citation the same as an arrest would represent a marked departure from this 34-year-old policy. If the Commission is going to shift policies, it should do so based on more than a bald suggestion that sentences for serious offenses might not be counted under the single sentence rule. The cases on both sides of the circuit split suggest this will not happen often.⁴⁹ And, even when there is no intervening arrest, multiple sentences are counted separately unless the sentences: (1) resulted from offenses joined in the same charging document or (2) were imposed the same day.⁵⁰ Thus, there is little, if any, need to better account for serious offenses that do not result in an arrest. In the rare case where the need arises, the court can vary (or depart) above the guideline range, as appropriate.

allegation from being ticketed or cited than from appearing in court. It is also unclear why notice matters. The goal of the intervening arrest rule is to distinguish related from unrelated cases, not to determine whether and when a person is placed on notice of an alleged law violation.

⁴⁸ USSG, App. C., [Amend. 382](#) (Nov. 1, 1991) (emphasis added).

⁴⁹ Facts that led to the circuit split underlying this proposed amendment mostly involved traffic stops, with citations for minor law violations. *United States v. Ley*, 876 F.3d 103, 104–05 (3d Cir. 2017) (possession of drug paraphernalia); *United States v. Wright*, 862 F.3d 1265, 1281–82 (11th Cir. 2017) (driving on a suspended license); *United States v. Leal-Felix*, 665 F.3d 1037, 1039 (9th Cir. 2011) (en banc) (driving on a suspended license); *United States v. Morgan*, 354 F.3d 621, 623 (7th Cir. 2003) (driving on a revoked license). In the one case involving a more serious (controlled substance) offense, the individual in fact had been formally arrested; he just hadn’t been indicted, which did not alter application of §4A1.2(a)(2). *United States v. Rogers*, 86 F.4th 259, 266–68 (6th Cir. 2023). More, CLC’s proposed inclusion in the definition of “intervening arrest” of “an appearance on a court-issued summons requiring a person to appear on a felony criminal charge,” is overbroad if the goal is to include only the most serious crimes. In some states and in certain circumstances, driving without a license and other minor offenses can count as felonies. See, e.g., Fla. Stat. § 322.34(2)(c) (2024) (making repeat driving on a suspended license a third-degree felony in certain circumstances).

⁵⁰ USSG §4A1.2(a)(2).

IV. Proposal 4: Simplification of Three-Step Process

The Department supports the Commission's simplification proposal, and it has not argued that any congressional directive prevents the Commission from moving forward with the proposal. But at last week's hearing, Ex Officio Commissioner Meisler suggested that the Commission might look into certain departures related to congressional directives.⁵¹ Our witness reiterated Defenders' position that uncodified directives do not handcuff the Commission into perpetuity. In response, Ex Officio Commissioner Meisler suggested that Defenders are claiming that the Commission can implement a directive one year and then delete that implementation the following year, perhaps based on a policy disagreement. This is not accurate. Defenders' position is that the Commission can (and sometimes must) alter a congressionally directed amendment *if a substantial and material change postdating implementation demands it*.

The Commission's overriding congressional mandate is found at 28 U.S.C. § 991(b), and a long list of structural requirements for the federal sentencing guidelines and policy statements are found at 28 U.S.C. § 994. The Commission must, of course, comply with any congressional directive to amend the Guidelines Manual. But after making an amendment under such a directive, if legal and/or factual circumstances impacting an amended guideline materially change, requiring further action to comply with §§ 991 and 994, the Commission is permitted to act as appropriate.⁵² As relevant here, it is hard to imagine a more significant change to the legal structure of

⁵¹ Defenders last year identified at most three departure provisions related to directives that required the Commission to amend the Guidelines Manual in some way. See [Defenders Comment on Simplification](#), at 21–23 (Feb. 22, 2024). As we explained in last year's comment, we would not object to the Commission addressing these rarely used, idiosyncratic departure provisions in some distinct way. *Id.* at 24. We simply do not think this is required.

⁵² Provisions in the PROTECT Act of 2003, mandating that amendments made under certain directives remain for at least a particular term of years and others remain into perpetuity, confirm that Congress also understands that, without further instruction, amendments made under uncodified directives are not set in stone. See Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, § 401(j)(2)–(4), Pub. L. No. 108-21, 117 Stat. 650; see also [Defenders Comment on Simplification](#), at 20–21 (discussing the PROTECT Act).

Hon. Carlton W. Reeves
February 18, 2025
Page 18

the federal sentencing guidelines, on which “departures” were built, than *United States v. Booker*, 543 U.S. 220 (2005).

* * *

The Federal Public and Community Defenders appreciate the Commission’s consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,



Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
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Sentencing Resource Counsel
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cc: Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
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