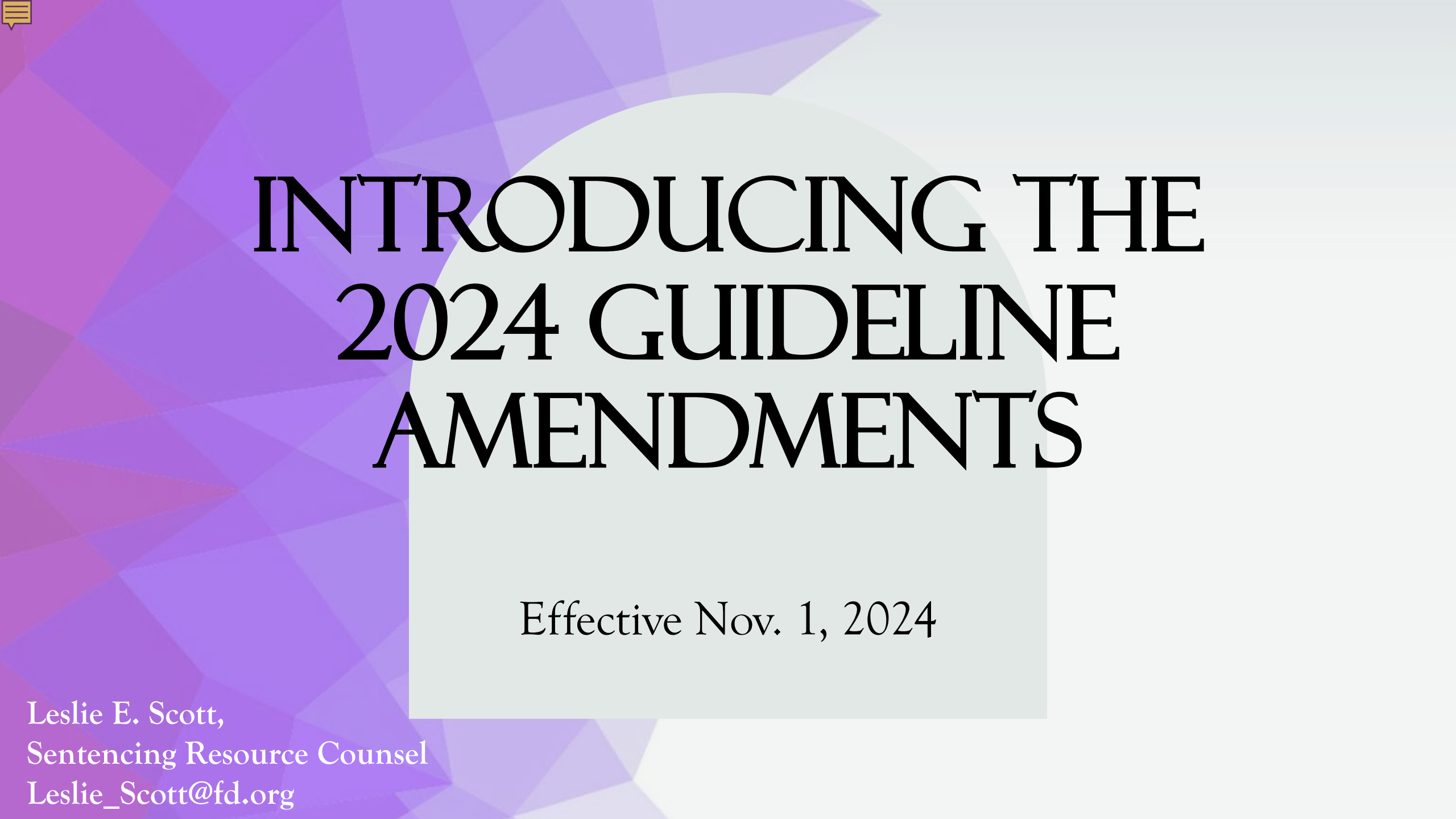




INTRODUCING THE 2024 GUIDELINE AMENDMENTS

Effective Nov. 1, 2024

Leslie E. Scott,
Sentencing Resource Counsel
Leslie_Scott@fd.org



GAME PLAN



Amendment cycle
overview



The 2024
amendments



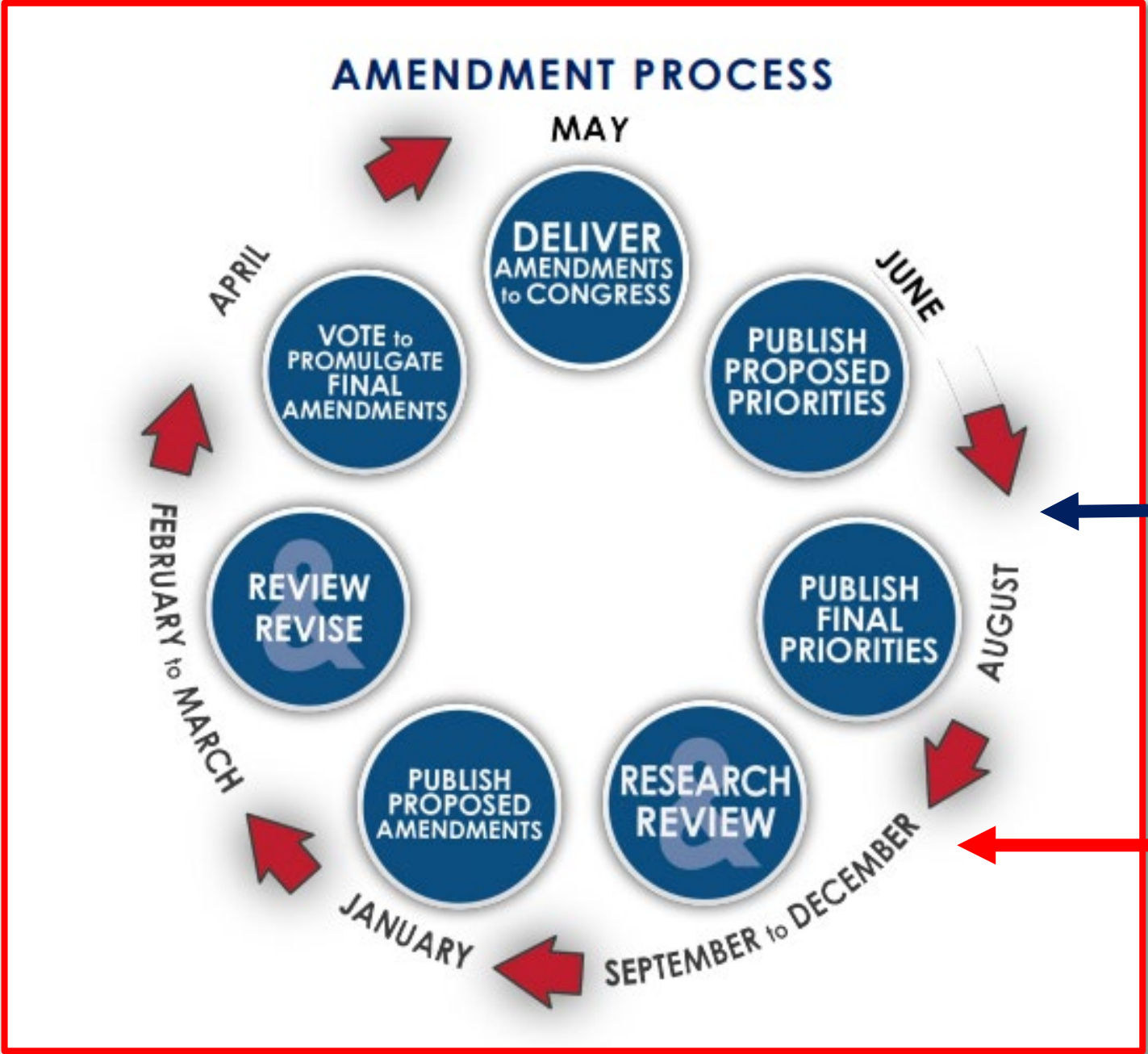
Retroactivity &
questions



MATERIALS

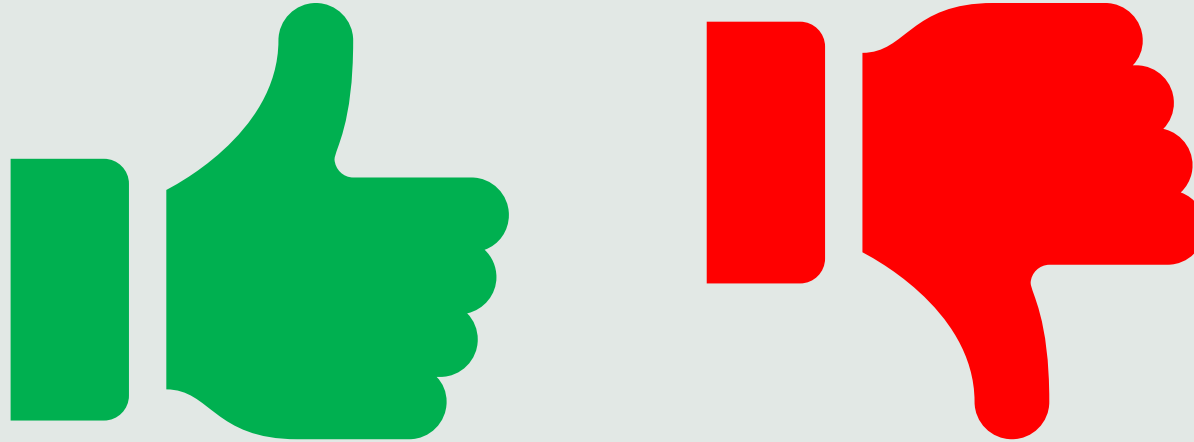
Meet the Commissioners





Retro
comments
& hearing

WE ARE HERE



WHAT DID THE COMMISSION DO?



Good

- **5H1.1:** Expanded “age” policy statement for youthful individuals
- **1B1.3:** Removed “acquitted conduct” from relevant conduct
- **2K2.1(b)(4)(B)(i):** Narrowed the +4 AOSN enhancement
- **2K2.4/3D1.2(c):** 924(c) does not prevent “grouping” of drug and gun charges
- **2D1.1(a)(1)-(4):** Conviction under statute or stipulation required for enhanced base offense levels to apply

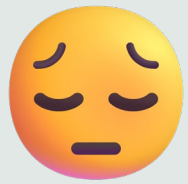


Bad

- **2B1.1:** Moved bad loss commentary into guideline text
- **4C1.1:** Expanded two exclusions from the zero-point reduction (aggravating role + CCE and meaning of “sex offense”)
- **2S1.3(b)(2)(B):** Expanded +2 enhancement in bulk cash smuggling/structuring cases to mirror statute



WHAT DIDN'T THE COMMISSION DO?



Commission did not:



- Did not limit the impact of, or exclude, “offenses committed prior to age 18” from the criminal history score
- Did not adopt proposed amendment to “simplify the three-step process” by eliminating departures from the Manual



REMEMBER EX POST FACTO

BUT...“ONE BOOK RULE”

*USSG 1B1.11





PRACTICE TIP FOR ALL GOOD AMENDMENTS: DON'T IGNORE THE REASONS FOR AMENDMENT!

§ 991(b)(1)(C), this amendment reflects the evolving science and data surrounding youthful individuals, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability. The amendment also reflects expert testimony to the Commission indicating that certain risk factors may contribute to youthful involvement in criminal justice systems, while protective factors, including appropriate interventions, may promote desistance from crime.



5H1.1: “AGE” POLICY STATEMENT





DEPARTURE VS. VARIANCE

Departure

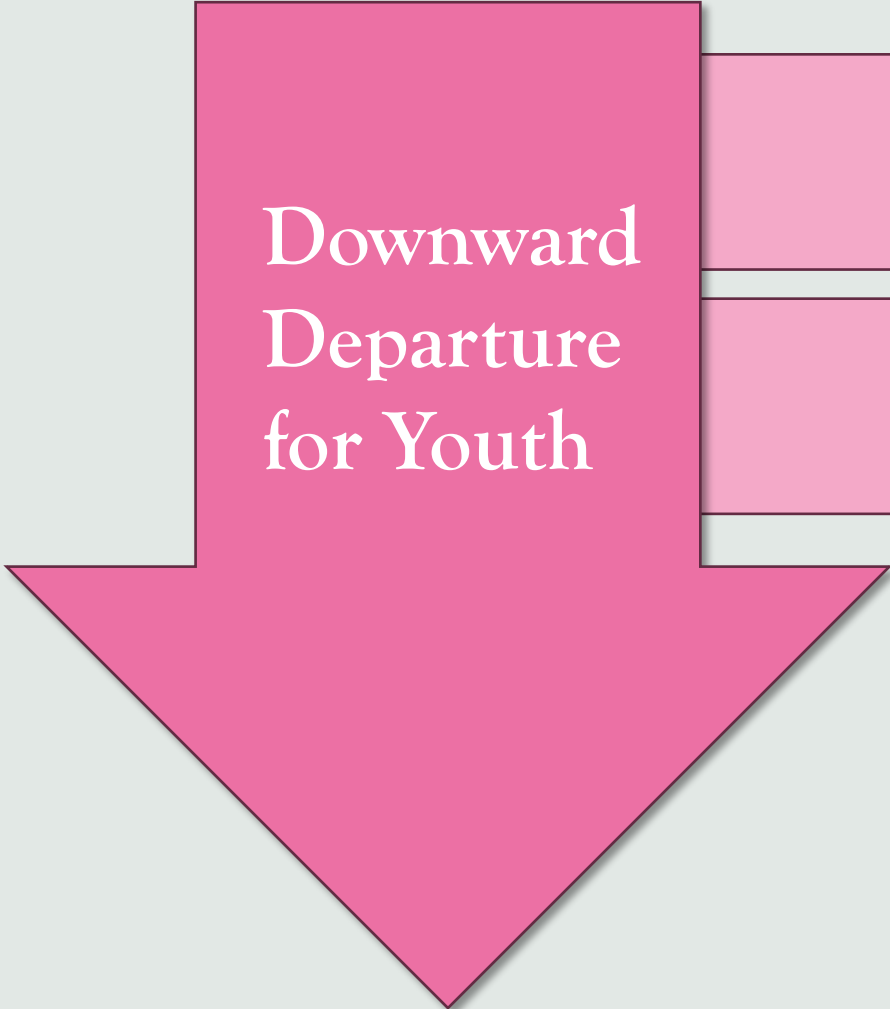
- A sentence imposed outside the guidelines range based on specific language in the Guidelines Manual
- Located in specific commentary or policy statements
- Index in back of Guidelines Manual

Variance

- A sentence imposed outside the guidelines range based on factors in 18 U.S.C. 3553(a)
- A court can vary for virtually any reason (including a policy disagreement with the guidelines) and is not constrained by language in the Guidelines Manual



5H1.1: DOWNWARD DEPARTURE FOR YOUTH

A large pink arrow pointing downwards, with the text 'Downward Departure for Youth' inside its upper portion.

Downward
Departure
for Youth

Time of Instant Offense

Time of Prior Offense(s)

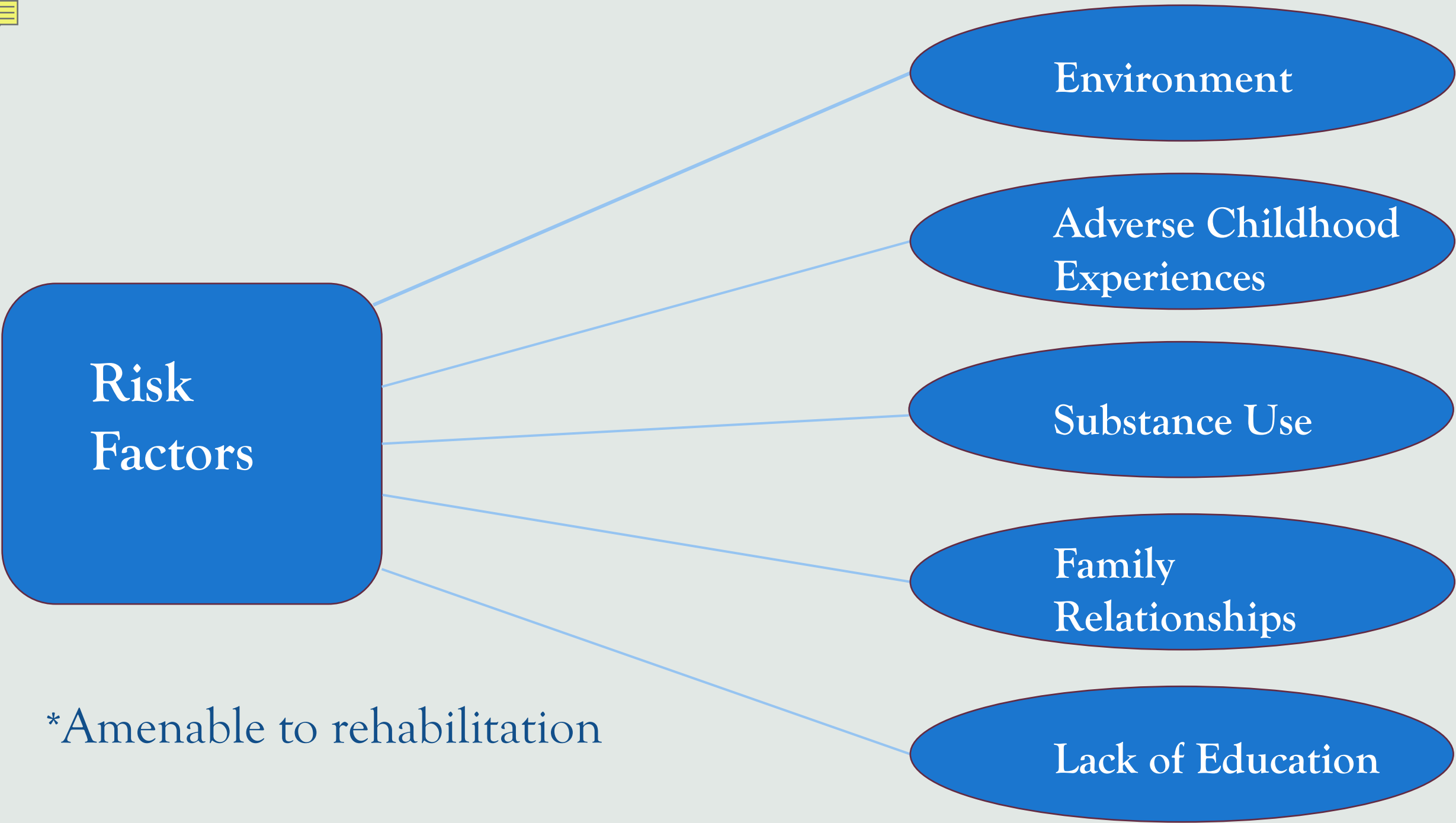
OR



Risk-
Seeking

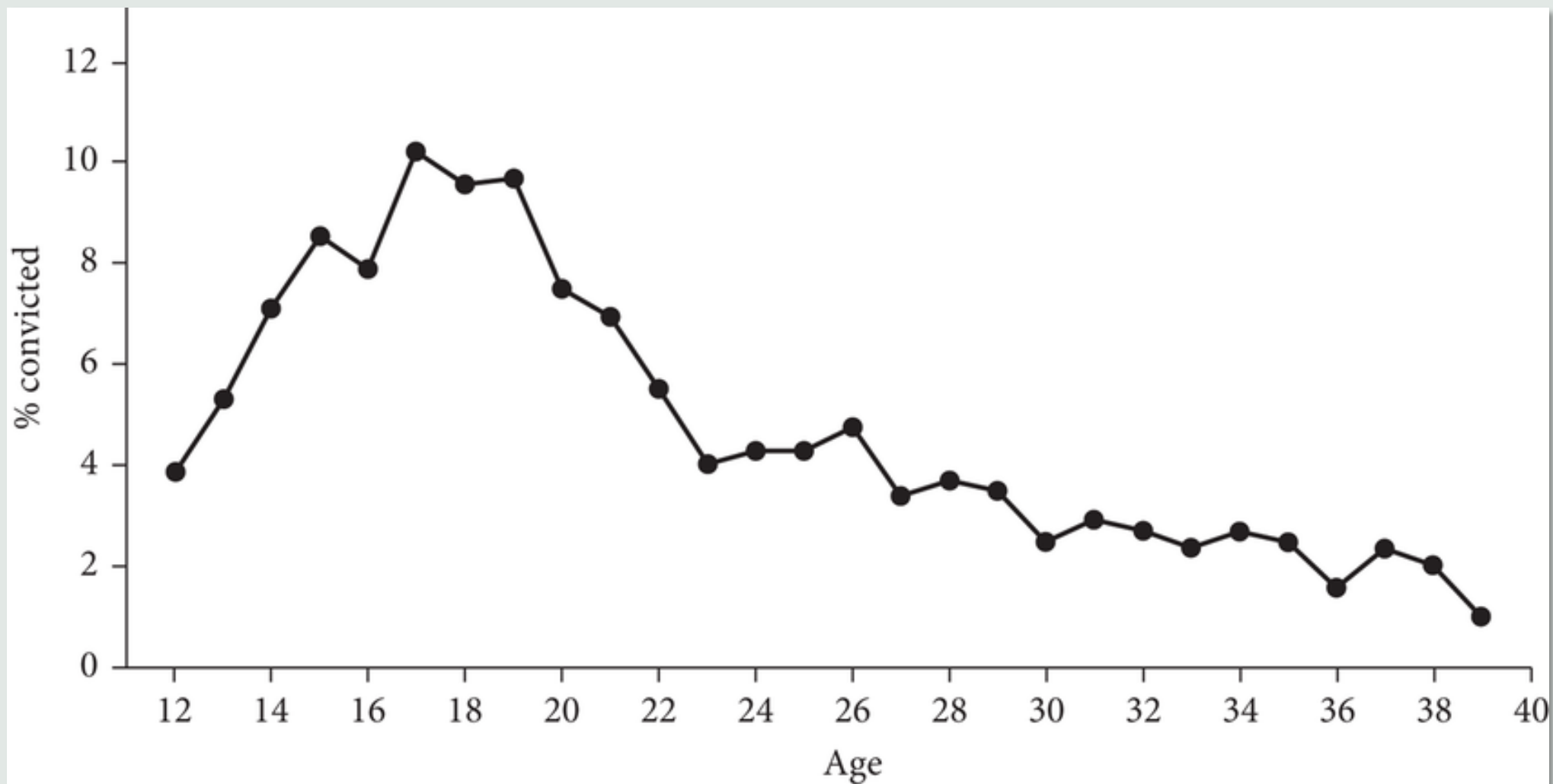
Impulsive

Vulnerable
to external
forces



*Amenable to rehabilitation

AGE-CRIME CURVE



§5H1.1. Age (Policy Statement)

~~Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.~~

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).



5H1.1 AMENDMENT: THE BASICS

- Stronger, more encouraging downward departure language to account for youthfulness
- Applies to youthful prior AND youthful instant offense
- Youthfulness= mid-20s and younger
- Practice Tip: For prior, use 5H1.1 & 4A1.3. Can also use to support 3553(a) variance arguments

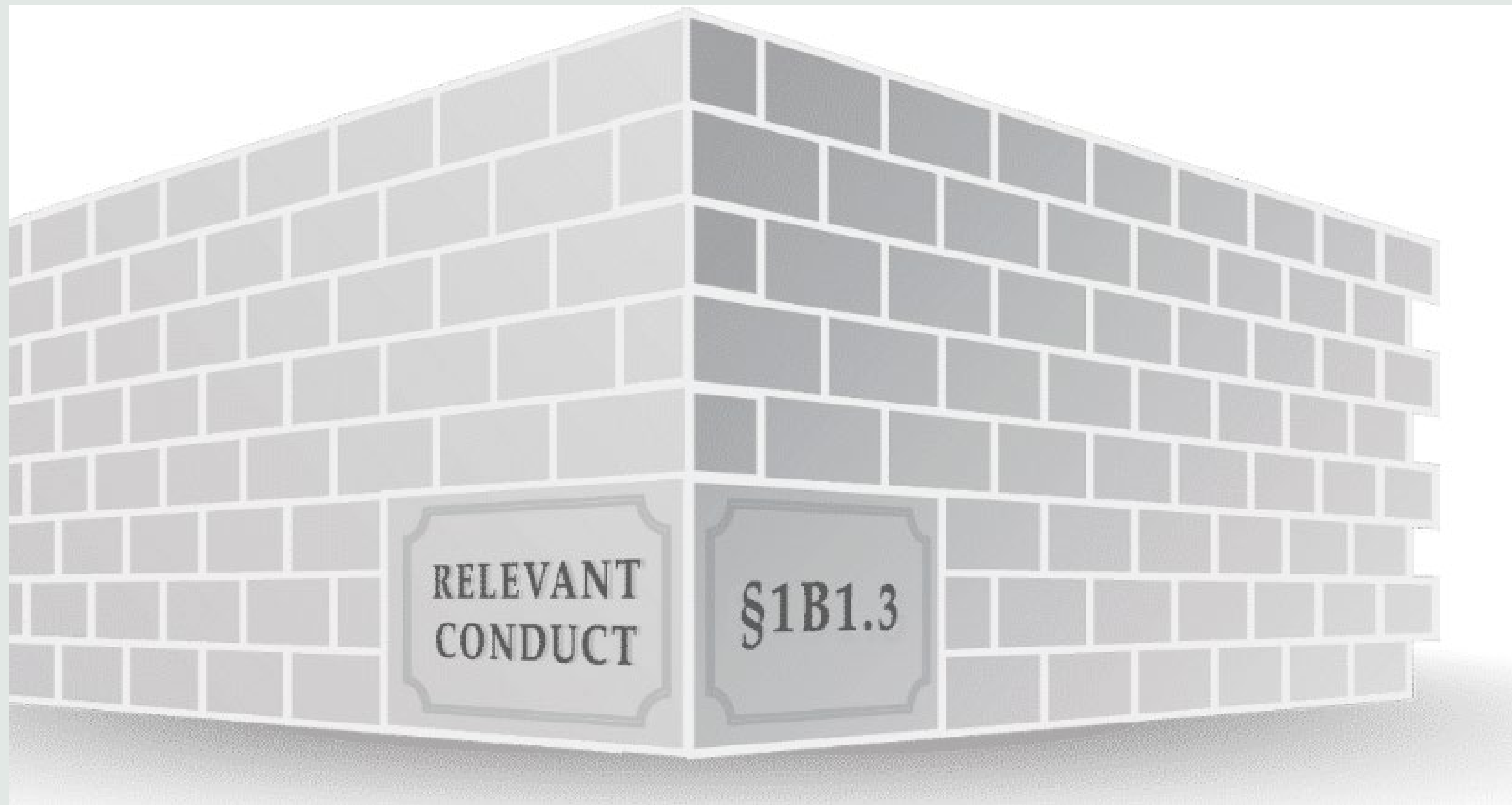


AFPD Gabi Leija's
Comment on Youthful
Individuals



1B1.3: ACQUITTED CONDUCT





UNCHARGED AND DISMISSED CONDUCT STILL ALLOWED

United States v. Brasher, 105
F.4th 1002 (7th Cir. 2024)
(Jackson-Akiwumi, J.,
concurring)

Defender Comment on
Proposed Priorities, pp. 9-16



**THE
DEVIL IS IN
THE DETAILS**



WHAT DOES THE AMENDMENT DO?



"We find the guilty defendant not guilty."

Change #1

Amends §1B1.3 to indicate that conduct for which a person was criminally charged and acquitted in federal court is not relevant conduct "unless such conduct also establishes, in whole or in part, the instant offense of conviction."



DRUGS & GUNS

§ 924(c)- possession of firearm

- Any person who “during and in relation to any” drug-trafficking crime possesses a firearm “in furtherance of any such crime”

Not Guilty

§2D1.1(b)(1)- possession of firearm

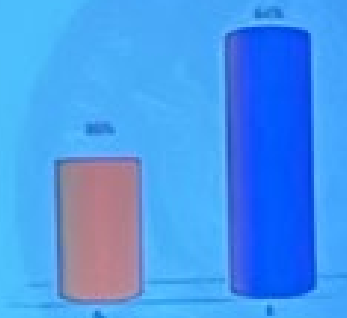
- If a dangerous weapon (including a firearm) “was possessed,” increase by 2 levels

Guilty- 841(a)

Jeremy Johnson was charged with Count 1 – Drug Trafficking and Count 2 – Felon in Possession of Firearm. Johnson went to trial and was convicted of Count 1 but acquitted of Count 2.

If the acquitted conduct amendment takes effect, will the enhancement for possession of a firearm at §2D1.1(b)(1) apply?

- A. Yes
- ✓ B. No



USSC staff on the interaction between a 922(g) acquittal and 841(a) conviction: 2D1.1(b)(1) enhancement **should not** apply.



MORE DRUGS & GUNS

§ 924(c)- possession of firearm

- Any person who “during and in relation to any” drug-trafficking crime possesses a firearm “in furtherance of any such crime”

Not Guilty

§2K2.1(b)(6)(B)- possession of firearm “in connection with” another felony (drug trafficking)

- If the defendant “used or possessed any firearm . . . in connection with another felony offense” increase by 4 levels

Guilty- 922(g), 841(a)



HUMAN TRAFFICKING & DEATH

8 USC § 1324(a)(1)(B)(iv)

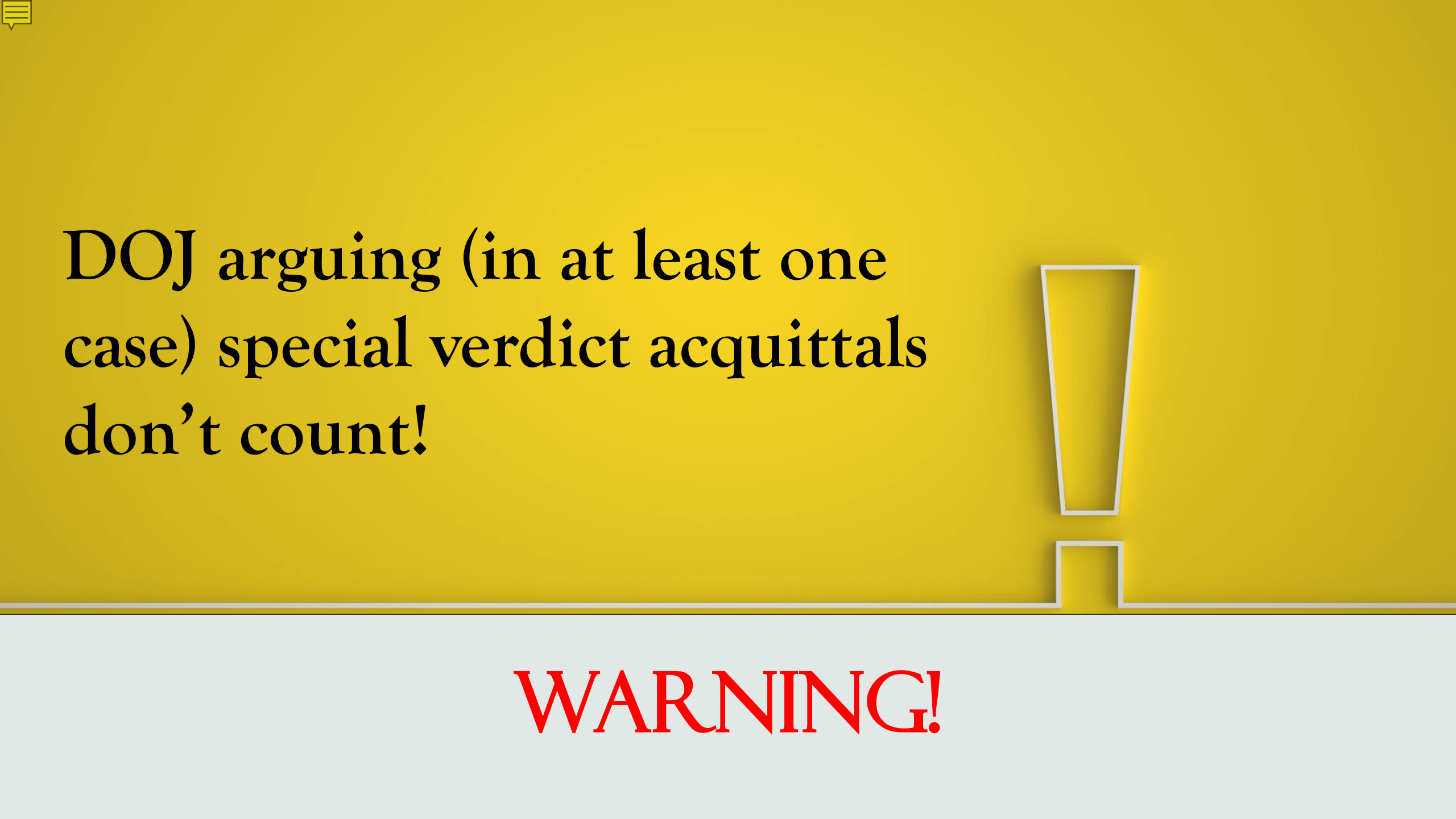
- A person who violates sub. (A) “shall . . . in the case of a violation . . . resulting in the death of any person, be punished by death or imprisoned for any term of years or for life.”

Not Guilty

§2L1.1(b)(7)

- “If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury: . . . (D) Death add 10 levels.”

Guilty- human trafficking



DOJ arguing (in at least one case) special verdict acquittals don't count!

WARNING!

VERDICT FORM

Count One – Racketeering Conspiracy

With respect to Count One of the indictment, we, the Jury, find defendant

NOT GUILTY ☐

GUILTY ☒

ADDITIONAL FINDINGS

Murder of

As to Count One, we, the Jury, find that the racketeering activity upon which defendant violation is based includes the commission, or aiding and abetting the commission, of the first degree murder of

NOT PROVEN ☒

PROVEN ☐

We, the Jury, find as follows regarding the killing of as to whether it was committed in a cold, calculated, and premeditated manner pursuant to a preconceived plan, scheme, and design to take a human life by unlawful means, creating a reasonable expectation that the death of a human being would result therefrom:

NOT PROVEN ☒

PROVEN ☐

We, the Jury, find as follows regarding the killing of as to whether it was committed through personal discharge of a firearm that proximately caused great bodily harm, permanent disability, or permanent disfigurement to another person:

NOT PROVEN ☒

PROVEN ☐

Count 5:

As to **Count 5** of the First Superseding Indictment, which charges conspiracy to distribute controlled substances, we, the Jury, unanimously find the defendant [REDACTED]

_____ Not Guilty

_____ *X* _____ Guilty

Question 2:

With respect to Count 5, the amount of the mixture or substance containing a detectable amount of **heroin** that was attributable to [REDACTED] as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was:

_____ 1 kilogram of heroin or more.

_____ less than 1 kilogram of heroin but 100 grams or more.

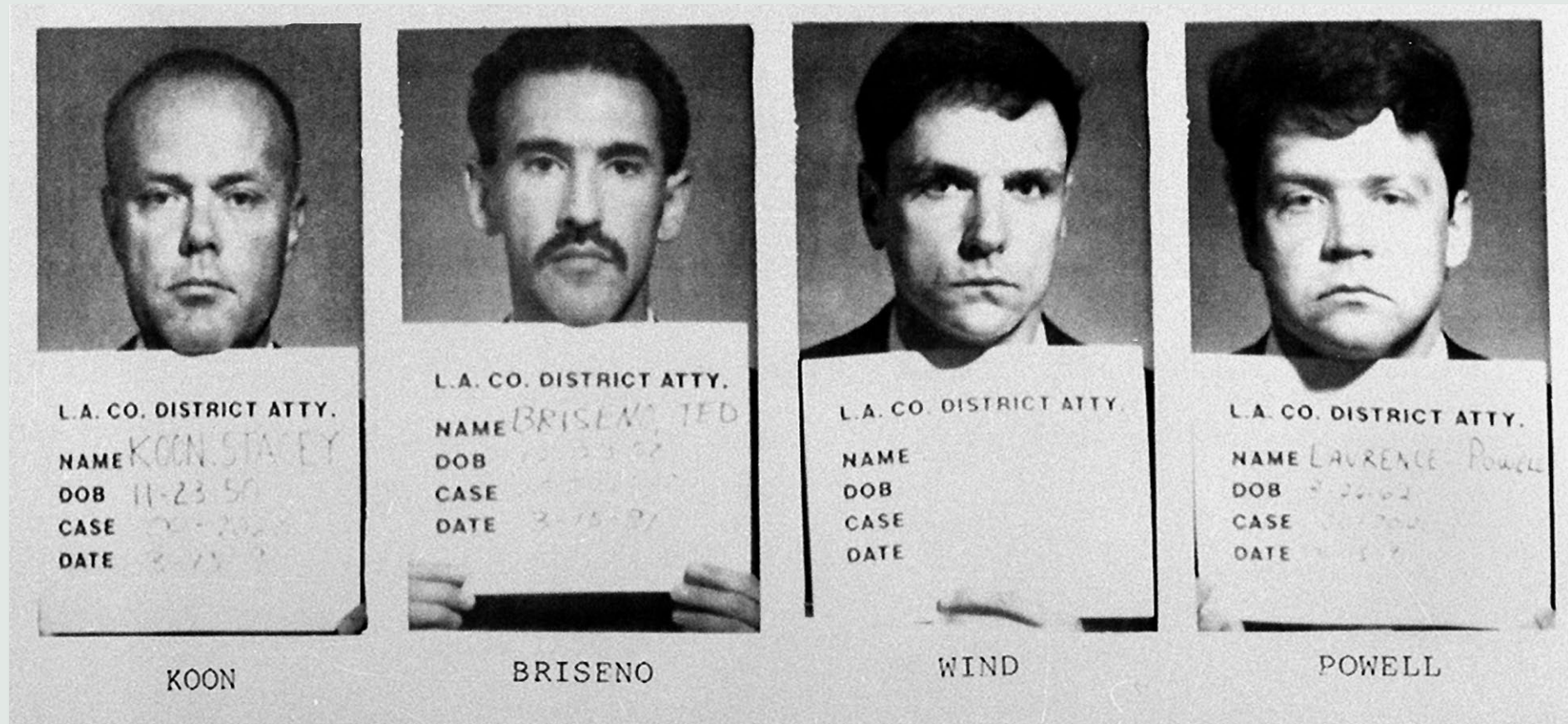
_____ *X* _____ less than 100 grams of heroin.



Start with the definition of the word “acquittal.” It is “a setting free from the *charge of an offense* by verdict, sentence, or other legal process.” Merriam-Webster dictionary (emphasis added). Similarly, Black’s Law Dictionary defines the term as: “The legal certification, usually by jury verdict, that an accused person is not guilty of the *charged offense . . .*” (emphasis added). Special interrogatories that ask the jury about drug weights are not “charges of offenses.”

A jury’s failure to find a threshold amount of drugs to trigger a statutory penalty is not an acquittal of conduct. It is the Court’s job—not the jury’s job—to calculate drug amounts for sentencing purposes when the sentence remains within the proscribed statutory framework.

LIMITED TO FEDERAL ACQUITTALS!





Acquitted conduct is out...

“unless such conduct also establishes, in whole or in part, the instant offense of conviction.”

WHAT DOES THE AMENDMENT DO?



"We find the guilty defendant not guilty."

Change #2

New application note
instructing courts what
to do when there's
"overlapping conduct"
between acquitted and
convicted counts.

(c) **ACQUITTED CONDUCT.**—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

Commentary

Application Notes:

* * *

10. **Acquitted Conduct.**—Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.

* * *

WHAT DOES THE AMENDMENT DO?



"We find the guilty defendant not guilty."

Change #3

Corresponding changes
to commentary of
§6A1.3 (Resolution of
Disputed Factors policy
statement)

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; ~~see also *United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution)~~ noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its

guidelines to the facts of a case. Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. See §1B1.3(c) (Relevant Conduct). Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.

States v. Rogers, 1 F.3d 341 (3rd Cir. 1993), see also *United States v. Young*, 581 F.2d 180 (3rd Cir.), cert. denied, 508 U.S. 980 (1993); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. *United States v. Ortiz*, 993 F.2d 204 (10th Cir. 1993).

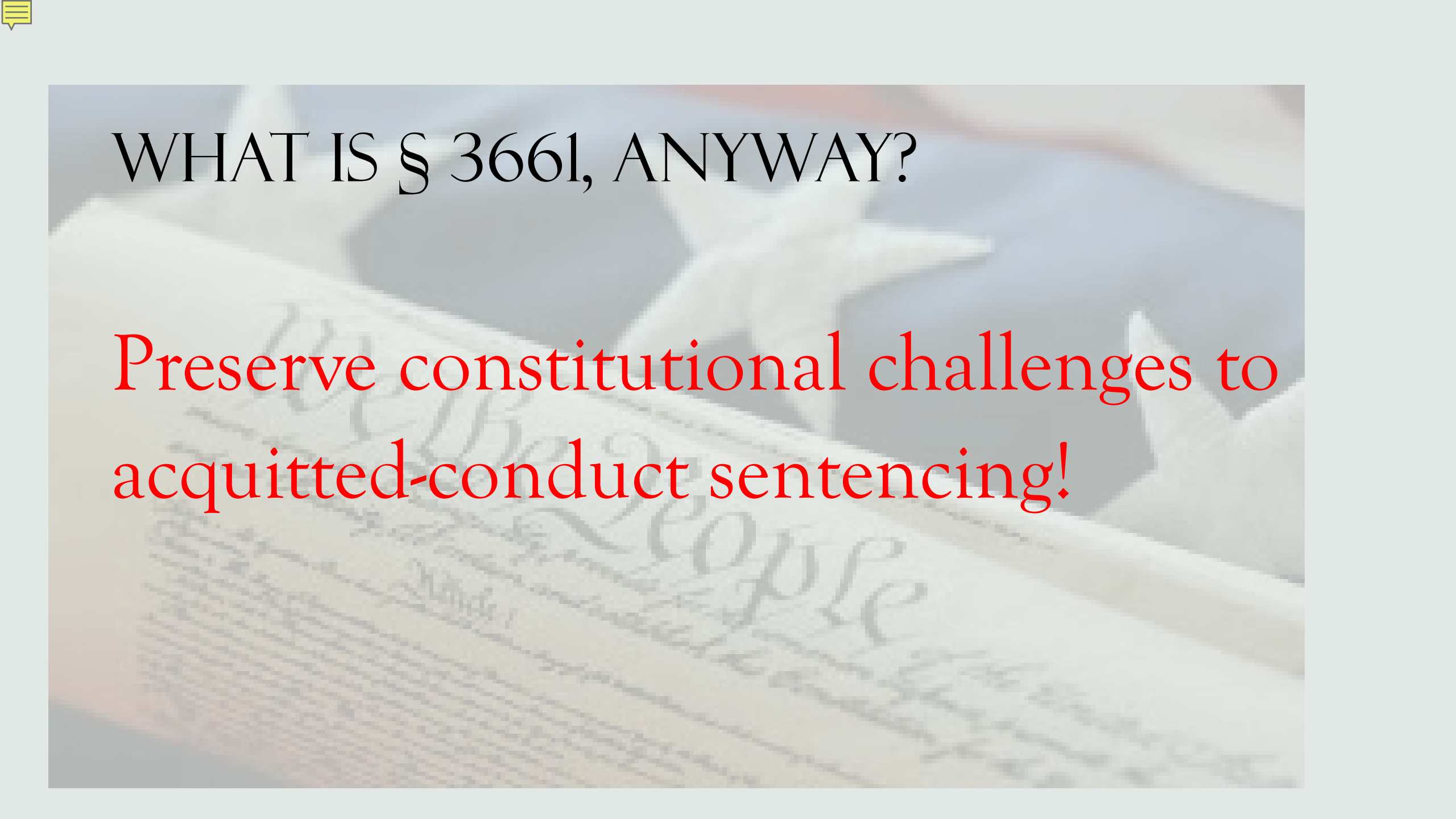
The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. See §1B1.3(c) (Relevant Conduct). Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.



WHAT IS § 3661, ANYWAY?

§6A1.3 cmt: “Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range.... Nonetheless, nothing in the Guidelines Manual abrogates a court’s authority under 18 U.S.C. § 3661.”

18 U.S.C. § 3661: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”



WHAT IS § 3661, ANYWAY?

Preserve constitutional challenges to
acquitted-conduct sentencing!



2K2.1(B)(4)(i): SERIAL NUMBERS





§2K2.1(B)(4)(b)

Provides for a **4-level increase** where:

- (i) a firearm has an altered or obliterated serial number
or
- (ii) the individual knew or was willfully blind to or consciously avoided knowledge that any firearm involved in the offense was not otherwise marked with a serial number

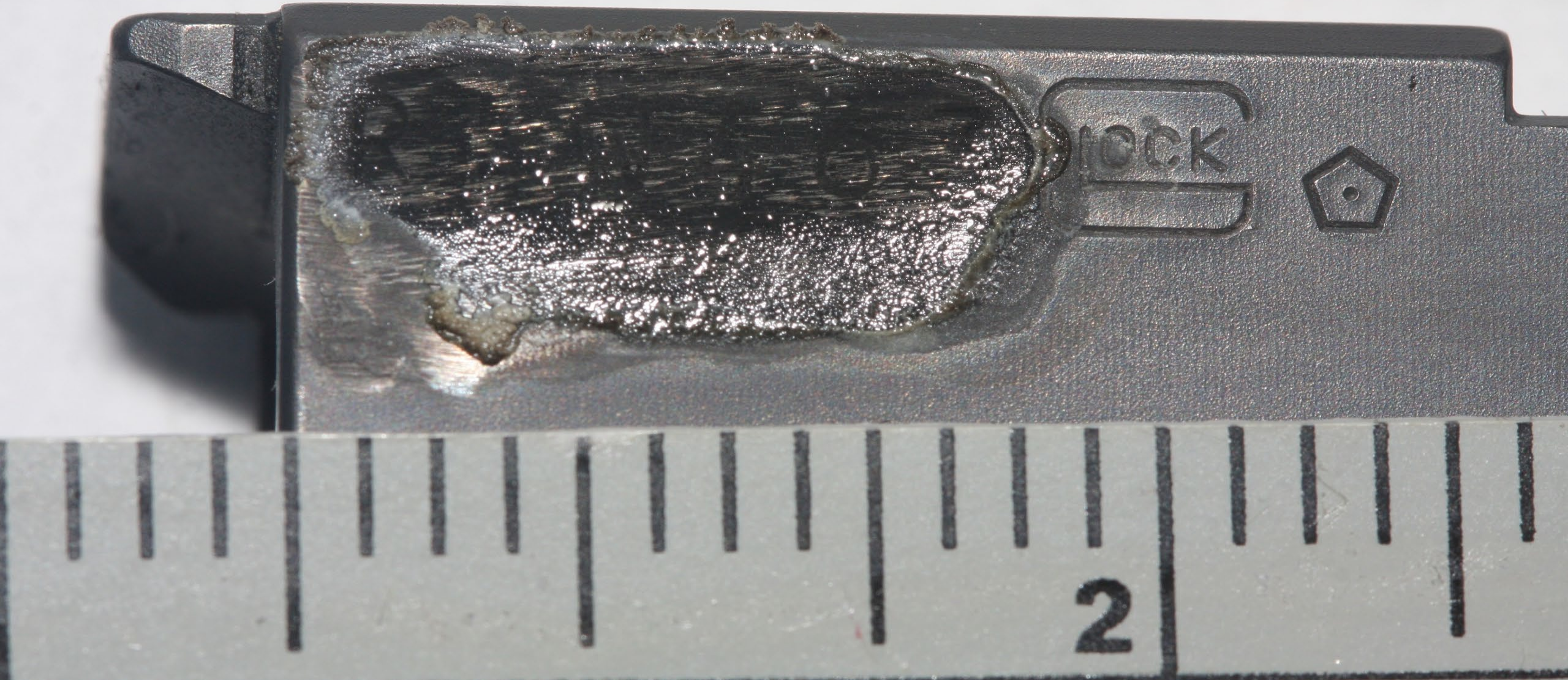


CIRCUIT SPLIT

- Does the defaced serial number have to be completely illegible to the naked eye for the enhancement to apply OR does it simply have to be less legible so that it's harder to read?

Illegible	Less Legible
Second Circuit Sixth Circuit	Fourth Circuit Fifth Circuit Eleventh Circuit

Illegible to unaided eye?



Or less accessible?



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

THE WINNER: UNAIDED EYE TEST



BUT BEWARE...



Still strict liability



Courts have held that if ***any*** of the serial numbers are illegible, enhancement applies, even if there's a visible serial number somewhere on the gun

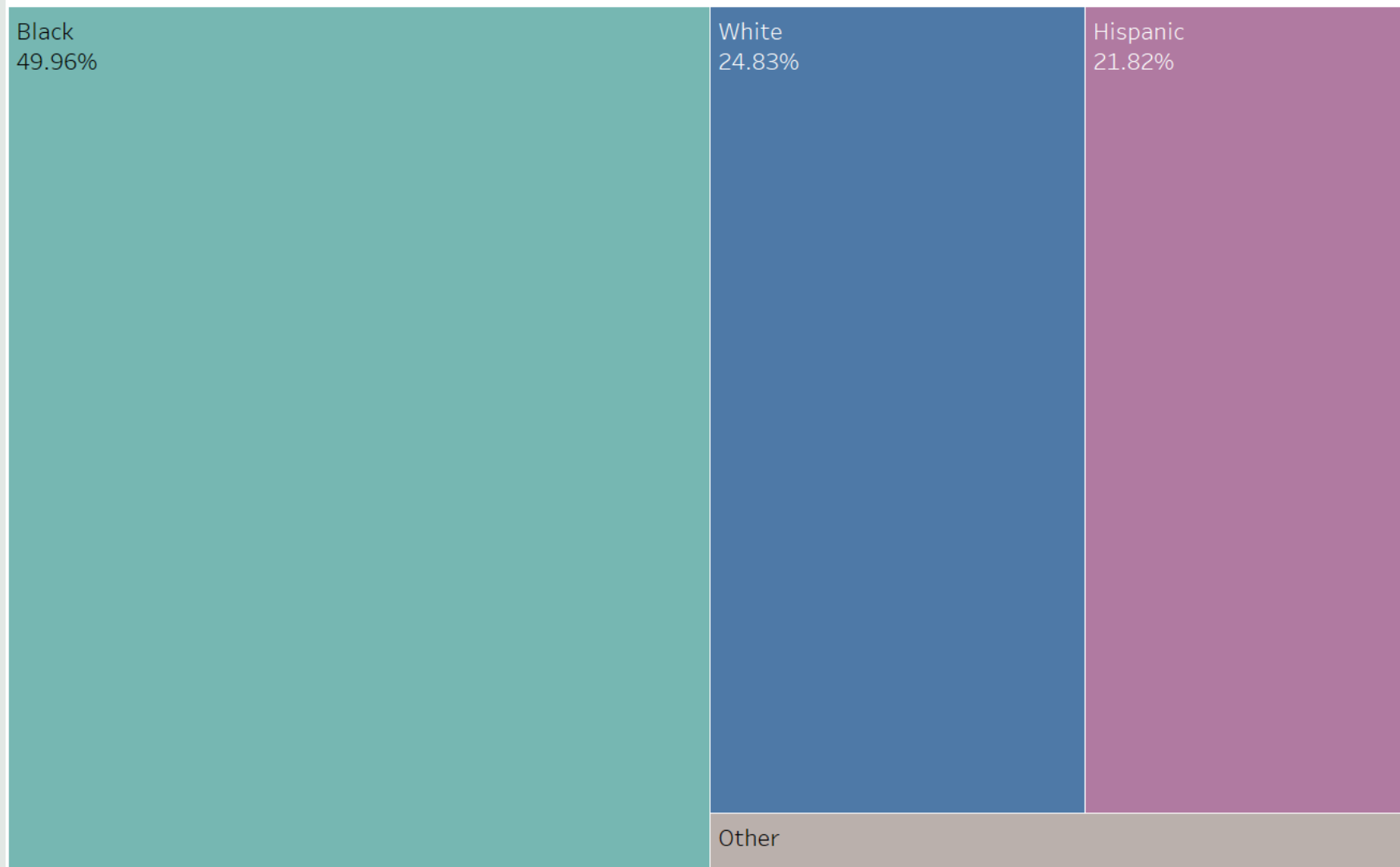




MENS REA?



Received (b)(4)(B) enhancement, FY 18-22





SCAN ME

AFPD DEIRDRE
VON DORNUM
WITNESS
STATEMENT

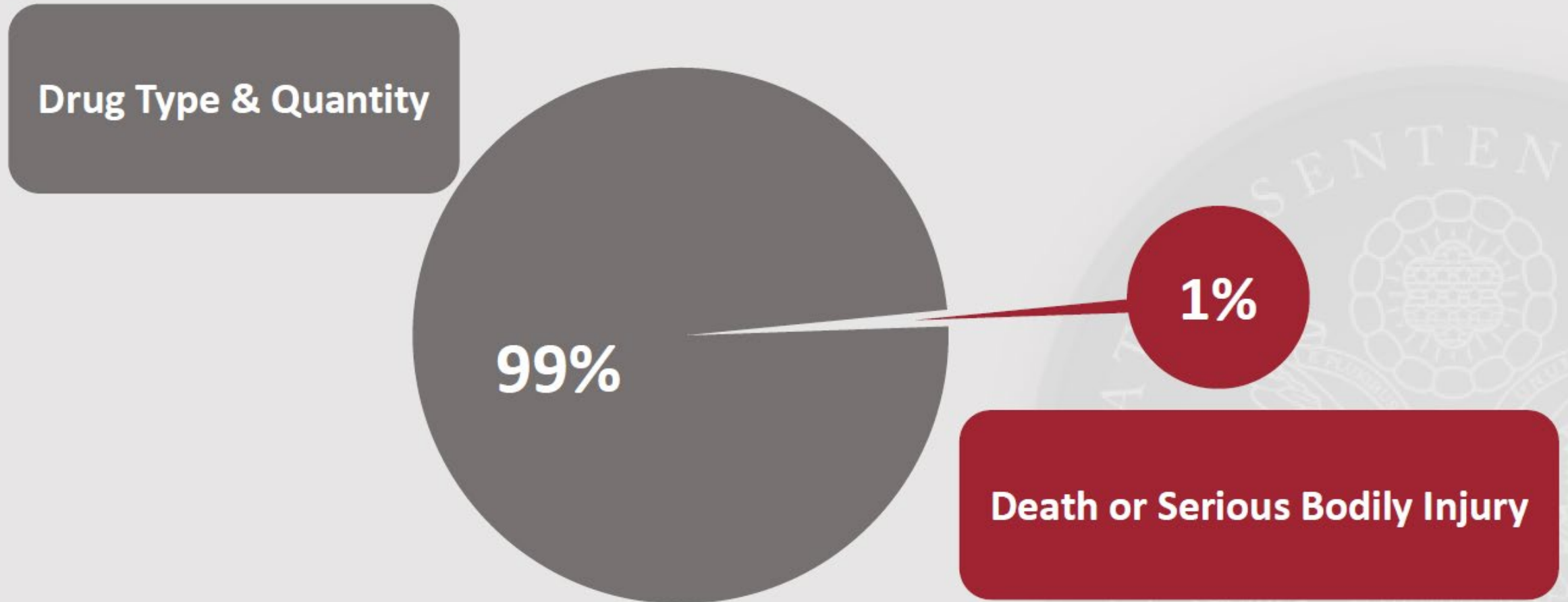


2D1.1(A)(1)-(4): ENHANCED DRUG BASE OFFENSE LEVELS



Drug Trafficking: Base Offense Levels

Two Calculation Methods





OLD: DEATH OR SBI ALTERNATIVE BOLS

43

Offense of conviction establishes death/SBI
+ predicate conviction(s)

38

Offense of conviction establishes death/SBI

30

Offense of conviction establishes death/SBI
+ predicate conviction(s)

26

Offense of conviction establishes death/SBI



DEATH/SBI: OFFENSE OF CONVICTION OR RELEVANT CONDUCT?



Offense of Conviction

OR



Relevant Conduct



FROM THE REASON FOR AMENDMENT...

“The amendment is intended to clarify the Commission’s original intent that the enhanced base offense levels apply because the statutory elements have been established and the defendant was convicted under the enhanced penalty provision provided in sections 841(b) or 960(b).”



NEW: DEATH OR SBI ALTERNATIVE BOLS

43

Statutory Minimum: Life

38

Statutory Minimum: 20 years

30

Statutory Maximum: 30 years

26

Statutory Maximum: 15 years



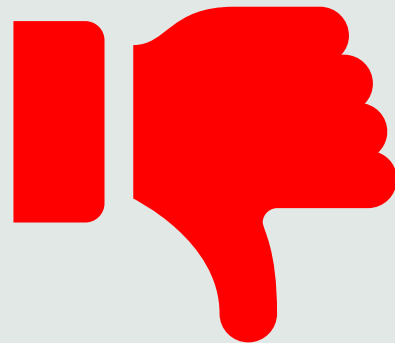
FROM THE REASON FOR AMENDMENT...

“The amendment also responds to comments made by the Federal Public and Community Defenders and the Department of Justice that the enhanced penalties should also apply when the parties stipulate to their application.”

(B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or



2B1.1: “GREATER OF” LOSS RULE







§2B1.1 AND LOSS

- **At Issue:** §2B1.1 cmt n.(3)(A), defining loss as the greater of actual *or* intended loss
- **The Conflict:** 3rd Cir. held under *Kisor*, §2B1.1 “loss” means “actual loss”
- **Commission:** Moved the rule establishing loss as the greater of actual or intended loss + the definitions of “actual loss” and “intended loss,” out of commentary and into guideline itself (as part of the Notes)



SAME TEXT, NEW HOME

*Notes to Table:

(A) **Loss.**—Loss is the greater of actual loss or intended loss.

(B) **Gain.**—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) “**Actual loss**” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) “**Intended loss**” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) “**Pecuniary harm**” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) “**Reasonably foreseeable pecuniary harm**” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.



A WORLD OF PURE IMAGINATION

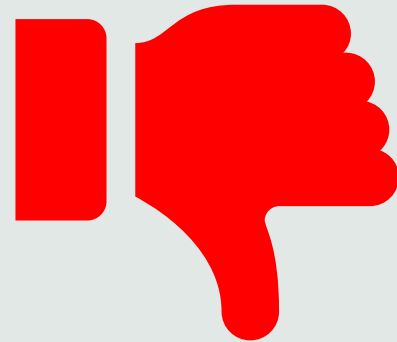


AFPD Daniel Dena
Witness Statement





4C1.1: EXPANDED EXCLUSIONS



4C1.1: ZERO-POINT EXCLUSIONS



- Terrorism Adjustment (3A1.4)
- Violence/Threats
- Death/Serious Bodily Injury
- Sex Offense
- Substantial Financial Hardship
- Firearms
- Individual Rights Offenses
- Vulnerable Victim/Hate Crime
- Aggravating Role & CCE

(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

decrease the offense level determined under Chapters Two and Three by 2 levels.



(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role)-and; and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

§4C1.1. Adjustment for Certain Zero-Point Offenders

(a) ADJUSTMENT.—If the defendant meets all of the following criteria:

(5) the instant offense of conviction is not a sex offense;

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

(2) “*Sex offense*” means (A) ~~an offense, perpetrated against a minor, an~~ offense under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.



2024 RECAP



Good

- **5H1.1:** Expanded “age” policy statement for youthful individuals
- **1B1.3:** Excluded “acquitted conduct” from the definition of relevant conduct
- **2K2.1(b)(4)(B)(i):** Narrowed application of the +4 AOSN enhancement
- **2K2.4/3D1.2(c):** 924(c) does not prevent “grouping” of drug and gun charges
- **2D1.1(a)(1)-(4):** Clarified need for conviction under statute or stipulation for enhanced base offense levels to apply



Not Good

- **2B1.1:** Moved bad loss commentary into text
- **4C1.1:** Expanded two exclusions from the zero-point reduction (aggravating role + cce and meaning of “sex offense”)
- **2S1.3(b)(2)(B):** Expanded +2 enhancement in bulk cash smuggling/tax evasion cases to mirror statute

A close-up, slightly blurred image of a vintage-style clock face. The clock has a dark blue outer ring, a red inner ring, and a white center. The hands are gold and silver. The background is a soft, out-of-focus mix of blue and white.

RETROACTIVITY?



UNDER CONSIDERATION

- Acquitted Conduct;
- §2K2.1(b)(4)(B) AOSN enhancement;
- §2K2.4 and §3D1.2(c) grouping; and
- Drug trafficking enhanced penalties

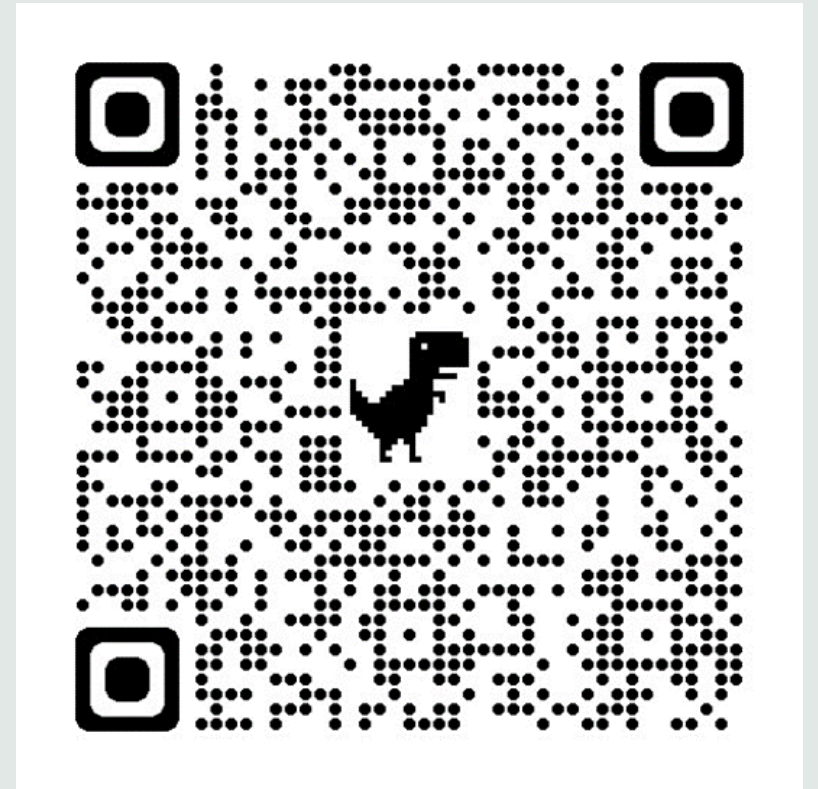






Additional Resources:

- SRC's listservs – email us
- SRC website: src.fd.org
- SRC Office Hours
- Sentencing data resources
- SRC Liaisons



Office Hours signup



KEY TAKEAWAYS



- Reach out to us if litigating acquitted conduct!
- Sign up for SRC office hours for any other issues
- Be on the lookout for possible retroactivity + new proposed amendments
- Utilize SRC Resources
- Share intel or ideas with SRC Liaison for your district

Questions

?

?

Answers

?