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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CASSIE WILL-DARNALL, Defendant.	**Case No.:** CR 24–00292 PCP **DEFENDANT'S SUPPLEMENTAL BRIEFING** **Court:** Courtroom 8, 4th Floor

INTRODUCTION

On September 4, 2025, the Court held a sentencing hearing in this matter and heard argument regarding the applicable Sentencing Guidelines. At that hearing, the defense requested leave to submit supplemental briefing to address issues raised by the Court. The tension between the Ex Post Facto Clause and the 2024 Guidelines arises from two amendments in the 2024 Manual: Amendment 827, which disadvantages Ms. Will-Darnall by foreclosing any argument, consistent with *Kisor v. Wilkie*, that the Court may not rely on intended loss, and Amendment 821, which benefits her by authorizing a two-level reduction for zero-point offenders. This conflict presents a novel issue. For these reasons, Ms. Will-Darnall respectfully submits this supplemental memorandum in support of her prior sentencing submission (ECF No. 84), to address the following:

I. The Court Must Apply the 2018 Guidelines in Effect at the Time of the Offense Because Using the 2024 Manual Violates the Ex Post Facto Clause

In accord with 18 U.S.C. § 3553(a)(4)(A)(i) the Court must apply the Guidelines in effect on the date the defendant is sentenced, unless doing so would violate the Ex Post Facto Clause of the United States Constitution; in that circumstance, the Court must apply the Guidelines in effect on the date the offense was committed.[1] *Peugh v. United States*, 569 U.S. 530, 537–38 (2013); U.S.S.G. §§ 1B1.11(a), (b)(1). Ms. Will-Darnall stands convicted of an offense that took place between March 31, 2020, and March 1, 2021. PSR ¶31; *see also* Information ECF Dkt. 1. At the prior sentencing hearing, the government argued that the 2018 Guidelines Manual applies and that Amendment 827 is a clarifying amendment that therefore applies to earlier versions of the Guidelines. The defense will address these points in turn.

As to the applicable Guidelines Manual, upon further consideration, the government is correct that the 2018 Guidelines Manual applies; however, the relevant provisions of § 2B1.1 are identical, and thus this does not alter the *Kisor v. Wilkie* analysis or the Ex Post Facto considerations. As to the government's contention that Amendment 827 is a clarifying amendment that applies retroactively, that analysis is incorrect and misses the point. For purposes of the Ex Post Facto Clause, it does not matter whether a Guidelines amendment is characterized as clarifying or substantive. *See United States v. Lopez-Solis*, 447 F.3d 1201, 1204 (9th Cir. 2006) ("Typically, we apply clarifying but not substantive amendments retroactively. We cannot do so if retroactive application would violate the Ex Post Facto Clause, however.").[2] At bottom, if applying an amendment violates the Ex Post Facto Clause, the Court may not apply it to sentence Ms. Will-Darnall, regardless of whether it is labeled clarifying or substantive.

As to the implications of applying Amendment 827, the Ex Post Facto Clause prohibits, inter alia, laws that "make more burdensome the punishment for a crime, after its commission." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); see also *Peugh v. United States*, 569 U.S. 530, 538 (2013)

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[1] Upon further consideration of the arguments in ECF 84, the defense respectfully withdraws its request that the Court apply the 2024 Guidelines to afford Ms. Will-Darnall the benefit of § 4C1.1 (zero-point offender), should the Court decline to limit loss to actual loss under *Kisor v. Wilkie* and grant a zero-point offender variance under the 2018 Guidelines.

[2] Moreover, Ammendment 827 is not a clarifying ammenment because it amended the text of §2B1.1

(citing *Calder v. Bull*, 3 U.S. 386 (1798)); *Fleming v. Oregon Bd. of Parole*, 998 F.2d 721, 723 (9th Cir. 1993). There are two elements to determine whether a law violates the Ex Post Facto Clause: (1) the law must be retrospective, that is, it must apply to events occurring before its enactment, and (2) it must disadvantage the offender affected by it. *Fleming*, 998 F.2d at 723 (citing *Miller v. Florida*, 482 U.S. 423 (1987)). Sentencing Guideline amendments, like Amendment 827 at issue here, are considered "laws" for purposes of Ex Post Facto analysis. *See Peugh*, 569 U.S. at 544. In *Peugh*, the Supreme Court held that applying a later version of the Sentencing Guidelines that results in a higher advisory range than the Guidelines in effect at the time of the offense violates the Ex Post Facto Clause, even though the Guidelines are advisory after *Booker*. *Id.* at 544. This principle is grounded in the most basic notions of fairness. *Id.*

As applied here, Ms. Will-Darnall's offense conduct ended in March 2021. Amendment 827 was adopted on November 1, 2023, more than two years after her offense. The Ex Post Facto Clause squarely prohibits applying that amendment because it retroactively increases her punishment. The 2018 Guidelines contained no textual definition of "loss," leaving room for this Court, consistent with *Kisor v. Wilkie*, to consider her argument that "loss" is limited to actual loss. By contrast, the 2023 Guidelines remove both the argument and the Court's discretion by defining loss to include intended loss. That change disadvantages Ms. Will-Darnall because it forecloses the possibility of a lower advisory range based on actual loss and mandates a harsher standard.[3] The Ninth Circuit has long recognized that sentencing courts may not apply a later, more "onerous" version of the Guidelines to earlier conduct. *United States v. Johns*, 5 F.3d 1267, 1272 (9th Cir. 1993)[4]. Amendment 827 thus operates to Ms. Will-Darnall's detriment and cannot be applied.

The government argues that the availability of § 4C1.1's two-level reduction for zero-point offenders renders it a "wash" whether the Court applies the 2018 Guidelines or the 2023 Guidelines. That contention misses the mark. The Ex Post Facto Clause analysis provides no consideration of

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[3] The government contends that applying the 2018 Guidelines Manual requires deference to the commentary defining "loss" as the greater of actual or intended loss. *See* Gov't Sent. Memo at 7:7–8. Post-*Kisor v. Wilkie*, that is incorrect. *Kisor* governs the judicial standard of review regardless of the Guidelines' date. *See, e.g., United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023) (applying *Kisor* analysis to an earlier version of the Guidelines).

whether later amendments contain offsetting provisions, but rather whether application of a later manual increases the risk of a harsher sentence. *See Peugh*. The addition of § 4C1.1 does not cure the constitutional defect created by Amendment 827, which eliminates Ms. Will-Darnall's ability to argue for a lower sentence based on actual loss. *Fleming* is instructive on this point. There, the State made a similar argument that was rejected. The panel cited approvingly *Miller v. Florida*, 482 U.S. 423 (1987)(overruled in part on other grounds), where the Supreme Court rejected precisely this reasoning. In *Flemming*, the Ninth Circuit applied *Weaver v. Graham*, 450 U.S. 24 (1981) (holding that new discretionary opportunities could not "offset" the loss of automatic credits), and rejected the State's offset argument, making clear that a disadvantageous change to one provision cannot be neutralized by possible favorable treatment elsewhere. *Id.* at 727. The Court in *Miller* similarly rejected this reasoning, explaining that ameliorative provisions do not neutralize the constitutional prohibition against retroactively applying a law that increases punishment, even if the sentence imposed under the new law was not more onerous. *Id.* at 430–33. The Ex Post Facto Clause looks to whether the new law creates a significant risk of increased punishment, not whether it also contains offsetting benefits. Accordingly, application of the 2024 Guidelines would violate the Ex Post Facto Clause.

II. Ms. Will-Darnall is a zero-point offender, and fundamental fairness warrants a two-level variance to reflect that status, because applying the 2024 Guidelines Manual containing § 4C1.1 would violate the Ex Post Facto Clause

Ex Post Facto concerns further support a variance, as Ms. Will-Darnall is a zero-point offender whose status warrants the leniency codified in § 4C1.1, and it is uncontested that she meets its eligibility requirements. As discussed, the Ex Post Facto Clause precludes the Court from applying the 2023 Guidelines Manual. The conflict between Amendments 821 and 827 has nothing to do with Ms. Will-Darnall's conduct and should not subject her to harsher treatment, particularly where it is undisputed that she qualifies as a zero-point offender. The tension between Amendment 827 and the Ex Post Facto Clause, and the resulting unavailability of a § 4C1.1 departure, raises concerns of fundamental fairness, especially since it has nothing to do with Ms. Will-Darnall's conduct. Amendment 821 was adopted to reflect the Commission's data showing that true first-time offenders are far less likely to reoffend and should be treated more leniently. Ms. Will-Darnall plainly qualifies.

Yet because Amendment 827 was adopted at the same time, and retroactively redefined "loss" to her detriment, she is denied the benefit of § 4C1.1 even though her offense ended more than two years earlier. Nothing about the nature and circumstances of the offense justifies her harsher treatment. To the contrary, the disparity arises solely from the bad timing of two unrelated amendments. In these circumstances, fundamental fairness and the sentencing purposes set forth in § 3553(a) strongly support granting Ms. Will-Darnall a two-level variance to reflect her zero-point offender status.

Amendment 821 became effective November 1, 2023, and was made retroactive effective February 1, 2024. Thus, even defendants sentenced before November 1, 2023, may seek reductions under 18 U.S.C. § 3582(c)(2). Anticipating this change, district courts granted variances in recognition of zero-point status. *See, e.g.*, *United States v. Cora-Alicea*, 100 F.4th 478 (3d Cir. 2024) (affirming downward variance expressly based on zero-point status); *United States v. Osemwengie*, No. 4:22-cr-00198 (S.D. Tex. August 5, 2025) (variance granted on the same basis).

Moreover, § 4C1.1 merely codified what courts had already recognized: true first-time offenders present a markedly lower risk of recidivism and warrant more lenient treatment under § 3553(a). Even before the formal codification, judges routinely recognized the lower recidivism risk of true first-time offenders. They often granted downward variances under § 3553(a) based on zero criminal-history points, particularly post-*Booker*. These variances reflected an understanding that zero-point offenders were empirically distinct from those with even minimal criminal histories. Long before the Sentencing Commission codified the zero-point offender reduction in § 4C1.1, district courts recognized that true first offenders warranted more lenient treatment under § 3553(a). *See, e.g.*, *United States v. Cabrera*, 567 F. Supp. 2d 271, 279 (D. Mass. 2008) (recognizing that "true first offenders" are statistically the least likely to reoffend); *United States v. Baird*, 580 F. Supp. 2d 889, 894–95 (D. Neb. 2008) (granting variance in part due to no prior criminal history); *United States v. Shipley*, 560 F. Supp. 2d 739, 745–46 (S.D. Iowa 2008) (same). The empirical data underlying Amendment 821 confirms that zero-point offenders like Ms. Will-Darnall are statistically far less likely to reoffend. Because they pose little risk of recidivism, longer sentences are unnecessary for deterrence, and fairness and proportionality weigh strongly in favor of a variance here.

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Respectfully submitted,

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