COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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Honorable Edmond E. Chang, Chair

March 6, 2026

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to comment on the proposed Guideline amendments for the 2025-2026 amendment cycle.

Within the Judicial Conference, the Committee oversees the federal probation and pretrial services system and reviews criminal law administration, and in both roles comments on proposed Sentencing Commission amendments to support effective probation and pretrial services operations and the fair, efficient administration of criminal law. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including

proposals that would increase the flexibility of the Guidelines."[1] The Judicial Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] In the past, the Committee has presented testimony and submitted comments supporting Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

These comments address the proposed amendments promulgated on January 30, 2026. On February 10, 2026, the Committee submitted a comment letter regarding the first set of amendments for this cycle, promulgated on December 12, 2025.

Discussion

The second set of amendments proposed by the Commission in its 2025-2026 cycle relate to a variety of substantive and procedural aspects of the sentencing guidelines. Where we oppose or disfavor certain options or proposals, we believe that those proposals would, among other problems identified below, complicate rather than simplify the guidelines, resulting in onerous and unnecessary sentencing litigation, or would otherwise undermine the goals of a fair and efficient system. In summary:

(1) The Committee generally supports the proposed Introductory Commentary, but opposes the addition of a new guideline provision (proposed §5A1.1).

(2) The Committee opposes the proposed expansion of Zones B and C of the Sentencing Table but encourages the Commission to examine whether data supports a more limited adjustment of zones.

(3) The Committee supports certain parts of the Career Offender amendment, and appreciates the Commission's continued efforts to reduce the Guidelines Manual's reliance on the categorical approach. Specifically, the Committee supports: Crime of Violence Option 2 (with some caveats, as discussed below); some version of Controlled Substance Offense Option 2 (in conjunction with the Circuit Conflicts amendment; and leaving §2K2.1 unchanged so that any changes made to §4B1.2 carry over to §2K2.1 (i.e., opposing both Firearms Options 1 and 2).

(4) The Committee supports the Circuit Conflicts amendment, preferring Option 2 for each of the conflicts.

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[1] JCUS-SEP 1990, p.69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

(5) The Committee generally supports the Human Smuggling amendment, and suggests some additional language.

1. Sentencing Options

According to the Commission's January 2026 synopsis, the proposals on Sentencing Options aim to provide courts with additional guidance on selecting the appropriate sentencing options (e.g., imprisonment, probation, or fine). The proposed Introductory Commentary states that the Commission intends for the proposed amendment "to support the court's 'full exercise of informed discretion in tailoring sentences to the circumstances of individual cases.' S. Rep. No. 225, 98th Cong., 1st Sess. 91 (1983)."

The Committee appreciates the Commission's efforts to highlight the statutorily available alternatives to incarceration and the court's discretion to tailor sentences to individual circumstances. To that end, as discussed in detail below, the Committee supports Part A's proposed addition of new Introductory Commentary to Chapter 5 but opposes the addition of a new guideline or other provision setting out "steps" that courts would be required to follow in determining what type of sentence to impose. The Committee also strongly opposes Part B of the proposal, which would expand Zones B and C of the Sentencing Table—up to 16 offense levels higher than the current levels—because there is no sound sentencing policy or empirical evidence to support the specific determination of the need to expand the zones or where new zones should be set.[3]

Sentencing Options Part A: Changes to Part A of Chapter 5

1. Addition of New Introductory Commentary

The Committee understands the importance of ensuring the Guidelines are not interpreted or applied in such a way that a term of imprisonment is the automatic or presumed starting point for the sentencing process. The Committee therefore supports the proposal to add new commentary that would "further underscore the importance of" the initial determination of sentence type and highlight the range of statutorily available sentencing options, so long as the new language is accurate and balanced.

According to data provided by the Administrative Office of the U.S. Courts (AO), the number of federal defendants serving a sentence of probation (in lieu of incarceration) has consistently declined over the past 15 years. Specifically, AO data shows that the number of individuals serving straight probation sentences has decreased 50% since 2011 (from 22,692 individuals serving probation sentences in 2011 to 11,281 individuals serving probation

[3] Although the Committee opposes the extensive zone expansions, largely because the proposal does not appear to be evidence-based, the Committee could support a smaller zone adjustment if there is an empirical basis to do so, as explained in more detail below.

sentences in 2025).[4]

At the same time, when judges are selecting probation as the appropriate sentence, the data shows that judges are generally doing so successfully when success is measured as completion of probation without revocation. According to the AO's data for FY 2025, individuals sentenced to straight probation had a low rate of revocation, while on release, specifically around 11%.[5] This rate of success generally suggests that judges can accurately predict when a defendant will succeed on probation.

Accordingly, the Committee agrees that it could be helpful, especially for newer judges, to add introductory commentary to highlight the sentencing options that are statutorily available. That new language, as the proposed commentary states, the "Commission is mindful that Congress decided against establishing a presumption in favor of any particular sentence type." For that reason, the Committee recommends that the commentary be more balanced by hewing closely to the statutory language itself and, where it paraphrases statutory language or the legislative history of the Sentencing Reform Act, include the entirety of the pertinent sentencing principles.

For example, the bracketed language in the second paragraph of the proposed introductory commentary should be adjusted to reflect not only the needs of the defendant but the other purposes of sentencing set out in Section 3553(a)(2). The bracketed language begins by paraphrasing *the Commission's* duty under 28 U.S.C. § 991(b)(1)(c) to draft policies and practices "that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." It then states that courts "should consider the resources available to address the defendant's needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option." In addition to the needs of the defendant, the language here – and throughout the new commentary – should also reflect the other factors that sentencing courts are statutorily required to consider at this (and every) stage under Section 3353(a), including the nature and circumstances of the offense and the history and characteristics of the defendant, the seriousness of the offense, just punishment, deterrence, and public safety.

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[4] *See* Table E-2 *Federal Probation System – Persons Under Supervision as of September 30, 2011* at https://www.uscourts.gov/sites/default/files/statistics_import_dir/E02Sep11.pdf and Table E-2 *Federal Probation System – Persons Under Supervision as of September 30, 2025* at https://www.uscourts.gov/sites/default/files/document/jb_e2_0930.2025.pdf. It is worth noting that the reduction in probationary sentences since 2011 is not necessarily, by itself, a reflection that there should have been more probation sentences imposed since that time. The reduction could reflect other circumstances in federal prosecutions, including differences in charging decisions or differences in defendants' criminal history or characteristics. Absent empirical evidence to the contrary, it is not clear that a change in guidelines is needed to urge judges to impose significantly more probationary sentences.

[5] Data Table 7-A Federal Probation System – Post-Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2025 at https://www.uscourts.gov/sites/default/files/document/jb_e7a_0930.2025.pdf. Defendants who were serving supervised release, rather than probation, had a revocation rate of 37%.

In addition, the Committee recommends that the new commentary include 28 U.S.C. § 994(j) in its entirety. That subsection provides general guidance not only when imprisonment is inappropriate—but also when it *is* appropriate:

> The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

2. Addition of new guideline provision, §5A1.1 (Determination of Type of Sentence)

The Committee opposes the proposal to add a new guideline that, among other things, sets out instructions that sentencing courts would be required to follow before determining and imposing a defendant's sentence. The language set out in this part of the proposal, which would add another two pages to Chapter 5, is repetitive, unnecessary, and could result in resource-intensive litigation.

First, the proposed provisions are likely to complicate the sentencing process significantly, adding unnecessary work for probation offices and sentencing courts, and could lead to excessive litigation. The synopsis refers to subsection (b) of the proposed guideline as "instructions" to the court and "steps necessary for the court to determine an appropriate sentence." But, whatever the description of the new guideline might be, the proposal appears to add new, formal step-by-step requirements for sentencing courts, which might be interpreted to require parties and courts to rigidly follow, inviting litigation over each formal step. First, the proposed provisions are likely to complicate the sentencing process significantly, adding unnecessary work for probation offices and sentencing courts, and could lead to excessive litigation. The synopsis refers to subsection (b) of the proposed guideline as "instructions" to the court and "steps necessary for the court to determine an appropriate sentence." But, whatever the description of the new guideline might be, the proposal appears to add new, formal step-by-step requirements for sentencing courts, which might be interpreted to require parties and courts to rigidly follow, inviting litigation over each formal step. For example, given that proposed 5A1.1(a)(1)-(4) sets forth each of Zones A, B, C, and D, would sentencing courts be required to go one-by-one to explicitly consider and then reject or accept — perhaps with written findings — each of the Zones on the record? That would unnecessarily complicate every sentencing hearing. Most courts already generally consider the mix of options, as discussed below, so adding this formal step would likely lead to unnecessary litigation when the goal for the proposal is already achieved.

Second, the provisions proposed here are unnecessary because they overlap with the provisions laid out in Part D of the Presentence Investigation Report and repeated throughout the guidelines themselves, which courts are already required to consider. For example, the "new" explanation of zones proposed as §5A1.1(a) and (b) is currently set out on the very next pages of the Guidelines Manual at §§5B1.1 and 5C1.1; the proposed "new" application note about a fine-only sentence is set out at §5C1.1 (App. Note 2), and verbatim at §5E1.2 (App. Note 1); and the "new" language at proposed subsection (d) requiring consideration of the §3553(a) factors is

discussed throughout Chapter Five, Chapter One, and elsewhere in the guidelines. Repeating these provisions in a new guideline would complicate the Guidelines Manual and could lead to unnecessary litigation.

In response to the first Issue for Comment, if the Commission were to promulgate only the new introductory commentary and not the new guideline, the Committee believes it should not incorporate the language of the new guideline into the commentary for all the reasons discussed above. If the Commission wishes to add a reference that is not otherwise provided in this chapter, without the unintended consequence of signaling new issues for litigation, it would be better to include it in the introductory commentary.

The second Issue for Comment asks about factors the proposed new guideline should include for courts to consider in determining the appropriate sentencing option; it lists seven factors (from the Commission's establishment statute and from Section 3553) and asks if there are other factors that should be included. Similarly, the third Issue for Comment asks whether the proposed guideline should reference the Section 3553(a)(2) factors and whether "referencing or incorporating these statutory factors into the proposed guideline inadvertently create a procedural requirement that could be subject to litigation." The Committee believes that the addition of the new guideline as well as the inclusion of a list of specific factors could create an unneeded procedural requirement, with little or no benefit and subject to the likelihood of substantial litigation.

Sentencing Options Part B: Expansion of Zones B and C of the Sentencing Table

The Committee has reviewed the Commission's February Public Data Briefing and strongly opposes the proposed expansion of Zones B and C because there does not appear to be any empirical evidence or other sentencing policy to support where the new levels would be set.

The proposed amendment would broaden the zones substantially. For Criminal History Category (CHC) I, for example, Zone B would be expanded by 12 Offense Levels, so that a probation sentence would be available for defendants with a guideline range up to 57 months (whereas that ceiling is currently set at 14 months). The proposal would expand Zone C by 16 Offense Levels to include defendants with a guideline range up to 108 months (the current ceiling is 18 months) for those in CHC I. The drastic expansions proposed would also cover defendants with higher CHCs.

In reviewing the data provided by the Commission in its Data Briefing, it appears that the Commission was focused on rearrest rates of those defendants who received a non-prison sentence in 2015. *See* Slide 9, *Rearrest Rates for Individuals with Non-Imprisonment Sentences by Cell on the Sentencing Table*. But a review of those rates seems to show that there is no correlation between Offense Level and rate of rearrest, even for individuals in Zone A. It is true that, given the myriad circumstances involved in individualized sentencing, and the snapshot nature of the data (only those defendants released in 2015), it would be unreasonable to expect that every increase in offense level was accompanied by an increase in rearrest rate. But the up-and-down variation in rearrest rate based on offense level within a CHC suggests that is not a stable basis on which to alter the Zones. Indeed, if rearrest rates were the only consideration,

then the data would arguably support *reducing* Zones B and C rather than expanding them for individuals in CHC II and up. It is also not publicly known from the Data Briefing the number of persons sentenced to non-imprisonment in each of the cells of the Sentencing Table in Slide 9 of the Data Briefing. If the numbers of defendants at the higher offense levels is low, then that would counsel hesitation in relying on those rearrest rates in changing the Zones.

Even if the data showed a correlation between the proposed zone expansions, offense levels, and risk of recidivism (related to the statutory sentencing factors of protecting the public and specific deterrence), by being tied to Offense Level, the zones also account in some manner for the seriousness of the offense. An individual with a more serious criminal history who falls into current Zone B or C does so because the offense is – on the scale of federal offenses captured by the Sentencing Table – a relatively minor one. Similarly, an individual may have committed a relatively serious crime or have aggravating factors but not present as a relatively severe recidivism risk, like an individual in CHC I with an Offense Level of 23 (the highest level at the top of proposed Zone B) or an Offense Level of 29 (the highest level at the top of proposed Zone C).[6] Put another way, the proposal does not appear to fully account for the seriousness of the offense, particularly for CHC I offenders.

Rather than the drastic expansion of zones proposed in this Part B, the Commission should consider a more limited change in the Zones or other means of encouraging consideration of non-incarceration sentences, where appropriate. One potential foundation for a re-examination would be to analyze the data on the sentence types *actually imposed* by judges in recent years. For example, if many defendants in current Zone C are already receiving straight probation sentences without a split prison sentence, and doing so successfully (low revocation and rearrest rates), then perhaps Zone B could be expanded to fit the actual sentencing practice of judges. Similarly, in Zone B cases, does Commission data show that courts are following the Zone B formula or instead imposing probation without any form of confinement? If the answer is that straight probation is the predominant sentence, then that could justify expanding Zone A to include those offense levels and CHCs.

To conclude, the Committee's primary concern is the lack of empirical support for the expanded levels. However, in the Committee's role in overseeing probation office resources, it is worth noting that a substantial expansion of the zones would raise workload concerns that probation offices would need additional resources to handle. While straight probation cases do not particularly implicate probation office workload concerns, sentences of probation (or supervised release) with an alternative-to-incarceration component are extremely resource intensive. Zone C sentences, in particular, require a substantial amount of time when they have an alternative-to-incarceration component, especially because individuals falling into the new Zone C could end up serving all or nearly all of their term of probation or supervised release on

[6] For example, an individual in CHC I who commits a fraud with a million-dollar loss, causes substantial financial hardship to a victim, and used sophisticated means would have a TOL of 22 (with a 3-level reduction under §3E1.1) and thus fall in new Zone B. An accountant who aids clients in committing tax fraud with a loss of $20 million using sophisticated means would have a TOL of 27 after a 3-level §3E1.1 reduction, and thus fall in new Zone C. An individual who commits bank robbery by brandishing a firearm and physically restraining a teller would have a TOL of 26 after a 3-level §3E1.1 reduction, falling in new Zone C.

home confinement with location monitoring.

2. Career Offender

This proposed amendment aims to eliminate use of the categorical approach for purposes of the Career Offender guidelines (USSG §§4B1.1 and 4B1.2) and other guidelines that reference these provisions. As the Commission is well aware, the categorical approach has long been a source of burdensome litigation at both the district and appellate level, and its application sometimes leads to inconsistent and counter-intuitive results. The proposed amendment would also eliminate the current enumerated-offenses provision, which relies on a generic-offense analysis. The Committee supports the Commission's efforts to simplify the guidelines by eliminating these two complex approaches. As detailed below, the Committee supports some, but not all, of the proposed changes to the Career Offender guideline.

Changes Relating to "Crime of Violence"

First, the amendment would place all provisions relating to the "crime of violence" definition in §4B1.2(a), including the reference to inchoate offenses. The Committee supports this change, as it aids in clarity.

The amendment then strikes the "force clause" currently in §4B1.2(a)(1) and the enumerated offenses in §4B1.2(a)(2), replacing them with a bifurcated approach for federal and state offenses. For federal offenses, a list of qualifying statutes is the primary determinant of whether an offense is a "crime of violence," with a secondary provision that would capture any other federal felony offense "that involves the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." The Committee supports this part of the Career Offender amendment, because it provides a straightforward approach for determining which federal offenses qualify as a crime of violence.

For state offenses, the amendment includes two options. Option 1 would set forth a list of presumptively violent offenses, and the determination of whether an offense is a "crime of violence" would turn solely on whether the label for the state offense matches the label of one of these listed offenses. The Committee opposes Option 1. There is enormous variation in the labels that state laws apply to criminal offenses, and such a list is likely to be simultaneously over- and under-inclusive of the types of conduct that should result in classification as a crime of violence. It would likely also result in litigation over state offenses where a state offense includes part of a listed label (for example, if a state has a single statute covering all forms of manslaughter, with differing subsections or degrees to denote conduct that would consist of either voluntary or involuntary manslaughter).

Option 2 appears very close to hitting the mark for a workable definition covering state offenses. As the Committee understands this provision, it would fully eliminate the generic-offense analysis and would largely eliminate – or at least remove the most difficult aspects of – the categorical and modified categorical approaches. Specifically, it would include any state offense that *could* be included under a listed federal offense (minus the jurisdictional component), even if the state statute is broader than the federal statute (that is, the offense in question could also be committed in ways that would not match the federal statute). However,

the Committee has some concern that the proposed guideline text may not clearly resolve the overbreadth issue, as described in the Commission's explanation of the amendment. The number of bracketed-language alternatives poses an obstacle to fully assess the impact of the change. If the final version allows consideration of all elements *and* all means for the state statute and does not exclude a state statute for being broader than the comparison federal statute, the amendment would be superior to the current version.

Next, the amendment sets forth an exclusion from the offenses that would be included as crimes of violence. The exclusion separates out any offense where the sentence imposed does not involve certain sentence types or lengths of sentences. If a sentence-length requirement is adopted, the Committee supports the use of "sentence imposed," rather than length of time "served." The sentence-imposed definition would maintain consistency with the criminal history rules in §4A1.1. It also would avoid what could be extensive litigation over whether defendants would still be considered to be "serving" a sentence if they are released from full custody but are still under a criminal justice sentence, such as part of parole, supervised release, or other state nuances like work release or different forms of pre-release custody. And even determining the specific release date of defendants from state custody can present challenges in obtaining pertinent and accurate records. Presumably, in the first instance, the Probation Officer would be required to obtain the records, which poses additional workload challenges.

Indeed, even as to excluding certain state offenses based on the sentence "imposed," some Committee members expressed concerns about jurisdictional differences (even within the same state) in the lengths of sentences imposed for the same offense. In some states, the length of the sentence imposed varies from county to county, resulting in low sentences for serious crimes in some counties, while other counties impose significant sentences for the same crimes. Having said that, the Committee also recognizes that this provision is intended to exclude less serious versions of otherwise-included crimes, and generally speaking the state sentencing court is in the best position to consider the relevant circumstances at the time of sentencing.

Finally, the amendment includes certain limitations by which a presumptive crime of violence under the proposed definition can nonetheless be removed from consideration as a crime of violence, with the burden of proof placed on the defendant. The placement of the burden of proof is crucial to the workability of the limitations provision. The Committee believes that imposing the burden for the limitations on the defendant would likely minimize what might otherwise be a significant potential for litigation over the limiting provisions based on bodily injury or state of mind. The defendant-bearing burden would serve as a gateway to narrow the litigation over the limitations provisions to those that present genuine disputes, because defendants who unreasonably invoke a limitation could jeopardize the mitigation argument that the defendant has fully acknowledged his past criminal history (and could even trigger an increase for obstruction of justice under §3C1.1, and in turn jeopardize acceptance of responsibility under §3E1.1). Having said that, the Committee does oppose the limitation based on the length of time "served" on the sentence. As explained above, litigation over the legal definition of what it means, from state to state, to "serve" time could be extensive and difficult to resolve.

Changes Relating to "Controlled Substance Offense"

The proposed amendment would make several changes to the definition of "controlled substance offense" for purposes of the Career Offender guideline. First, it would move all provisions relating to this definition, including the inchoate offense provision, into §4B1.2(b). The Committee supports this change.

Next, it sets forth two options for limiting the scope of the controlled substance offense definition. Option 1 would exclude all state drug offenses, limiting application of the Career Offender guideline to certain federal drug offenses. The Committee opposes this option. While it makes application very straightforward, there does not appear to be a clear reason or empirical basis for treating federal drug offenders as posing a risk of recidivism while excluding state offenders convicted of equally serious drug crimes.

Option 2 maintains the current definition but would limit the scope by setting a minimum sentence length. The Committee believes that some version of Option 2, in conjunction with the Circuit Conflicts amendment, may solve many of the difficulties currently posed by the controlled substance offense definition. All three of the Suboptions presented would require that the prior conviction count separately under §4A1.1. The three Suboptions then impose minimum sentence lengths in different ways: Suboption 2A limits application to convictions that receive 3 points (thus, a sentence imposed of at least 13 months); Suboption 2A limits application to convictions where the sentence imposed meets a certain amount (with brackets for 5 years, 3 years, and 1 year); and Suboption 2C limits applications to those where the time "served" meets a certain amount. The Committee opposes Suboption 2C, as the availability of documents showing the amount of time served varies widely by jurisdiction, and because it raises the issue of what forms of time (e.g., halfway house) count toward time served, as explained earlier. Suboptions 2A and 2B, which rely on the sentence imposed, maintain consistency with the criminal history calculation rules in §4A1.1. However, the Committee once again urges the Commission to undertake a study of the rearrest rates for defendants with prior state drug convictions based on the length of the sentences imposed. That study would assist the Commission in picking between Suboptions 2A and 2B.

Changes to Other Guidelines

The final part of the Career Offender amendment addresses the interaction between the Career Offender guideline and the firearms guideline, §2K2.1. The first possibility is that the Commission makes no changes to §2K2.1, and thus any changes made to the Career Offender definitions as part of this amendment would carry over to §2K2.1 by way of the current reference. The Committee strongly supports this approach. It is logical to have one consistent definition for these terms throughout the Guidelines Manual. Firearms Option 1 would preserve the current definitions by incorporating the current definitions directly into §2K2.1. The Committee strongly opposes this option; it makes little sense to require the courts, parties, and probation officers to deal with two differing guidelines-based definitions of the same terms. It would also have the effect of increasing difficulty of legal research, as the case law for the same terms but under different guideline provisions would begin to diverge due to the differing

definitions. Firearms Option 2 would separate §2K2.1 from the Career Offender guideline, instead relying on statutory definitions of "serious drug offense" and "violent felony" while (oddly) still retaining the use of the terms "controlled substance offense" and "crime of violence." The Committee opposes this option but finds it preferable to Firearms Option 1. The Committee understands that a statutory directive as to §2K2.1 might require closer adherence to the statutory definitions. But the introduction of those terms would lead to continued litigation over the very issues the Commission seeks to resolve through the Career Offender and Circuit Conflicts amendments.

3. Circuit Conflicts

The Committee appreciates the Commission's efforts to resolve ongoing litigation over the definition of "controlled substance offense," which has resulted in disparate application of the Career Offender guideline and certain §2K2.1 enhancements.

The first part of the Circuit Conflicts amendment addresses which substances are included in determining whether a prior offense is a "controlled substance offense." As pointed out in the synopsis, Justices Sotomayor and Barrett have explicitly called on the Commission to address this conflict. The amendment proposes two options. Option 1 would limit the definition to substances specified in the federal Controlled Substances Act (CSA) and is consistent with the minority view in the circuit split. Option 2 would cover any controlled substance included under the CSA or that is otherwise controlled by state law and is consistent with the majority view in the circuit split. The Committee supports Option 2, as it aligns with the majority view and better reflects the real-world concerns of drug trafficking. For example, under Option 1, a court would have to ignore the fact that a person was convicted of distributing a CSA-covered substance such as heroin or methamphetamine, if the state law also included other (often obscure or rarely prosecuted) drugs not covered by the CSA. Option 2 avoids the factual absurdity of these situations and ensures that defendants convicted of similar conduct are treated similarly. In the rare instance where the underlying conviction involved a substance not covered under the CSA, the court could vary downward if Career Offender (or a §2K2.1 enhancement) overstates the seriousness of the prior offense.

The second part of the Circuit Conflicts amendment addresses which temporal version of the applicable drug schedule (state or federal) should be used to determine whether a prior offense qualifies as a controlled substance offense. Option 1 would rely on the schedule in place at the time of sentencing for the instant federal offense, adopting the minority approach. Option 2 would rely on the schedule in place at the time of the prior conviction, adopting the majority approach. The Committee supports Option 2, as it reflects the majority position and is sensible in that it is based on whether the conduct was a crime at the time it was committed. The Committee notes that in certain circumstances – such as where marijuana was illegal at the time of the prior conviction but has since been legalized at the state level – the court can vary downward if warranted.

Finally, the amendment would make corresponding changes to the definition of "drug trafficking offense" in the Commentary to §2L1.2. The Committee supports this part of the amendment, as it ensures consistency among guideline provisions.

4. Human Smuggling

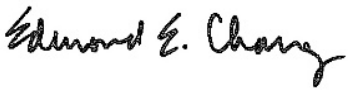
The proposed Human Smuggling amendment would expand the tiers in §2L1.1(b)(2) for the number of persons smuggled, providing better gradation of the impact of the offense. It also adds a new 2-level increase for certain forms of concealing or carrying persons in a vehicle or vessel, and adds provisions expressly covering smuggling involving sexual offenses (including a possible new 2-level enhancement and a possible new cross reference), and expands the current death or injury provision to cover situations involving death or injury to more than one person.

The Committee is generally supportive of the Commission's efforts to more effectively address the seriousness of human smuggling offenses and provide greater nuance to the factors considered in those cases. The Committee suggests only that the Commission broaden the proposed language on concealing persons in a "trunk or engine compartment" as follows: "concealing persons in the trunk or engine compartment of a motor vehicle, or in any other part of a motor vehicle or vessel that is similarly confining or is not reasonably designed for human transportation."

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this set of proposed amendments for the 2025–2026 amendment cycle. The Committee members look forward to working with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,



Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 2, 2026

Hon. Carlton W. Reeves
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RE: Practitioners Advisory Group Comment on Proposed Amendments to the Sentencing Guidelines, January 30, 2026

Dear Judge Reeves,

The Practitioners Advisory Group ("PAG") submits these comments to the Commission's proposed amendments regarding (1) sentencing options, (2) the career offender enhancement, (3) certain circuit splits affecting § 4B1.2, and (4) human smuggling.

With respect to sentencing options, the PAG is grateful to the Commission for proposing the revised introductory language making clear judges' non-carceral options and the expansion of Zones B and C. The proposals are welcome and would better align the Guidelines with the Sentencing Reform Act and the realities of current sentencing practices. That said, the PAG suggests further refinement to the introductory language and recommends the elimination of zones altogether. The zone-based structure incorrectly suggests non-statutory limits on judicial discretion with respect to sentencing options and is inconsistent with post-*Booker* judicial authority. In the alternative, the PAG recommends further expansions to the zones, including Zone A, and replacing the prefatory term "authorizes" in § 5A1.1(a)(1)-(4) with "recommends" to comport with the Commission's stated goal of emphasizing the options available to judges and avoid impermissibly narrowing those options.

Regarding the career offender guidelines, the PAG opposes eliminating the categorical approach for crimes of violence. That said, of the options presented for comment, the PAG supports Option 1 for both the crime of violence and controlled substance offenses. Those options provide the best hope for a simplified determination of career offender status and for narrowing the class of people subject to a provision that has been roundly criticized for its overbreadth and unjustified severity. For similar reasons, we recommend Option 1 for both circuit splits regarding the timing and scope of substances covered by § 4B1.2.

Lastly, we oppose the proposed amendments to the human smuggling guidelines as unsupported by empirical evidence or valid policy considerations.

I. Sentencing Options

The Commission seeks comment on a proposed amendment relating to sentencing options. The Commission has noted, "[t]he proposed amendment would retain the *Guideline Manual*'s zone-based structure . . . ."[1] The Commission then sets forth two non-mutually exclusive options upon which it seeks comment.[2] The PAG respectfully submits (1) that the zone-based structure is a relic of the pre-*Booker* mandatory Guidelines regime; (2) that it suggests constraints to judicial discretion that are potentially in conflict with 18 U.S.C. § 3553(a); and (3) that it conflicts with the Commission's stated goal of simplification of the Guidelines.

Accordingly, the PAG respectfully asks the Commission to eliminate the zone-based structure and to adopt: (1) the Introductory Comment set forth in part A of the proposed amendment as well as (2) the following revised version of proposed guideline § 5A1.1 that eliminates references to sentencing zones:

> § 5A1.1. Determination of Type of Sentence
>
> (a) DETERMINING THE AVAILABLE SENTENCING OPTIONS.—Determine the guideline applicable to the defendant's offense level and criminal history category in accordance with the Sentencing Table set forth in § 5A1.2 (Sentencing Table).
>
> (b) DETERMINING THE APPROPRIATE SENTENCING OPTION.—In determining the appropriate sentencing option(s), courts should consider which option(s) will best meet the purposes of sentencing and the needs of the individual defendant.
>
> (c) DETERMINING THE SENTENCE UNDER THE GUIDELINES.—Determine the length, conditions, and other aspects of the sentence by applying the provisions in this chapter.
>
> (1) If the court determines that a term of probation is appropriate, proceed to Part B (Probation) of this chapter to determine the length and conditions of any term of probation. Certain conditions of probation are addressed in further detail in Part F (Sentencing Options) of this chapter.
>
> (2) If the court determines that a term of imprisonment is appropriate, proceed to Parts C (Imprisonment) and D (Supervised Release) of this chapter to determine the length of the term of imprisonment, whether to impose a term of supervised release, and, if a term of supervised release is imposed, the length

[1] U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines ("Proposed Amendments") at 1 (Jan. 30, 2026), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.
[2] *Id.* at 1-4.

and conditions of that term. Certain conditions of supervised release are specifically addressed in further detail in Part F (Sentencing Options) of this chapter.

(3) In all cases, proceed to Part E (Restitution, Fines, Assessments, Forfeitures) to determine whether to impose restitution, fines, forfeiture, or a special assessment.

(4) If applicable, proceed to Part G (Implementing the Total Sentence of Imprisonment) to determine how to implement a sentence in a case involving multiple counts of conviction, an undischarged term of imprisonment, or an anticipated state term of imprisonment.

(d) CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).—The court shall consider the applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Any sentencing option authorized by statute may be appropriate based on the consideration of these factors.

The elimination of sentencing zones is consistent with the statutory language of 18 U.S.C. § 994(j) which provides that "[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." It is also consistent with 18 U.S.C. § 994(k)'s directive that "[t]he Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Sentencing zones, by contrast, suggest limits on the ability of sentencing courts to fashion sentences that are "sufficient, but not greater than necessary" to comply with the purposes of sentencing upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).

The original Commission expected that "continuing research, experience, and analysis [would] result in modifications and revisions to the guidelines," which is why the Commission was established "as a permanent agency to monitor sentencing practices in the federal courts."[3] The recent amendments resulting in the elimination of many departures reflected the Commission's recognition that departures had largely become obsolete in the post-*Booker* sentencing regime. So, too, are sentencing zones. And they should suffer the same fate as departures, jettisoned in favor of a recognition that, aside from statutory prohibitions, courts can—and should—consider all sentencing options no matter the offense level or criminal history category.

[3] U.S. Sent'g Comm'n, *Guidelines Manual* at ch. 1, part A (1987), *available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf.

In addition to suggesting to sentencing courts that certain types of sentences are not "authorized" when in fact courts are constrained only by 18 U.S.C. § 3553(a) and statutory sentencing limits, sentencing zones are needlessly complex. In the most recent amendment cycle, the Commission amended the Guidelines to eliminate the three-step process in favor of a two-step process that recognized the reality of post-*Booker* sentencing practice. The PAG supported this simplification initiative and respectfully submits that the elimination of sentencing zones and implementation of the Introductory Comment set forth in part A of the proposed amendment as well as the revised version of § 5A1.1 proposed above would provide clearer guidance to sentencing courts.[4]

Should the Commission retain the current sentencing zones, however, the PAG supports both parts A and B of the proposed amendment with two additional suggestions: (1) the Commission should replace "authorizes" with "recommends" in each of the proposed subsections, and (2) the Commission should expand the reach of Zone A so that the Guidelines more clearly recognize that probation often constitutes sufficient punishment, particularly for those offenders with minimal to no criminal history.

A. *Replacing "authorizes" with "recommends"*

The Commission's choice of words in § 5A1.1(a) has the potential to lead courts astray from the discretion they have exercised since *Booker*. Each subsection in § 5A1.1(a) begins with nearly identical prefatory language stating that the particular Zone "authorizes" the type of sentence described. The implication, of course, is that a sentence other than one described in that zone is unauthorized. But this flouts the Supreme Court's federal sentencing jurisprudence, which long ago rendered the Guidelines advisory.

And even if courts are not confused by the imprecise and potentially misleading language, other concerns persist. Much has been written about the anchoring effect of the Guidelines. Telling courts that particular zones "authorize" particular types of sentences may have anchoring effects on what types of sentences to impose, frustrating congressional intent.[5] The PAG recommends that "authorizes" be replaced by "recommends" in § 5A1.1(a)(1)-(4) to better comport with current sentencing law. The PAG is not alone in this recommendation, which in many ways mirrors last year's comment from the Federal Public and Community Defenders that "identified additional language in tension with the post-*Booker* advisory Guidelines system—that is, language suggesting certain Commission guidance is mandatory."[6] In support of its recommendation that the Commission amend its phrasing, the Defenders argued that "replacing language that mandates a specific sentence with permissive language is consistent with the rest of the Proposal's post-*Booker* update."[7]

[4] Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 Hofstra L. Rev. 799, 804 (2018) ("My final suggestion, one for the Commission, is simplification. Simplification is important and everybody knows that.").

[5] *See* 28 U.S.C. § 994(j) ("The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense").

[6] Letter from Federal Public and Community Defenders to U.S. Sent'g Comm'n, at 11 (Feb. 3, 2025) (commenting on Simplification of Three-Step Process), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20250212/FPD.pdf.

[7] *Id*.

B. *Expanding Zone A*

The PAG appreciates that the proposed amendments would expand the reach of Zones B and C. Doing so is a welcome recognition that alternatives to incarceration can serve the purposes of sentencing. But the PAG asks the Commission to go further still and believes that expanding Zone A is necessary to reflect contemporary sentencing practices. Probationary sentences often better comport with congressional directives in § 3553(a) and § 994(j), they save precious taxpayer funds by eliminating the cost of incarceration[8], and they can also be imposed without compromising public safety.[9]

The Commission's proposed introductory commentary highlights the groundswell of authority in recent years that has recognized that probation constitutes punishment,[10] and rightfully so. But it need not stop there. Instead, the PAG recommends an expansion of Zone A beyond the sentencing range of 0-6 months. If an offense level is thought to reflect the seriousness of the offense, there is little reason to limit probationary sentences to 0-6 months. Because of the increasing sentencing ranges for each criminal history category, offenses with uncommonly low offense levels are excluded from Zone A. The result is that Zone A is largely an illusory promise outside of the first two criminal history categories. While the PAG agrees that Zones B and C should be expanded, the Commission should do the same to Zone A to recognize, as the Supreme Court has repeatedly, that probation can be "sufficient, but not greater than necessary"[11] to achieve the purposes of sentencing.

II. Career Offender

A. *Crimes of Violence: The Categorical Approach Should Not Be Abandoned*

For decades, both courts and the Commission have recognized, as does the PAG, that the career offender guideline is one of the harshest, least empirically grounded, and most disparity-producing features of the Guidelines.[12] The career offender guideline routinely generates excessive sentences, disproportionately

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[8] *See The Public Costs of Supervision Versus Detention*, U.S. Courts (June 5, 2025), *available at* https://www.uscourts.gov/data-news/judiciary-news/2025/06/05/public-costs-supervision-versus-detention ("In fiscal year 2024, detaining a person before trial and then incarcerating them post-conviction was roughly 10 times more costly than supervising an individual in the community. . . . 'Supervision is an effective and affordable alternative to incarceration that achieves similar public safety outcomes in cases not involving violent crime,' said John Fitzgerald, who leads the national U.S. Probation and Pretrial Services office.").

[9] *See, e.g.*, Statistical Tables for the Federal Judiciary, Table E-7A, U.S. Courts (2025), *available at* https://www.uscourts.gov/data-news/data-tables/2025/06/30/statistical-tables-federal-judiciary/e-7a (showing that 66.6% of post-conviction supervision cases terminated without revocation, and of the remaining 33.4%, 22.4% terminated with only technical violations and 2.8% with minor violations); Thomas H. Cohen, *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety*, 88 Fed. Probation 3, 11 (2024) (finding that early terminations of post-conviction supervision "did not endanger community safety" and that "the post-supervision rearrest rates for violent offenses were relatively similar for the early- and regular-termed groups").

[10] *See Gall v. United States*, 552 U.S. 38, 48 (2007); *Esteras v. United States*, 606 U.S. 185, 196 (2025).

[11] *See* 18 U.S.C. § 3553(a).

[12] *See, e.g.*, U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Enhancements* 35 (2016) ("USSC Career Offender Report") (noting that judges granted departures or variances from the career offender guideline in roughly 75% of drug-based career offender cases, often sentencing close to the non-career offender drug guideline); U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 131-34 (2004) (noting that the career offender guideline produced a significant and unwarranted adverse impact on Black defendants); U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004).

impacts defendants of color, and performs poorly as a predictor of recidivism.[13] Any proposal that expands its reach, rather than narrows it, should therefore be viewed with caution. Eliminating the categorical approach as a means for determining what qualifies as a crime of violence would do exactly that.

Not only would eliminating the categorical approach unwisely expand application of the career offender guideline, but it would likely lead to the sort of litigation its critics decry. For the many years that courts and litigants have been living with the categorical approach, a comprehensive body of case law has developed guiding its application. We now know how to apply the categorical approach. Abandoning it would entail starting from scratch, necessitating a flood of new litigation over the application of whatever new approach the Commission adopts.

Still further, the categorical approach, whatever its flaws, avoids re-litigation of old cases at sentencing, which could potentially require litigants to locate stale evidence, to refresh faded recollections, and to chase down long-lost witnesses in an effort to establish the facts underlying a previous conviction. Certain portions of the proposal would engender just that in some cases—*and* it would unfairly place the burden on defendants to do so, requiring the defendant to prove that the underlying facts of old convictions do not qualify for career offender treatment.[14]

i. Abandoning the Categorical Approach Expands a Deeply Flawed Guideline

The problems with the career offender guideline do not stem from the categorical approach. They stem from the guideline itself. It is overly punitive, lacks empirical justification, and has been criticized by judges[15], Federal Defenders[16], and the Commission's own reports.[17] Even the Department of Justice ("DOJ") has recognized that the guideline "has been the subject of considerable criticism for producing overly long sentences."[18] Criticisms of occasional under-inclusiveness cannot justify replacing an elements-based framework with one that will sweep in even more defendants under an already overbroad enhancement.

If the guideline is fundamentally broken, expanding it will not fix it. The categorical approach has been tested in the courts. Over the course of thirty-five years, it has been shown to be consistent with Congress's intent as expressed in 28 U.S.C. § 994(h). It passes Constitutional muster. It has the added benefit of appropriately limiting the application of the flawed career offender guideline. For all these reasons, the PAG urges that the categorical approach should not be abandoned.

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[13] *Id.*

[14] *See, e.g.*, Proposed Amendments at 25 ("An offense of conviction shall not qualify as a 'crime of violence' under subsections (a)(1) and (a)(2) if the defendant can establish [that] . . . [d]uring the commission of the offense, the acts for which the defendant is criminally liable did not inflict, did not intend to inflict, and did not threaten to inflict . . . bodily injury to another person.").

[15] *See, e.g.*, *United States v. Newhouse*, 919 F. Supp. 2d 955, 967 (N.D. Iowa 2013) (noting "the growing chorus of federal judges who have rejected applying the Career Offender guideline in certain cases," and collecting cases).

[16] *See, e.g.*, Statement of Juval O. Scott, *Before the United States Sentencing Commission Public Hearing on Proposed Amendments to the Career Offender Guideline* (March 8, 2023) (noting that the guideline "has long been recognized – including by the Commission – to be overly punitive, to have no empirical basis, and to exacerbate racial disparities in guideline sentencing").

[17] *See generally* USSC Career Offender Report.

[18] Letter from U.S. Dep't of Just., Crim. Div., to U.S. Sent'g Comm'n, at 27 (Feb. 27, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

ii. The Categorical Approach Protects Constitutional Boundaries

For more than thirty-five years, the Supreme Court has required an elements-based method for determining predicate convictions.[19] The Court has rejected fact-based, conduct-based, and accusation-based alternatives for the same basic reasons: they create unfairness, invite re-litigation of old cases, and risk Sixth Amendment violations.[20] Congress too has consistently tied recidivist enhancements to convictions, not allegations.[21]

The Commission's proposal flips this structure on its head. In certain cases, it authorizes sentencing courts to engage in precisely the kind of mini-trials that *Taylor*, *Descamps*, and *Mathis* warned against—except with the burden on the defendant to show that the underlying facts of the prior conviction do *not* qualify. This proposal will generate exactly the "daunting" factfinding the categorical approach was designed to avoid.

Replacing a constitutionally grounded, Supreme Court-mandated framework with an untested conduct-based process would destabilize a well-settled area of law and raise serious constitutional concerns.

iii. Efficiency Cannot Trump Fairness

Ten years ago, the Commission urged Congress to reform the career offender directive because of the unjust sentences it produces.[22] This proposal would move in the opposite direction, broadening a guideline the Commission has repeatedly acknowledged is unduly severe.

While the PAG supports simplifying the Guidelines when doing so promotes fairness, jettisoning the categorical approach would do the opposite in both respects: it would make sentencing *more* complex—requiring mini-trials at sentencing and necessitating development of an entirely new body of caselaw—and it would expand the application of a guideline that is flawed and unfair.

Eliminating the categorical approach would expand an already flawed guideline, undermine decades of Supreme Court precedent, generate extensive new litigation, and increase sentencing disparities. The Commission should preserve, not discard, the categorical framework that has served as the backbone of recidivist sentencing law for over 35 years.

B. *Changes Relating To "Crime of Violence" – Option 1 Is The Best Option*

Should the Commission jettison the categorical approach, the PAG believes it should adopt the *first* of the two proposed options for determining which state offenses qualify as "crimes of violence."[23] Additionally, the PAG supports the Commission's proposed exclusions and limitations to the scope of the "crime of violence" definition.

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[19] *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016).

[20] *See, e.g.*, *Mathis*, 579 U.S. at 501.

[21] Dispensing with an elements-based test runs afoul of the plain language of § 994(h), which emphasizes actual convictions over speculative conduct.

[22] *See* USSC Career Offender Report at 3.

[23] *See* Proposed Amendments at 18–19.

The PAG recognizes that stakeholders have consistently criticized the categorical approach as too "difficult to apply."[24] Option 1 addresses this criticism head-on and would be easy for judges, practitioners, and probation officers to apply. If a state has labeled a certain offense as a crime that is included on Option 1's list, the offense presumptively qualifies as a "crime of violence"—no further analysis needed. Overbreadth issues, which will inevitably arise, are then addressed by the Commission's proposed exclusions and limitations to the "crime of violence" definition.

Option 2, on the other hand, would complicate the analysis and is antithetical to the Commission's stated desire to simplify the Guidelines.[25] Option 2 will require judges, practitioners, and probation officers to determine how a crime is defined, rather than labeled. In doing so, Option 2 invites the same kind of complaints regarding the categorical approach that have flooded the Commission's inbox over the years.

Asking a stakeholder to determine how a state crime is "defined" is not all that different than asking someone to "list" the elements of a particular state offense.[26] As such, the same problems with interpreting confusing legal terms and potentially having to utilize statutory interpretation to define such terms are going to occur. The only major difference in the two approaches is that, under Option 2 and unlike with the categorical approach, one will *not* be required to entertain whether a particular means of satisfying a required element renders an offense overbroad.[27]

The following example illustrates the PAG's concern. Under Option 2, "domestic violence" is a listed offense and is defined as "committing any act with the intent to kill or injure a spouse, intimate partner, or dating partner."[28] The term "spouse" is easy enough to define and would likely encompass many of the domestic violence offenses the Commission seeks to include in the "crime of violence" definition.
But what constitutes an "intimate partner"?[29] How intimate and how long a partnership is required? Would the answer to that question be the same in every state? And even if the term were easy to define, does

[24] Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISCOURSE 132, 135 (2019); *see also Larios v. Att'y Gen. United States*, 978 F.3d 62, 65 (3d Cir. 2020) (stating that the categorical approach "has proven difficult (and often vexing) in practice").
[25] *See* US. Sent'g Comm'n, amend. 836 (discussing "the Commission's exploration of ways to simplify the guidelines").
[26] *See Mathis v. United States*, 579 U.S. 500, 504–05 (2016) (describing the basics of the categorical approach).
[27] *See* Proposed Amendments at 19 (noting that Option 2 is designed to allow courts to look to "any" part of a statute, including any listed "means of committing any element" of an offense, to "determine whether any part of the statute of conviction includes an offense that constitutes" an enumerated offense"); *see also United States v. Lightsey*, No. 20-13682, 2026 WL 531922, at *4 (11th Cir. Feb. 26, 2026) (noting that a key part of the categorical approach analysis requires one to assume that the prior offense rested upon the "least culpable conduct" (citation and quotation marks omitted)).
[28] Proposed Amendments at 23.
[29] *See, e.g.*, 18 U.S.C. § 921(a)(37) (defining "dating relationship" as "a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature"); 18 U.S.C. § 921(a)(32) (defining "intimate partner" as "with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person"); NCGS § 50B-1(b)(6) (specifically stating that "a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship" and that "[a] casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship"); NCGS § 14-32.5 (establishing the offense of "misdemeanor crime of domestic violence" without providing that said offense can be committed against an "intimate partner").

every state afford the same legal protection to intimate partners as spouses in the context of domestic violence?

Answers aside, these questions illustrate the problems inherent with Option 2: it is not simple and will result in an equal to or similar amount of litigation that the categorical approach has already generated. As such, Option 2 would effectively take us "back to square one" in this endeavor, only without the benefit of the well-developed case law we currently enjoy with respect to the categorical approach. For these reasons, the PAG encourages the Commission to either retain the categorical approach or, in the alternative and should it choose to abandon it, adopt the first of its two proposed options that does so.

C. *Changes Relating To "Controlled Substance Offense"- Option 1 Is The Best Option*

According to the Commission's recent Public Data Briefing regarding the proposed Career Offender Amendments, in FY 2024 only 18% of the defendants sentenced under the career offender guideline received a within range sentence.[30] This data point is consistent with the decades-long trend of below-guideline sentences for most career offenders.[31] It is beyond debate that a majority of the judiciary deems the career offender guideline over-inclusive and that far fewer defendants should qualify for an enhanced sentence under the guideline.

Unless Congress modifies the career offender directive of 28 U.S.C. § 994(h), a certain category of defendants who have previously committed drug offenses must have Guidelines that are "at or near the maximum term authorized," and the career offender guideline should be designed to fulfill that directive. But that statutory category of drug offender defendants contemplated by Congress does not consist of defendants with two or more "controlled substance offenses" as currently defined in the guideline. Instead, the statutorily mandated category only includes defendants with two or more prior convictions under specified sections of the federal Controlled Substances Act ("CSA") and the federal Controlled Substances Import and Export Act. 28 U.S.C. § 994(h)(2)(B). The most logical way to comply with the congressional directive while at the same time fixing the over-inclusive nature of the career offender guideline is to limit the "controlled substance offense" definition to the federal offenses listed in the statute.

Controlled Substance Offense Option 1 comes closest to the best fix and is thus endorsed by the PAG. This option remains over-inclusive, because it includes federal offenses not listed in § 994(h). But Option 1 is preferable to Options 2 A-C because those options continue to allow some state drug felonies to be counted as controlled substance offenses. Congress did not include state drug offenses in its career offender directive and thus Options 2 A-C remain substantially over-inclusive. Simply put, Option 1 is preferable because more defendants will be excluded from career offender consideration under Option 1.

Additionally, it is the experience of the PAG's members that federal drug prosecutions usually involve higher level drug traffickers while state prosecutions typically target smaller scale drug activities. Even when higher level drug defendants are initially investigated and arrested by state law enforcement, those defendants know their cases are likely going to be federally charged. Limiting the career offender

[30] U.S. Sent'g Comm'n, *Public Data Briefing Video Transcript: 2026 Proposed Amendments on Career Offender* 3 (Feb. 2026), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2026_Career-Offender.pdf.
[31] USSC Career Offender Report at 22.

guideline's reach to federal drug offenders will properly focus the guideline, in most cases, on defendants with substantial involvement in the drug trade.[32]

Finally, Option 1 is preferable because it is the simplest. The PAG has long agreed with the Commission's policy priority of simplification. Option 1 is straightforward and easy to apply. A sentencing court need only determine whether the defendant was convicted under one of the enumerated federal statutes. Options 2 A-C are far more complicated. Those options will require the parties to litigate issues concerning not only the nature of the state court conviction (*e.g.*, did it involve a controlled substance or counterfeit controlled substance? Did it involve manufacturing, importing, exporting, distributing, or dispensing? Did it involve possession with intent?), but also the state court sentence imposed, the amount of time that a defendant served in state prison or jail facilities, and whether parts of the sentence imposed or time served were attributable to other non-drug offenses. The cases in which a defendant served a state court sentence consisting of multiple concurrent sentences, only some of which were controlled substance offenses, may be particularly thorny. Options 2 A-C do not further the goal of simplification to the same degree as Option 1.

For these reasons, the PAG urges the Commission to adopt Controlled Substance Offense Option 1.

III. Circuit Conflicts Concerning §4B1.2(b)

A. *The Commission should amend the Guidelines to clarify that for an offense to qualify as a "controlled substance offense" under § 4B1.2(b), a substance involved in that offense must be controlled by the Controlled Substances Act (Option 1).*

Over the past decade, a circuit split has developed over whether a "controlled substance offense" under § 4B1.2 encompasses offenses involving substances controlled under state law or only offenses involving federally controlled substances. To resolve that split, the Commission has proposed two options for an amendment to § 4B1.2. Option 1 defines "controlled substance offense" to include only offenses involving substances that are listed in the CSA. Option 2 would include offenses involving substances that are controlled under state law. As it did when a similar amendment was proposed in 2023,[33] the PAG supports Option 1.

Option 1 offers a straightforward framework for assessing whether a defendant's prior conviction is a "controlled substance offense" for career offender and other guideline purposes. Under that framework, defendants (and their lawyers) will have no doubt where to look to determine whether the substance at issue qualifies. Option 1 would also bring the guideline into alignment with the recidivist penalty enhancement provisions of 21 U.S.C. § 841(b) and the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2). Both define "serious drug offense[s]" by reference to the same CSA definitions – not state analogues. Next, Option 1 will promote uniformity by minimizing litigation over varying state definitions used to categorize offenses. And finally, it will reduce to some degree the overly harsh outcomes of the career offender guideline. As noted above, in FY 2024, only 18% of the defendants sentenced under the career

[32] In cases where a defendant's record reflects a prior serious state court drug conviction, sentencing courts can consider an upward variance.

[33] Letter from PAG to U.S. Sent'g Comm'n, at 18-19 (Mar. 14, 2023).

offender guideline received a within range sentence.[34] A narrower set of qualifying substances would help to bring Guidelines recommendations more in line with the judiciary's view of appropriate sentences in these cases.

In contrast, Option 2 would increase complexity and result in unwarranted sentencing disparities. That option would rely on inconsistent state law definitions, raising opportunities for litigation over which definitions, precisely, should apply to a given case. It would also subject defendants to vastly different Guidelines recommendations depending on where they live. Take, for example, state offenses involving cannabidiol ("CBD"). CBD has been decriminalized at the federal level since 2018.[35] But CBD remains criminalized in some states.[36] A Florida resident may be convicted for possessing certain kinds of CBD recreationally, while a Californian may possess CBD without risk of prosecution.[37] Based on that distinction, the Floridian could be subject to a career offender enhancement for conduct substantively identical to the Californian's. This result is particularly troubling given that the conduct underlying the prior conviction is not a federal crime.

B. *The Commission should amend the Guidelines to clarify that for an offense to qualify as a "controlled substance offense" under § 4B1.2(b), the substance involved in that offense must be controlled at the time of sentencing (Option 1).*

A circuit split has also arisen over whether a "controlled substance offense" under § 4B1.2 encompasses offenses involving substances that have been decriminalized by the time of sentencing for the instant offense. The Commission has proposed two options to resolve that split. The PAG supports Option 1 of the proposed amendments, which would require that the substance involved be controlled at the time of sentencing. We do so for three reasons: Option 1 would (1) simplify the Guidelines, (2) better reflect the defendant's actual culpability, and (3) prevent unwarranted sentencing disparities.

First, adopting Option 1 would further the Commission's goal of simplifying the Guidelines. Option 1 would require consulting the drug schedules in place on the date of sentencing. Option 2, by contrast, would require courts to consult historical federal drug schedules—and historical state drug schedules, should the Commission choose Option 2 for the first circuit conflict—to determine how "controlled substance" was defined on the date of the defendant's conviction for that offense. Particularly where the prior conviction was under state law, this process may be tedious and susceptible to errors. But perhaps more importantly, courts would have to conduct this inquiry anew for each and every defendant. Option 1, especially when paired with Option 1 of the proposed amendment to address the first circuit conflict, would streamline the process of determining the applicable law by allowing courts to look only to current federal drug schedules.

Second, Option 1 would help courts fulfill 18 U.S.C. § 3553(a)'s sentencing purposes and goals. Section 3553(a)(2)(A) requires courts to impose sentences that reflect the need for the sentence imposed "to reflect

[34] U.S. Sent'g Comm'n, *Public Data Briefing Video Transcript: 2026 Proposed Amendments on Career Offender* 3 (Feb. 2026) *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2026_Career-Offender.pdf.
[35] Agriculture Improvement Act of 2018, Pub. L. 115-334, 132 Stat. 5018 (Dec. 20, 2018).
[36] *See The CBD Map of the United States*, COVA Software (2025), *available at* https://www.covasoftware.com/hubfs/cbd-legality-map-2025.png (showing that Florida permits CBD only with a prescription, while California has fully legalized it).
[37] *Id.*

the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Option 1 would direct courts to impose sentences based on drug schedules that reflect present-day understanding of the relative seriousness and potential harm of drugs. Given the vast shift in public opinion—and the resulting changes to federal and state drug policy—over the last forty years, it is inappropriate to set sentencing guidelines based on since-abandoned drug schedules. Even though the Guidelines are merely advisory, their powerful anchoring effect would all but ensure defendants receive harsher sentences for conduct that society no longer views as wrong.[38]

Finally, Option 1 would better minimize unwarranted sentence disparities among similarly situated defendants, as required by 18 U.S.C. § 3553(a)(6). Imagine for a moment, two defendants who are identically situated in every way except for the date of their past conduct involving a now-decriminalized controlled substance. The unlucky earlier defendant has a conviction for that conduct; the lucky later defendant has none. If those defendants are sentenced on the same day by the same judge for a subsequent offense, they may receive radically different Guidelines ranges and, by extension, radically different sentences for the exact same underlying conduct. In contrast, under Option 1, those defendants would receive the same Guidelines ranges.

Accordingly, the PAG urges the Commission to adopt Option 1 of the proposed amendment addressing this circuit split.

IV. Human Smuggling

The PAG opposes the proposed amendment regarding human smuggling. That proposed amendment runs contrary to the Commission's stated, and laudatory, goal of simplifying the Guidelines and is not based upon any study or empirical data. The Commission's increased reliance on empirical data to develop, monitor, and amend the Guidelines is designed to reduce sentencing disparities and ensure that the Guidelines are grounded in penological research. It should not abandon that reliance here.

The DOJ's reasoning in support of this amendment is disingenuous. It suggests that § 2L1.1 should be amended because Congress clearly intended to provide increased punishment for each individual smuggled, which the Guidelines do not reflect.[39] But 8 U.S.C. § 1324 has not been amended since the Illegal Immigration Reform and Responsibility Act was passed on September 30, 1996. Congressional intent is reflected in the statute which authorizes prosecution—and the potential statutory penalty—for each individual smuggled, a fact the DOJ recognizes.[40] The Guidelines, as they currently exist, contain an enhancement based upon the number of individuals smuggled in § 2L1.1(b)(2). The combination of that

[38] *See United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) ("[I]t would be illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is *not* culpable and dangerous."); *United States v. Abdulaziz*, 998 F.3d 519, 528 (1st Cir. 2021) ("A guideline's enhancement for a defendant's past criminal conduct . . . is reasonably understood to be based in no small part on a judgment about how problematic that past conduct is when viewed as of the time of the sentencing itself.").

[39] Letter from Scott Meisler, Deputy Chief, Crim. Div., U.S. Dep't of Just., to U.S. Sent'g Comm'n at 14 (July 18, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=97.

[40] U.S. Dep't of Just., Criminal Resource Manual § 1907, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-1907-title-8-usc-1324a-offenses.

potential statutory penalty, extant specific offense characteristics, and 18 U.S.C. § 3553(a) provide ample authority to impose an appropriate sentence, even in outlier cases.

There is also no need to amend the current guideline and change the specific offense characteristic based upon the number of aliens smuggled. The fact that 55% of cases sentenced under § 2L1.1 within the last five fiscal years were sentenced below the advisory guideline range[41] vividly demonstrates that judges think the existing guideline goes too far. In light of that data, it is inadvisable to increase the potential offense level without study and reliance on empirical data.

The PAG also opposes the proposed amendment at § 2L1.1(b)(8) (as renumbered). Again, the combination of the potential statutory penalty, extant specific offense characteristics, and 18 U.S.C. § 3553(a) provide ample authority for courts to impose an appropriate sentence, and it is inappropriate to add enhancements without study and reliance on empirical data.

The PAG further opposes adding an enhancement based upon multiple deaths or injuries. The guideline already authorizes such enhancement and contains a cross reference to the appropriate homicide guideline for cases in which death occurs. Accordingly, there is no need for the additional enhancement proposed—and certainly no need for an enhancement that does not rely on empirical data.

The PAG likewise opposes an enhancement to address a smuggler's involvement with a transnational criminal organization ("TCO"). There is no empirical data to suggest this is a proper focus for sentencing an individual in the mine run case, and it would likely shift focus away from addressing the culpability of the individual being sentenced. Again, ample statutory authority to impose an appropriate sentence exists. There is no demonstrated need for this additional enhancement. The proposal would also run counter to the Commission's simplification efforts because it would result in additional litigation around the required connection to a TCO. For example, how attenuated could the TCO connection be? A distant TCO connection is present in many cases even where the connection sheds little light on a person's culpability. Those are concerns that even a heightened men rea requirement does not address.

To summarize: adding enhancements, without reliance on study and data, to a guideline from which sentencing judges usually depart downwards will not enhance the safety of migrants, and it could result in even greater variation between the sentences given to similarly situated defendants, based on judges' differing deference to the Guidelines. Thus, the PAG strongly urges the Commission not to enact the proposed amendments to § 2L1.1.

[41] Because of the way that placement relative to guideline range is recorded, it is difficult to determine how many cases receiving a fast-track reduction (35% of these cases) also might have received a variance or departure. But the percentage of within-range sentences rose in fiscal year 2024 to 51.8%, while the percentage of cases receiving fast-track reductions dropped to 26.6%. *See* U.S. Sent'g Comm'n, *Quick Facts: Alien Smuggling* (2024), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY24.pdf.

VICTIMS' RIGHTS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 2, 2026

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines

Dear Chair Reeves, Vice-Chairs, Members of the Commission:

Thank you, once again, for the opportunity for the Victims' Rights Advisory Group (VRAG) to publicly comment on your proposed amendments to the Federal Sentencing Guidelines ("Guidelines"). We are appointed to assist you in considering how victims and survivors, who are key stakeholders in the federal criminal court process, may be affected by important Guidelines decisions that you make. Your decisions, in turn, guide the courts. We provide the following to assist you in fulfilling your responsibilities under 28 U.S.C. § 994(o).

As you each listen to and understand the harm that victims and survivors suffer, the acceptance of responsibility from offenders they want, and how they may be made whole through the sentencing process, your important decisions will be fairer and more just.

The VRAG encourages the Commission to provide a fair and just sentencing process resulting in fair and just outcomes. The VRAG promotes the Commission's respect for and adherence to victim legal rights under the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771. The VRAG reminds the Commission that retroactive application of approved amendments reopens victim survivor wounds, requires victim notification and the right to be heard, and may undermine victim survivor faith in the fairness, justice, and finality of the federal criminal court process. From this foundation, VRAG respectfully submits the following for your consideration.

PROPOSED AMENDMENT: SENTENCING OPTIONS

EXECUTIVE SUMMARY

The VRAG supports Part A's framework for guiding sentencing option determinations but urges the Commission to add explicit victim protection factors and avoid creating mandatory procedural requirements that generate litigation.

We strongly and unequivocally oppose Part B's expansion of Zones B and C to higher criminal history categories. The Commission's data demonstrates that this expansion would:

- Double the percentage of violent offenders eligible for community-based sentences (from 6% to 12%)
- Triple the percentage of weapon-involved offenses eligible for alternatives to incarceration (from 4% to 12%)
- More than double the number of defendants with aggravating role adjustments receiving leniency (from 2% to 5%)
- Endanger victims by placing repeat offenders in their communities with inadequate supervision
- Abandon progressive punishment by offering alternatives to career criminals who have already failed at rehabilitation
- Overwhelm probation resources that are already critically strained

The bottom line: Criminal History Categories IV, V, and VI represent defendants who have repeatedly chosen crime despite prior sanctions. The Commission's own data shows that expanding Zone C would authorize community placement for substantially more dangerous offenders, those with violent convictions, weapon enhancements, and leadership roles in criminal activity. These individuals have almost certainly been incarcerated before. Offering them home detention now does not create progressive punishment; it creates regressive punishment where victims bear the consequences of failed policy.

PART A: GUIDANCE ON SENTENCING OPTIONS

Issue 1-2: New Commentary and §5A1.1 Guideline

On behalf of victims, we support providing courts with guidance on selecting sentencing options. The framework proposed in §5A1.1 is helpful for ensuring courts thoughtfully consider threshold sentencing decisions. However, we urge two critical modifications:

1. Add Explicit Victim Protection Factor

Current proposed §5A1.1(b) states:

> In determining the appropriate sentencing option(s) from among those authorized under the guidelines, courts should consider which option(s) will best meet the purposes of sentencing and the needs of the individual defendant.

Courts also should consider:

- Whether the sentencing option adequately addresses victim safety
- The defendant's access to or proximity to the victim
- Whether the option allows for meaningful restitution to victims while ensuring victims' safety
- Victim impact statements regarding the defendant's danger to the victim or community
- The need to protect victims and the community from further crimes by the defendant

Victim protection is a core purpose of sentencing under 18 U.S.C. § 3553(a). The proposed language centers defendant needs while forgetting victim safety, an inversion of priorities that the Commission must correct.

2. Avoid Mandatory Procedural Requirements

Regarding Issue 3 (whether to list 18 U.S.C. § 3553(a) factors), we recognize these factors are familiar and useful to practitioners. However, we oppose listing them as mandatory considerations that could create procedural requirements subject to appellate litigation. This would delay finality for victims awaiting closure, generate endless appeals claiming courts failed to "adequately address" each factor, and transform sentencing into a checklist exercise rather than holistic judgment.

PART B: EXPANSION OF ZONES B AND C

I. Criminal History Categories IV-VI: Who We Are Really Talking About

To reach CHC IV, a defendant might have three prior felony convictions with significant sentences, or numerous lesser convictions, plus recent criminal activity. To reach CHC V-VI, a defendant has an extensive record of repeated offending, almost certainly including prior incarceration.

The Commission already made significant recent changes that reduced criminal history calculations, including Amendment 821 (2023), which reduced criminal history points for certain prior sentences; narrowed circumstances for adding status points, and modified how older convictions are counted. In other words, today's CHC IV, V, or VI defendant would have scored even higher under prior rules.

The amendment proposed in Part B is not progressive punishment. It is punishment regression.

II. The Victim Safety Crisis: Home Detention Reality

The amendment assumes that electronic monitoring provides reliable location tracking; probation officers supervise offenders closely; violations are detected and addressed quickly; and victims are safer than with no supervision at all. But in reality home detention, by definition, places offenders in "the community," often the same community where their victims live, work, shop, worship, and send their children to school.

For victims, this means unexpected encounters, constant hypervigilance and fear during routine activities, and a disrupted sense of safety in their own neighborhoods. While victims are fearful, home detention offers the freedom for defendants to have employment, medical appointments, religious services, grocery shopping, family emergencies, and treatment programs. Each time leaving the home provides opportunity for "coincidental" contact with victims.

A. Electronic Monitoring Is Routinely Defeated

Courts and the public often assume GPS ankle monitors provide foolproof tracking. They do not. The reality of electronic monitoring is far more complicated and far less reliable than the sanitized version presented in courtrooms. Physical tampering occurs, with offenders

cutting straps, removing devices entirely, or using simple materials to shield GPS signals. Signal dead zones are pervasive in buildings, tunnels, and rural areas where GPS loses signal entirely, creating blind spots that offenders quickly learn to exploit. Battery issues plague the system, with devices "accidentally" going uncharged by offenders who know that a dead battery creates hours of unmonitored freedom. In more brazen cases, offenders deliberately remove monitors, commit crimes during the window of freedom, and replace the monitors before anyone responds. Even when the technology functions as designed, there are inherent limitations, including lagging time between when a violation occurs and when notification reaches supervising probation officers.

B. The Nightmare Scenario: When Tamper Alerts Come In

When an ankle monitor tampers or signals a violation, a cascade of systemic failures begins. An automated alert goes to the probation duty officer, often after hours when resources are most limited. The probation officer must immediately assess whether this is an equipment malfunction, which is common, or actual tampering with intent to evade supervision. The working assumption among experienced probation officers is stark: when someone tampers with their monitor to defeat it, they are planning to commit serious harm. Yet the reality demonstrates that by the time the system responds effectively through all these decision points and bureaucratic processes, harm may have already occurred.

C. Probation Resources Cannot Support This Expansion

U.S. Probation and Pretrial Services is a source of pride for our nation. Already overworked, they currently supervise over 135,000 individuals nationwide with approximately 4,000 officers, with significant variation by district[1]. High-risk offenders like CHC IV-VI defendants should receive intensive supervision that includes weekly face-to-face contacts, random drug testing, employment verification, residence checks, coordination with treatment providers, and victim safety monitoring, but the math simply does not work. Intensive supervision of 50 high-risk offenders would require a minimum of 50 weekly contacts, exceeding more than 50 hours of direct supervision time, plus additional hours for travel time,

[1] https://www.govinfo.gov/content/pkg/GOVPUB-JU10-PURL-LPS40954/pdf/GOVPUB-JU10-PURL-LPS40954.pdf (last visited 02/23/2026).

documentation, court appearances, and violation processing. The current reality is that many officers struggle to provide intensive supervision to their existing caseloads. Adding thousands more CHC IV-VI offenders through zone expansion would require nearly one-to-one officer-to-offender ratios to provide adequate supervision. That ratio is fiscally and practically impossible.

III. The Commission's Data Confirms the Danger

The Commission's own data, USSC Public Data Briefing on Sentencing Options, Slide 23, reveals the stark reality of who would benefit from this expansion.

Offense Characteristics	Current Zone C (n = 2,101)	Proposed Zone C (n = 4,061)
Received Mitigating Role Adjustment	8%	17%
Received Aggravating Role Adjustment	2%	5%
Received Weapon SOC or 924(c)	4%	12%
Convicted of a Violent Offense	6%	12%
Received Acceptance of Responsibility	97%	95%
Received Substantial Assistance	8%	16%

Under current Zone C, six percent of defendants have violent offense convictions, but the proposed expansion would double that to twelve percent, a 100% increase in violent offenders eligible for community placement.

The weapon offense data is even more alarming. Currently, four percent of Zone C defendants received weapon enhancements or convictions under 18 U.S.C. § 924(c), but the proposed expansion would triple that to twelve percent, a 200% increase in weapon-involved offenses eligible for community placement.

The data on criminal leadership tells an equally troubling story. Currently, two percent of Zone C defendants received aggravating role adjustments, but the proposed expansion would increase that to five percent, a 150% increase in criminal leaders eligible for community placement.

The cumulative effect reveals that this is not a minor technical adjustment to zone boundaries but rather a fundamental policy shift that would systematically authorize community placement for demonstrably more dangerous offenders.

IV. The Restitution Argument is Unsupported by Data

The proposed amendment's emphasis on restitution payment ability misconstrues victim priorities and is based on false assumptions. Restitution is important, but ancillary to safety and justice.

The Commission assumes that community placement increases restitution payment through maintained employment, court-ordered payment plans, and probation officer oversight, but this assumption should be supported by data not provided. Critical questions remain unanswered: What are actual restitution payment rates for probationary sentences versus imprisonment? What percentage of restitution orders are fully satisfied under each sentence type? How long does it take to complete restitution under different sentence types? Do high criminal history offenders like those in CHC IV-VI actually pay more restitution when on probation? Without this data, the restitution rationale is speculation, not evidence-based policy.

V. Judges Already Have Discretion for Extraordinary Cases

The current system already provides flexibility. Judges possess extensive authority to depart or vary from guideline recommendations under 18 U.S.C. § 3553(a). They can consider:

- Nature and circumstances of the offense
- History and characteristics of the defendant
- Need for just punishment, deterrence, incapacitation, and rehabilitation
- Kinds of sentences available
- Guideline ranges and policy statements
- Need to avoid unwarranted sentencing disparities
- Need to provide restitution to victims

When judges find extraordinary circumstances warranting downward variance (unusual rehabilitation efforts, extraordinary cooperation, unique family circumstances, atypical offense conduct), they can and do vary. The system works for outlier cases.

VI. Answering the Commission's Specific Questions

Issue 1: Should the Commission expand Zones B and C?

No. The Commission should not expand Zones B and C to higher criminal history categories.

Data considerations: The Commission's own data (Slide 23, February 2026 briefing) demonstrates the expansion would:

- Double violent offender eligibility (6% → 12%)
- Triple weapon offense eligibility (4% → 12%)
- More than double criminal leadership eligibility (2% → 5%)
- Nearly double the total affected population (2,101 → 4,061)

Statutory provisions:

- 18 U.S.C. § 3553(a): purposes of sentencing include "adequate deterrence," "protection of the public," and "just punishment, all undermined by this expansion
- 18 U.S.C. § 3771: Crime Victims' Rights Act guarantees victims "the right to be reasonably protected from the accused," directly threatened by community placement of repeat, violent, weapon-involved offenders

Policy considerations:

- Progressive punishment requires escalating consequences for repeat offenders, not expanded leniency
- Victim safety must be paramount, especially with demonstrated dangerous conduct
- Probation resources are finite and already critically strained
- Recent criminal history reductions already benefit these defendants

Issue 2: Whether authorizing different sentencing options for defendants with the same guideline range is appropriate

The question the Commission asks is whether criminal history is a credible differentiator in sentencing, a question already answered by the Commission itself:

> Conclusion
>
> As found in previous Commission reports, Criminal History Category is a strong predictor of recidivism. The analyses contained in this report show that the various components of Chapter Four of the *Guidelines Manual*, including criminal history points, category, and seriousness of past offenses as reflected in point assignment to past convictions also are strong predictors of recidivism.[2]

[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research publications/2017/20170309_Recidivism-CH.pdf at 20 (last visited 02/23/2026).

The current system appropriately authorizes different sentencing options based on criminal history. Two defendants with the same offense level but different criminal histories (e.g., CHC I vs. CHC III) present different risks to victims and the public. The defendant with extensive criminal history has demonstrated greater disregard for law and victims' safety through actual conduct, not speculation.

VII. If the Commission Proceeds: Minimum Safeguards Required

We urge the Commission to reject Part B entirely. However, if the Commission insists on proceeding despite the dangers documented above and in its own data, at minimum the following safeguards must be implemented:

1. Categorical Exclusions

No expansion for:

- Violent offenses (as defined in 18 U.S.C. § 16)
- Offenses where weapon enhancement or § 924(c) conviction applies
- Sex offenses (USSG Chapter 2, Part A, Subpart 3)
- Offenses involving victims under 18, over 65, or with disabilities
- Defendants with prior protective order violations in criminal history
- Offenses against the same victim as any prior conviction
- Defendants who received aggravating role adjustments (leaders/organizers)

Rationale: The Commission's own data shows these categories represent substantially elevated danger. At a minimum, they must be excluded from expanded alternatives.

2. Mandatory Victim Protections

Required for any community placement:

- **Victim notification** of proposed community placement with sufficient time for input
- **Victim right to be heard** on safety concerns at sentencing
- **Geographic restrictions:** Minimum distance requirements from victim residence, workplace, children's schools
- **Enhanced GPS monitoring** with real-time geo-fencing around victim locations
- **Immediate detention** for any violation without requiring warnings, no second chances, no "technical violation" distinctions
- **Victim impact assessment** as part of presentence report addressing specific safety risks

3. Resource Requirements and Accountability

Before expanding zones:

- **Mandatory intensive supervision** classification (not standard supervision)
- **Caseload limits:** No officer supervising more than 25 intensive supervision cases
- **Technology upgrades:** Modern monitoring equipment with proven reliability
- **Training requirements:** Officers supervising high-risk offenders must complete specialized training

Ongoing accountability:

- **Annual reporting** on violation rates, victim safety incidents, and recidivism by zone and criminal history category
- **Victim surveys** on whether they feel safer under current supervision
- **Data collection** on actual restitution payment rates by sentence type
- **Sunset provision:** Expansion automatically expires in 5 years unless renewed based on demonstrated success

4. Strong Presumption Against Community Placement When Victims Object

Create rebuttable presumption that community placement is inappropriate when:

- Victim files formal objection based on safety concerns
- Victim demonstrates ongoing fear based on defendant's history or conduct
- Prior relationship existed between victim and defendant (domestic violence, stalking, etc.)
- Defendant has made threats or intimidating statements about victim

PROPOSED AMENDMENT: CAREER OFFENDER

Crime of Violence

The VRAG supports the elimination of the categorical approach to determine whether a prior conviction is a crime of violence offense for purpose of applying to recidivist offenders the career offender guideline under USSG § 4B1.1. The VRAG supports a conduct-based approach as more aptly determining the actual or increased risk of physical or psychological injury to crime victims and better assuring the inclusion of violent offenses. The VRAG supports the proposed amendment to the "Crime of Violence" definition in §4B1.2(a), including, with important modification, Crime of Violence Option 2.

Regarding the conduct-based approach, courts routinely examine conduct to determine enhancements and mitigating factors when making sentencing determinations. A conduct-based approach for prior crimes of violence or controlled substance offense would be a similar analysis, would have a uniform standard of review (e.g., substantial evidence or preponderance of the evidence), and would be based on reliable evidence presented to the court at sentencing.

In determining reliability of such evidence of prior crimes of violence, courts also routinely make evidentiary determinations regarding the reliability of evidence presented at trial, so this would be much the same type of reliability determination. The Sentencing Commission can choose specific types of *per se* reliable evidence for courts to rely on, such as verdict forms and plea colloquies, as well as factors to consider when determining reliability of other evidence.

While supporting Crime of Violence Option 2, and each of its bracketed inclusions, VRAG opposes proposed subparagraphs §§4B1.2(a)(3) "Exclusions," and (4)(A), (B) and (C) "Limitations."

First, VRAG opposes the exclusion of certain probated offenses in §§4B1.2(a)(3) and (4)(A), from the definition of a "crime of violence," which are based on the sentence received by the recidivist offender rather than the conduct of the offender's prior offense. These proposed exclusions are contrary to the proposed language of §4B1.2(a)(1)(B), defining a State Offenses Crime of Violence as "An offense under state law by whatever designation, *punishable by imprisonment for a term exceeding one year*, is presumptively a 'crime of violence'" (emphasis added). The emphasized phrase, "punishable by imprisonment for a term exceeding one year," already excludes crimes of violence that the individual states designate as less serious offenses. Proposing further exclusions from the definition of a state "crime of violence," based on sentences actually imposed, makes the state's designation of the severity of the offense superfluous and diminishes the fact that a crime of violence was committed upon a person.

Such a determination will condition the determination of a "crime of violence" on the inconsistent application of the sentencing guidelines across the country and/or whether a criminal defendant pled to a lesser offense. This will turn the determination into an arbitrary exercise, where two offenders who had the same conduct might not have their offenses

classified in the same way, solely based on the sentence imposed. The proposed exclusions also will add complications to the sentencing process, demanding additional investigation and litigation over what sentence was imposed and, of that sentence imposed, what part of that sentence was actually served.

Second, the VRAG opposes the §4B1.2(a)(4)(B) and (C) "Limitations" regarding a lack of bodily injury or physical harm to the victim or reckless or negligent conduct by the defendant. §4B1.2(a)(4)(B) removes from a "crime of violence," prior convictions for which the defendant "can establish" that he or she "did not inflict, did not intend to inflict, and did not threaten to inflict **[**serious**]** bodily injury to another person" or "did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person." This limitation does not take into consideration that many violent offenses, including most sexual offenses, do not include any type of bodily injury. But sexual offenses, for example, are inherently crimes of violence. *See Fairchild v. Norris*, 5 F.3d 1124, 1125 (8th Cir. 1993) (describing rape as "inherently violent"). The §4B1.2(a)(4)(B) "bodily injury" limitation should be omitted.

The §4B1.2(a)(4)(C) recklessness and negligence proposed limitation should also be rejected. The listed crimes of violence appear to be intentional acts, and not acts of mere reckless or negligent behavior, such that there should not be such a limitation. Moreover, that proposed §4B1.2(a)(4)(C) would not limit "extreme reckless conduct," indicates that there is a degree of reckless conduct that the Commission would find appropriate, although that term is undefined in this proposed amendment.

Consequently, each of these proposed "bodily injury" and "recklessness and negligence" limitations will add complications to the sentencing process, demanding additional investigation and litigation into those facts. Those complications will exist whether the offender was previously convicted of a crime of violence or previously convicted of "abetting, attempting to commit, or conspiring to commit" a crime of violence[3].

[3] *See* proposed §4B1.2(a)(2): "Aiding and Abetting, Inchoate Offenses Included, —The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense."

Controlled Substances

The VRAG strongly does not recommend that the Commission adopt Option 1, limiting application of prior controlled substance offenses only to federal offenses, for the reasons discussed in our comment on the Circuit Court Conflicts Concerning §4B1.2(b) proposed amendment, *infra*.

Additionally, as to Option 1, the Commission's Data Briefing, *2026 Career Offender Data Briefing, Feb. 13, 2026*, states that in FY 2024, of 1,279 offenders sentenced under §4B1.1, an estimated 962 individuals qualified for the §4B1.1 enhancement in part due to at least one state-controlled substance offense. The adoption of Option 1 would mean that 75% of the recidivist Career Offender sentenced in FY 2024 would have their sentences reduced if state controlled substances were eliminated from consideration. That appears to VRAG to be contrary to the intention of Congress for the Guidelines to punish and deter recidivist criminal conduct.

The VRAG recommends the very first part of Option 2, which reorders §4B1.2(b)(1), but leaves intact that controlled substance offenses include both federal and state offenses. Our recommendation is for the same reasons discussed in our comments on the Circuit Court Conflicts Concerning §4b1.2(b) proposed amendment, *infra*. The VRAG also supports the Option 2's proposed inclusion of new subparagraph §4B1.2(b)(2) "Aiding and Abetting, Inchoate Offenses Included" and new subparagraph §4B1.2(b)(3) "Additional Consideration."

The VRAG strongly does not recommend the adoption of either Suboption 2A, Suboption 2B or Suboption 2C to Option 2, each of which amend §4B1.2(c) to limit the "scope by setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense." [Proposed Amendments to the Sentencing Guidelines (Preliminary), Jan. 30, 2026, Proposed Amendment: Career Offender, Synopsis, p.4.] The Commission does not provide a reason in its Synopsis or in its Data Briefing [2026 Career Offender Data Briefing, Feb. 13, 2026], for limiting the scope by setting a minimum sentence length. The primary focus appears to be to include only prior controlled substances offenses for offenders acquiring the highest sum of three points allotted by §4A1.1(a) for each prior sentence of imprisonment exceeding one year and one month.

As to Option 2, the Commission's Data Briefing, *2026 Career Offender Data Briefing, Feb. 13, 2026*, states that in FY 2024, of 1,279 offenders sentenced under §4B1.1, an estimated 471 individuals qualified for the §4B1.1 enhancement in part due to at least one controlled substance offense for which the sentence was not assigned three criminal history points under §4A1.1(a). The adoption of Option 2 would mean that roughly one-third of the recidivist Career Offender sentenced in FY 2024 would have their sentences reduced if prior controlled substance offenses were limited to the three criminal history points under §4A1.1(a). Aside from the three point §4A1.1(a) information, the Data Briefing does not appear to include data on the effect of "time served" disqualification under each of Suboptions 2A, 2B or 2C. The VRAG has strong concern that effect of each of these Suboptions is contrary to the intention of Congress for the Guidelines to punish and deter recidivist criminal conduct.

If the Commission were to adopt any of the Suboptions, despite the VRAG recommendation not to, the VRAG would recommend only the strike-throughs and additions in the first paragraph of proposed §4B1.2(b) of Suboption A, *without its inclusion* of any of the bracketed language disqualifying prior offense based on the time the offender served for those offenses. Disqualification based on the amount of time the offender served of the prior sentence imposed will add complications to the sentencing process, demanding additional investigation and litigation into those facts, and is contrary to the intention of Congress for the Guidelines to punish and deter recidivist criminal conduct.

PROPOSED AMENDMENT: CIRCUIT CONFLICTS CONCERNING §4B1.2(b)

The Commission proposes two amendments to §4B1.2(b), each with two options, addressing related circuit court conflicts about career offenders' prior controlled substance offenses.

The VRAG strongly recommends the Commission adopt Option 2 for each circuit conflict. The Commission's Option 2 proposals for each circuit conflict match the majority of

circuit opinions on these issues. The VRAG finds the majority opinions' logic most compellingly grounded on the Commission's plain language in §4B1.1(a)[4] and §4B1.2(b) and (c)[5].

The Commission's Option 2 proposals provide clear direction for the minority circuits to bring them in accord with the majority.

The Commission's Option 2 proposals properly address the concerns of Justice Sotomayor and Justice Barrett that "It is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines." *Guerrant v.*

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[4] §4B1.1(a) reads:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

[5] §4B1.2(b) and (c) read:

> (b) CONTROLLED SUBSTANCE OFFENSE.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or
>
> (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).
>
> (c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

United States, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting the denial of certiorari).

The Commission's Option 2 proposals are best directed at supporting the intention of Congress for the Guidelines to punish and deter recidivist criminal conduct, by providing enhanced sentences for defendants with prior federal or state felony convictions.

The Commission's Option 2 proposals will best serve victims and communities harmed by the current federal offense. At sentencing for the current offense, the recidivist defendant will be held accountable for all of his or her prior federal or state controlled substance offenses punishable by imprisonment for a term exceeding one year.[6]

Adopting each Option 2 will not interfere with the statutory discretion sentencing courts exercise pursuant to 18 U.S.C. § 3553(a).

For these reasons, and as discussed below, the VRAG strongly recommends that for each circuit conflict the Commission adopt Option 2.

CIRCUIT CONFLICT 1: WHETHER A SUBSTANCE INVOLVED IN AN OFFENSE MUST BE CONTROLLED BY THE CONTROLLED SUBSTANCES ACT TO QUALIFY AS A "CONTROLLED SUBSTANCE OFFENSE" UNDER §4B1.2(b).

Circuit Courts split on whether the Commission's §4B1.2(b) term "controlled substance offense," which "means an offense under federal or state law, punishable by imprisonment for a term exceeding one year," requires courts to consider controlled substances listed in the federal Controlled Substances Act (CSA), 21 U.S.C. § 801, *et seq*., *and* those controlled by state law, or *only* those listed in the CSA. The VRAG strongly recommends that the Commission adopt proposed Option 2 as the solution to this conflict, supporting the majority of circuits, and including both those listed in the CSA and those controlled by state law.

The majority of circuits (seven circuits) hold that the plain text of §4B1.2(b) requires the former, including both controlled substances listed in the CSA and those controlled by state law. *See United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), *cert. granted, judgment vacated sub nom*. *Dubois v. United States*, 145 S. Ct. 1041 (2025), reinstated by 139 F.4th 887 (11th Cir. 2025);

[6] *See* §4B1.2(e)(4): "'***Prior felony conviction***'" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed."

United States v. Lewis, 58 F.4th 764 (3d Cir. 2023); *United States v. Jones*, 81 F.4th 591 (6th Cir. 2023); *United States v. Jones*,15 F.4th 1288 (10th Cir. 2021); *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021); *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020); *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020).

The minority (three circuits) inferred that a controlled substance must be listed in the CSA, primarily because there is no §4B1.2(b) definition of "controlled substance" requiring them to do otherwise. *United States v. Minor*, 121 F.4th 1085 (5th Cir. 2024); *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018).

Option 2 provides that "controlled substances" definition, comporting with the majority Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit holdings. Since "controlled substance offense" under §4B1.2(b) "means an offense under federal or state law," proposed Option 2 plainly defines the term "controlled substance" to include controlled substances under federal or state law:

> For purposes of this provision, the term "*controlled substance*" refers to a drug or other substance, or immediate precursor, either listed in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801*et seq.*) or otherwise controlled under applicable state law.

Option 2 follows most closely with the plain language interpretation of §4B1.2(b) given by the majority circuits. *United States v. Dubois*, 94 F.4th 1284, *supra*, observed that traditional statutory interpretation applies to the Guidelines, beginning with the text, and ending with the text when the text is clear. *Id*., 94 F.4th 1284, 1286. *Dubois* holds the §4B1.2(b) Guideline text clear that "'controlled substance' includes a substance that is regulated only by the law of the state of conviction." *Id*. This was supported by two important findings: a. the ordinary language that the state's ability to define by law a controlled substance offense necessitates the state also defining the drugs that are controlled substances; and b. the Commission's decision to not reference the CSA was a notable omission since the Commission regularly makes cross-references to statutory definitions when it wants to. *Id*., 1286-1287.

Similarly looking at the plain language of §4B1.2(b), *United States v. Lewis*, *supra*, 58 F.4th 764, holds that it was not required to match the prior offense to a federal or generic crime:

> because Guidelines § 4B1.2(b) defines a "controlled substance offense" by reference to certain prohibited conduct, not by reference to a federal criminal statute or a "generic" crime like burglary. *See Shular v. United States*, —— U.S. ——, 140 S. Ct. 779, 783, 206 L.Ed.2d 81(2020). So we must "determine not whether the prior conviction was for a certain offense, but whether the conviction meets some other criterion." *Id.* at 783[.]
>
> […]
>
> The "other criterion" to which we must compare the elements of Lewis's prior conviction, *Shular*, 140 S. Ct. at 783, comes directly from the Guidelines definition of controlled substance offense in § 4B1.2(b). That definition contains three parts: (1) "an offense under federal or state law," (2) "punishable by imprisonment for a term exceeding one year," (3) that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance," or possession with the intent to do so. U.S.S.G. § 4B1.2(b)."

Id., at 768.

Consequently, the text of § 4B1.2(b), by giving a definition of "controlled substance offense" which includes federal or state offenses, provides that the state can define the offense and the drugs that are controlled substances. *Id*., at 769. The minority Circuit Court opinions are flawed by reading § 4B1.2(b) to include a CSA cross-reference that does not exist. *Id*.

Each of the other majority circuits similarly rely on the plain text and the Commission's decision to not cross-reference the CSA. *See United States v. Jones*, *supra*, 81 F.4th 591 597-600; *United States v. Jones*, *supra*, 15 F.4th 1288, 1291-1293; *United States v. Henderson*, *supra*, 11 F.4th 713, 717-719; *United States v. Ward*, *supra*, 972 F.3d 364, 369-375; *United States v. Ruth*, *supra*, 966 F.3d 642, 651-654.

In contrast, the VRAG finds the proposed Option 1 a weaker and less grounded approach. The proposed Option 1 would limit the controlled substances to those only found in the CSA by inserting a CSA cross-reference that the Commission intentionally never previously placed in §4B1.2(b). Adopting proposed Option to align with the minority circuits displaces the traditional plain text interpretation of §4B1.2(b) that the majority circuits used to impose a CSA

reference that does not exist in §4B1.2(b). Adopting Option 1 will turn §4B1.2(b)'s plain text on its head, to follow what the majority of circuits believe is a flawed legal theory.

As a practical matter, adopting Option 1 also will require a 180-degree turn for the substantial majority of circuits in their pronounced legal standards and the courts' and public's anticipated expectation of what the law is. As for the public, including crime victims, that 180-degree turn expectedly will lower sentence enhancements for a large number of recidivist offenders with cases pending sentencing.

If Option 1 is adopted by the Commission *and then given retroactive application*, the VRAG anticipates that Commission will identify a large number of *already sentenced recidivist offenders* as eligible for lowered enhancements, thereby lowering confidence in the fairness of the Guidelines and directly harming the victims of those prior offenses through the added trauma of notification and the right to be heard on a future resentencing.

The Commission's adoption of Option 2, on the other hand, will support victims and communities already harmed by recidivist offenders and will adhere most closely to the intention of Congress for the Guidelines to punish and deter recidivist criminal conduct. The VRAG strongly recommends that the Commission approve Option 2.

CIRCUIT CONFLICT 2: WHICH VERSION OF THE APPLICABLE DRUG SCHEDULE DETERMINES WHETHER A PRIOR CONVICTION QUALIFIES AS A "CONTROLLED SUBSTANCE OFFENSE" UNDER §4B1.2(b).

Circuit Courts are also split on whether the Guidelines §4B1.2(b) "controlled substance" is controlled under the applicable law at the time the defendant was originally convicted for the offense or at the time of sentencing for the instant offense. The VRAG strongly recommends that the Commission adopt proposed Option 2, requiring the "controlled substance" applicable law be applied as it was controlled at the time the defendant was originally convicted for the offense, which properly aligns with the majority of circuits.

The five circuit majority, *United States v. Nelson*, 151 F.4th 577 (4th Cir. 2025); *United States v. Dubois*, *supra*, 94 F.4th 1284 (11th Cir. 2024); *United States v. Lewis*, *supra*, 58 F.4th 764 (3d Cir. 2023); *United States v. Perez*, 46 F.4th 691, 703 (8th Cir. 2022); and *United States v. Clark*, 46

F.4th 404, 408 (6th Cir. 2022), each apply the applicable law at the time the defendant was originally convicted for the offense.

Of the four circuit minority, three circuits, *United States v. Minor*, *supra*, 121 F.4h 1085 (5th Cir. 2024); *United States v. Bautista*, *supra*, 989 F.3d 698 (9th Cir. 2021); *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021), use the time of sentencing for the instant offense. The fourth, *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), *adhered to on reh'g*, 60 F.4th 720 (2d Cir. 2023), does not use the time of the prior conviction.

Option 2 follows the "applicable law at the time the defendant was originally convicted for the offense" standard of the majority Third, Fourth, Sixth, Eighth, and Eleventh Circuit holdings, adding to §4B1.2(b):

> For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, that was controlled under the applicable law at the time the defendant was originally convicted for the offense.

Option 2 provides the court imposing a sentence for a recidivist offender with a logical "backward-looking" approach to the prior controlled substance offenses conviction. This approach is based firmly both on the plain Guideline text and on the Guidelines' intention of focusing on controlled substance convictions that happened in the past.

Applying the traditional plain text interpretation of the Guidelines, the Sixth Circuit holds:

> The time-of-conviction approach flows from the Guidelines' text. Section 4B1.1 states that a career offender is a person who has "at least two *prior* felony convictions" for a crime of violence or controlled substance offense. U.S.S.G. §4B1.1(a) (emphasis added). Section 4B1.2(c), which immediately follows the definition of "controlled substance offense," further defines "two prior felony convictions" to require that the defendant's commission of the instant offense be "*subsequent to* sustaining at least two felony convictions" for a crime of violence or controlled substance offense. *Id.* § 4B1.2(c) (emphasis added). The words "prior" and "subsequent to" direct the court's attention to events that occurred in the past. Thus, the Guidelines language indicates that the court should take a backward-looking approach and

> assess the nature of the predicate offenses at the time the convictions for those offenses occurred.

United States v. Clark, *supra*, 46 F.4th 404, 408-409 (6th Cir. 2022).

The Third Circuit observes that courts that ignore the text-based Guidelines "backward-looking" approach subvert the Guidelines' intent to punish recidivist offenders more severely:

> If we looked to the drug schedules in effect at the time of federal sentencing, any narrowing […] would expunge prior offenses related to that drug for purposes of the enhancement. Doing so would give a windfall to even the most serious drug traffickers and subvert, not vindicate, the Guidelines' intent to punish recidivists more severely than first-time offenders. […] Simply put, controlled substances include those regulated at the time of the predicate conviction.

United States v. Lewis, *supra*, 58 F.4th 764, 772 (3d Cir. 2023). *See also United States v. Dubois*, *supra*, 94 F.4th 1284, 1298-1300.

In support of Option 2's time-of-conviction rule, the VRAG agrees with these decisions from the majority of circuits.

The VRAG opposes Option 1 because Option 1 is contrary both to: a. the Guidelines' "backward-looking" focus on past convictions; and b. the Guidelines' intention to enhance recidivist offender sentences based on their earlier convictions. In support of its time-of-conviction rule, *Clark*, *supra*, relied on *McNeill v. United States*, 563 U.S. 816, 131 S.Ct.2218, 180 L.Ed.2d 35 (2011), as answering a closely related question about a sentence enhancement under the Armed Career Criminal Act (ACCA). *Clark, supra*, 46 F.4th 404, 409-411. *Clark* then declined to follow the time-of-sentencing rule of the minority circuit opinions of *United States v. Bautista*, *supra*; and *United States v. Abdulaziz*, *supra*. *Clark* found *Bautista* and *Abdulaziz* based on "flawed reasoning," because *McNeill* rejects a time-of-sentencing rule since the ACCA [and the Guidelines] are "concerned with convictions that have already occurred" and the "culpability and dangerousness [of the prior convictions] attach at the time of conviction." *Clark, supra*, 46 F.4th 404, 414 [citations omitted]. The Commission should decline Option 1 as being based on the same flawed reasoning that *Clark* specifically declined to follow.

As a practical matter, adopting Option 1 will also require a 180-degree turn for the substantial majority of circuits in their pronounced legal standards and the courts' and public's anticipated expectation of what the law is. As for the public, including crime victims, that 180-degree turn expectedly will lower sentence enhancements for a large number of recidivist offenders with cases pending sentencing.

If Option 1 is adopted by the Commission *and then given retroactive application*, the VRAG anticipates that Commission will identify a large number of *already sentenced recidivist offenders* as eligible for lowered enhancements, thereby lowering confidence in the fairness of the Guidelines and directly harming the victims of those prior offenses through the added trauma of notification and the right to be heard on a future resentencing.

The Commission's adoption of Option 2 best honors the plain text of §4B1.1(a) and §4B1.2(b) and (c) as well as the Guidelines' intention of enhancing sentences for recidivist offenders. Option 2 follows rulings of the majority of circuits.

The Commission's adoption of Option 2 will support victims and communities already harmed by recidivist offenders and will adhere to the intention of Congress for the Guidelines to punish and deter recidivist criminal conduct. The VRAG strongly recommends that the Commission adopt Option 2.

PROPOSED AMENDMENT: HUMAN SMUGGLING

The VRAG supports Guidelines that: properly consider and uphold the rights of crime victims under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771; recognize the traumatic impact of crime on victims; and comport with the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2)(A)–(D). Those purposes include reflecting the seriousness of the offense, promoting respect for the law, providing just punishment and adequate deterrence, protecting the public, and providing defendants with needed treatment.

The VRAG supports the proposal to increase the guideline range exposures, but we believe that the proposed increases are not sufficient to reflect the seriousness of the offense. The VRAG endorses the view of the Department of Justice (DOJ), as noted in the Commission's

proposal. "The Department opined that the guideline does not reflect a congressional intent 'to provide increased punishment for each alien smuggled.'"[7] The DOJ also expressed that §2L1.1 "does not adequately address human smuggling cases in which a victim was sexually abused or otherwise sexually assaulted."[8] From the victims' rights perspective, the VRAG agrees.

Multiple Aliens Smuggled

For crimes involving multiple aliens[9] smuggled, the VRAG strongly recommends that the offense enhancements be greater than currently proposed to fully reflect the extreme harm caused by the criminal conduct. Transporting undocumented non-citizens is a serious crime that circumvents border protections designed to vet entrants and protect the public from foreign threats. Crimes of this nature exploit the desperation of non-citizens seeking to enter the United States illegally, treating them as commodities and exposing them to harm and abuse. On many occasions, human smuggling operations have resulted in serious injury and death. In an enterprise where human beings—"bodies"—are seen as dollar signs, alien-smuggling coordinators and the drivers who further their agendas are incentivized to transport as much "cargo" as possible. Because the amount of money earned in these transactions is dependent upon the number of people smuggled, so too should the penalty be tantamount to the risk.

Because human smuggling operations involving multiple aliens create greater risks than offenses involving a single individual, the effect on each victim should be judged cumulatively. Each additional person subjected to the smuggling process increases the collective passengers' potential for injury, sexual abuse, death, and psychological trauma. The current guidelines do not adequately account for this calculus.

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[7] Letter from Scott Meisler, Deputy Chief, Crim. Div., U.S. Dep't of Just., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, 14 (July 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=97.

[8] *Id*.

[9] The term "alien" does not appear to be defined in the Guidelines. Relevant to the Guidelines, however, "Alien" is a term of law defined by the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3): "The term "alien" means any person not a citizen or national of the United States." For the purposes of VRAG's comment to the proposed amendments to § 2L1.1, the VRAG emphasizes that "aliens" are persons, humans, men, women and children.

It also further dehumanizes the aliens by failing to account for their numbers in sentencing. Each human being smuggled should give rise to a higher guideline-range exposure, just as the Guidelines currently account for the difference in drug weights, punishing defendants who transported greater quantities of drugs more harshly than those with lighter loads. But here, unlike in drug trafficking cases, the defendants are aware of the number of humans in their charge—and they knowingly place these people at risk. Defendants acting as load drivers for drug trafficking organizations are often unaware of the quantity of drugs they are transporting—but still they are held responsible for those amounts. That is because the Commission, in tune with Congress, recognizes that the punishment must account for the harm. The greater the drug quantity, the greater the risk of harm to the community, the more lives ravaged, the more minds and souls destroyed. So too here. The human smuggling realm involves a conscious dismissal of the value of human life and should therefore follow the drug trafficking model and provide harsher punishments for greater number of smuggled aliens.

The conditions in which aliens are transported are often dangerous, inhumane, and unsanitary. They are often ordered to crouch inside car trunks or lay supine on the floor of a van; they seldom have seatbelts. They are sometimes crowded in the beds of tractor trailers, driven at high speeds through arid desert conditions, trapped in rollover accidents, or marched onto unseaworthy vessels crossing oceans or the Great Lakes. Each of these circumstances dramatically heightens the risk of serious injury or death—to the drivers, the passengers, and the public. The criminal conduct in these instances must not be treated as equivalent to an isolated offense. The loss of a single human life is tragic; the potential loss of hundreds of lives is catastrophic.

Increasing the offense level in these cases would ensure that the sentencing framework appropriately reflects both the scale of human suffering and the elevated public safety risks posed by large-scale smuggling operations. It would send a clear message that organized exploitation of multiple vulnerable individuals will be met with commensurate punishment.

Criminal Sexual Contact

The VRAG supports an enhancement for criminal sexual contact, but that enhancement should be much higher than the ones proposed. Human beings smuggled into the United States

are often subjected to sexual abuse and exploitation, even from other smuggled aliens. The victims, including unaccompanied minors and vulnerable adults who may not be attempting to enter the United States on their own volition, suffer intense trauma that includes post-traumatic stress, anxiety, depression, and long-lasting emotional and psychological harm.[10] The coercion inherent in sexual offenses compounds the already dangerous smuggling process. When human beings become victims of a sexual offense, the harm created extends far beyond the immediate journey.

Sexual offenses devastate individual victims and have lasting consequences for families and communities, highlighting the urgent need for sentencing enhancements that reflect the severity of both the physical and psychological risks involved in transnational human smuggling operations. The deterrent effect of these sentences, both general and specific, needs to be telegraphed in clear and unequivocal statements at sentencing.

Multiple Deaths or Injuries

The VRAG supports enhancements for multiple deaths or injuries but recommends a combination of Options 1 and 2. The VRAG further recommends that the enhancements should be higher to remain consistent with the purposes of sentencing, as specified above. The VRAG recommends that the multiple-alien enhancement begins at 3 instead of 6. This would more clearly respect the direction that a penalty should be added for each alien smuggled. Each proposed new level should be increased by at least 2 more than proposed and at the two highest levels by at least 5 more than proposed. And, while such increases account for the harm on victims and the vulnerable population of aliens smuggled, higher guideline ranges do not preclude courts from using their discretion to grant downward variances in appropriate cases.

Along those same lines, the VRAG also recommends that enhancements be offense-based to accurately reflect the nature, scope, and harm caused by the criminal conduct rather than the characteristics of the offender. Each additional alien smuggled, each death or injury, and each instance of sexual abuse or exploitation represents a discrete harm directly caused by the offense. Enhancements should thus be tied to the aforementioned factors to ensure that

[10] *See* Emily R. Dworkin, et al.; *Sexual Assault victimization and Psychopathology: A Review and Meta-Analysis*, 56 CLINICAL PSYCHOLOGY REVIEW 65 (2017).

sentences are proportional to the severity of conduct. Unlike offender-based enhancements, offense-based adjustments directly address the harm caused by the crime itself and align with the purposes of sentencing under 18 U.S.C. § 3553(a)(2)(A)-(D). The offender's history and characteristics are always at play, and any mitigators would already be accounted for appropriately by the sentencing court.

Human smuggling is inherently dangerous and may result in serious injury or death to human beings who become victims. As explained earlier, that risk arises directly from the inhumane methods smugglers use to transport migrants, including overcrowded vehicles, unventilated compartments, unsafe vessels, desert crossings, and high-speed motor vehicle transport. These conditions create a high probability of tragic outcomes, including mass fatalities, severe trauma, and permanent disability. When multiple victims are harmed or killed in a single smuggling operation, the societal and individual harms are increased.

Each additional life represents a separate and measurable injury. Enhancements for multiple deaths or injuries signal that the law treats organized endangerment of multiple individuals as especially serious and would provide accountability proportionate to the harm caused.

Transnational Criminal Organizations

The VRAG supports the addition of a specific offense characteristic to §2L.1.1 that would address the risks associated with human smuggling offenses committed by members of "Transnational Criminal Organizations" (TCO). The current enhancements under §2L.1.1 do not adequately address the harm, both societal and to individual victims, caused by TCO activity. TCOs operate, wholly or in part, through illegal means and are a threat to the national and economic security of the United States.[11] TCO activity includes migrant smuggling, human trafficking, money laundering, firearms trafficking, illegal gambling, extortion, creation/sale of counterfeit goods, wildlife and cultural property smuggling, and cybercrime.[12] Additionally,

[11] *See* https://www.fbi.gov/investigate/transnational-organized-crime (last accessed February 14, 2026).
[12] *Id.*

TCOs pose ongoing and continuously evolving threats to the public, especially near border communities.[13] When public safety is at risk, the likelihood of serious injury or death increases.

The VRAG recommends that the enhancement should be tiered. An enhancement would be consistent with this purpose as it would differentiate organized criminal conduct from crimes of opportunity, recognize the risk to public safety posed by TCOs, promote sentencing proportionate to the offense committed, and deter cross-border networks.

Along those lines, the VRAG supports a broad definition of a TCO. While 21 U.S.C. § 2341(5) expressly identifies certain TCOs, it is limited and does not carefully consider splinter factions, affiliated networks, or newly formed organizations that engage in similar criminal conduct. TCOs constantly evolve; thus, a definition tied to a static statutory list would undermine the deterrent and proportional sentencing purposes of the enhancement. By contrast, 31 C.F.R. § 590 addresses TCOs and is inclusive of successor organizations and affiliates. It is adaptable to evolving threats posed by TCOs.

The VRAG supports the application of the enhancement to all participants working with or for a TCO, regardless of their formal role or status within the organization. TCOs rely not only on leaders and organizers, but on participants who perform lower-level tasks. Each participant in the TCO contributes to the ability to conduct large-scale, coordinated, criminal activity across borders that often results in violence and creates a risk of serious physical injury or death.

Thank you for this opportunity to address the Commission's proposed Sentencing Guideline amendments for the 2025-2026 cycle.

Respectfully yours,

Christopher Quasebarth

The Victims' Rights Advisory Group
Christopher Quasebarth, Chair

cc: Victims' Rights Advisory Group Members

[13] *Id.*

March 3, 2026

Dear Judge Reeves and Members of the United States Sentencing Commission:

Thank you for seeking additional public comment on proposed amendments for the U.S. Sentencing Commission's ("Commission") amendment cycle. On behalf of Right On Crime—a national criminal justice campaign of the Texas Public Policy Foundation focused on conservative, data-driven solutions resulting in less crime, fewer victims, and safer communities— I am pleased to submit the following comments and recommendations.

The Commission proposed additional amendments on January 30, 2026.[1] Right On Crime appreciates this Commission's consistent and comprehensive comment process in seeking feedback from a diverse array of stakeholders. To that end, Right On Crime respectfully submits to the Commission the below select comments and further recommendations to the proposed amendments.

(1) Sentencing Options

The Commission has proposed an amendment that seeks to move beyond a prison-first mentality and expand the availability of non-custodial sentencing options. Specifically, the proposed amendment on Sentencing Options would add new introductory commentary and a guideline change to emphasize that determining the *type* of sentence (probation, fine, or imprisonment) is a critical threshold decision.

Part A's introductory commentary is uniquely helpful for litigators and judges to reference when recommending and issuing federal sentences which, as the Commission notes, would "further underscore the importance of this critical decision."[2] And it is similarly encouraging to see the introductory commentary highlight the need for judicial discretion in tailoring the type of sentences, namely by stating that "[a]s the criminal justice system continues to develop more advanced tools to assess and respond to individual defendants' unique risks and needs, the court should consider the resources available to address the defendant's needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option."[3]

The Commission also proposes possible changes to §5A1.1. These suggestions are overall positive and could be instructive for practitioners in ensuring the appropriate length and type of sentence is handed down. This is particularly true where the proposed amendment urges courts to "consider which option(s) will best meet the purposes of sentencing and the needs of the

[1] U.S. Sentencing Comm'n, Proposed Amendments to the Sentencing Guidelines (Jan. 30, 2026), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.
[2] *Id*. at p. 5.
[3] *Id*. at p. 6.

individual defendant."[4] Right On Crime's only suggestion in this proposal is to simultaneously pay reverence to the victim in sentencing decisions. This very well could be covered by the courts' consideration of the applicable factors in 18 U.S.C. § 3553(a) – which the Commission explicitly notes are still relevant.[5] However, an explicit instruction to courts and litigants to choose sentences based on the defendant's risks and needs alone begs the question: does this encompass any particular needs of the victim?

The Commission asks whether the introductory commentary and Guideline amendments should both be adopted.[6] Based on the aggregate positive impact, Right On Crime would support adoption of both parts of the Part A amendment.

Part B of the proposed amendment considers expansion of Zones B and C of the Sentencing Table to increase the number of defendants eligible for split sentences, or probation with conditions of confinement. Right On Crime supports the Commission's amendment to expand non-custodial sentencing options where appropriate. Judges are best positioned to evaluate the unique risks and needs of individual defendants and the specific circumstances of a case. To that end, courts need to move away from the assumption that incarceration is the only and most meaningful response to crime. Alternative punitive measures – like home confinement, probation, and deferred prosecution – can support non-violent offenders maintain normalcy while serving a sentence. This targeted rehabilitation is a sensible crime management policy that can reduce recidivism and costs to the Bureau of Prisons, all while maintaining public safety.[7]

This proposed amendment is a step towards realigning the Guidelines with the original intent of the Sentencing Reform Act – supporting the "full exercise of informed discretion."[8] This proposal makes clear that the Commission recognizes that many low-to-moderate risk defendants can be effectively punished and supervised without the destabilizing effects of long-term imprisonment.

(2) Career Offender

The Commission has proposed an amendment to address the "recurrent criticism of the categorical approach" for career offender sentencing enhancements.[9] Right On Crime is providing comment on part of this proposal: the elimination of the use of the categorical

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[4] *Id*. at p. 7.
[5] *Id*.
[6] *Id*. at p. 9.
[7] *See, e.g.*, *Home Confinement Under the CARES Act*, 88 Fed. Reg. 19830 (Apr. 4, 2023) (codified at 28 C.F.R. § 0.96c), noting that the expansion of home confinement served as a sensible crime management policy by prioritizing targeted rehabilitation; this transition allowed the Bureau of Prisons to significantly reduce institutional costs and lower recidivism rates through stabilized community reentry, all while maintaining a rigorous standard of public safety via electronic monitoring and strict supervision.
[8] S. Rep. No. 225, 98th Cong., 1st Sess. 91 (1983).
[9] *Supra n*. 1 at p. 17.

approach for purposes of determining whether a federal offense is a "crime of violence" by listing federal offenses that would qualify as a "crime of violence."

Generally speaking, imprecise language surrounding what constitutes a crime of violence has been struck down as unconstitutionally vague.[10] And statutory questions on this issue continue to clog the federal court dockets.[11] The categorical approach, despite its frequent appearances before the Supreme Court of the United States,[12] is still "difficult to apply and can yield dramatically different sentences depending on where [the crime] occurred[.]"[13]

While well intentioned and intended to "correct some of the 'odd' and 'arbitrary' results that the categorical approach has produced relating to the 'crime of violence' definition,"[14] there are some well-worn criticisms and valid hesitations towards outlining the specific offenses that would qualify as "crimes of violence," as proposed in this amendment.

For example, in listing out specific statutes of "crimes of violence," sentencing judges may have to ignore the facts of the case. A person may commit one of the newly defined "crimes of violence" without criminal intent or perhaps without any harm caused. Also, once a list of "crimes of violence" is crafted and accepted by the Commission, it would be slow to change.[15] However, social standards, technology, and criminal enterprises move fast. A list from 2026 may not account for how certain crimes are viewed in the future. And conversely, it could take years for the Commission to once again add new, warranted, and genuinely dangerous behavior to a formal list.

To that end, the Commission's proposal to address the inequities of the categorical approach is laudable. However, as it identified in the proposal itself, the revision – listing out specific offenses by reference to the U.S. Code – will identify "crime of violence" offenses as presumptively violent and in an overbroad way.[16] The list of qualifying offenses is not only overinclusive, but simultaneously underinclusive. It could have the adverse effect of failing to capture certain crimes where violence is associated with the crime but not an element of the offense to where Congress would have made it clear in its statutory definition.[17]

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[10] *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015); *see id.* at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The Court last term similarly struck down the residual clause in 18 U.S.C. § 924(c)(3)(B), *see United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), and did the same to the residual clause in 18 U.S.C. § 16(b) during the 2017 Term in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

[11] *See, e.g.*, summary outlined by Rachel Barkow in https://harvardlawreview.org/print/vol-133/the-flawed-framework-of-the-armed-career-criminal-act-and-mandatory-minimum-sentencing/#footnote-11.

[12] *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) ("Indeed, over the past decade, perhaps no other area of law has demanded more of our resources.").

[13] *Mathis v. United States*, 136 S. Ct. 2243, 2269-70 (2016).

[14] *Supra n*. 1 at p. 17.

[15] It would certainly be even slower with Congress.

[16] *Supra n*. 1 at p. 17.

[17] Compare, for example, those offenses listed out in the proposed amendment for a "crime of violence" and those that are not qualifying for earned time credits in the First Step Act. First Step Act (FSA) of 2018 (P.L. 115- 391).

To be sure, the criminal justice system would be much improved if it distinguished more between chronic offenders who are truly dangerous and those who are low-level repeaters. Narrowing this helps prioritize resources on violent threats. Therefore, limiting the scope of the Career Offender guideline could be a positive improvement so long as it prevents non-violent drug offenders or those with technical violent priors (where no actual force was used) from receiving massive sentence enhancements.

Overall, Right On Crime is cautiously supportive of the Commission's decision to seek clarity and improve the career offender guideline as it pertains to defining a "crime of violence." Any clarity and efficiency gained by moving away from the categorical approach is a win. However, the Commission must remain vigilant to ensure that the definition remains robust enough to protect the public from truly violent recidivists while ensuring that non-violent offenders are not caught in the Career Offender net. This is a delicate balance that the Commission clearly seeks and further discussion on the merits of the current list, definition, and the offenses' impacts on public safety will be helpful in informing the Commission on how to best proceed.

(3) Human Smuggling

The Commission has also proposed an amendment addressing specific factors for consideration in human smuggling crimes, such as the number of aliens smuggled and whether the offense involved bodily injury or sexual assault.[18] It appears that the proposal is largely influenced by the Department of Justice's comment submitted to the Commission last year.[19] The Justice Department is right to point out that "[t]he human cost of smuggling operations is enormous."[20] And generally speaking, Right On Crime is incredibly sympathetic to holding dangerous human smugglers accountable.

However, the structure of the proposed amendment may not be the most effective way to protect victims of human smuggling equally. Much of the proposed amendment focuses on issuing sentencing enhancements through a tiered system based on the number of aliens involved and decreasing the number of aliens in each tier. This tiered system may originally have been intended to reflect the intent of Congress to punish the offender for each individual alien affected.[21] However, it has set up an overreliance on arbitrary numerical thresholds for enhancements. The current and proposed tiered enhancements (i.e., 6 – 24 aliens vs. 25 – 99) suggest that a crime is only significantly more serious if a certain random number of victims is reached. However, nothing suggests that a particular threshold for number of victims has a deterrent effect of future crime. And similarly, nothing suggests that just because fewer victims

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While these lists are written for different purposes, to be sure, it illustrates that the applicability of certain enhancements, restrictions, and interpretations of rehabilitation vary significantly.

[18] *Supra n*. 1 at p. 51.

[19] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=97.

[20] *Id*.

[21] 8 U.S.C. § 1324(a)(1)(B).

are impacted that the crime itself is any less heinous. Rather, a crime committed against *one* person is a violation of human dignity and is a threat to public safety. Headcount alone does not necessarily redress the harms to individual victims. Increasing penalties and having arbitrary enhancements may be penalizing just for penalizing's sake.

Further, the Commission's own data reveals a disconnect: the majority (59%) of smuggling cases involve an average of three aliens and receive no enhancement.[22] Yet, the current proposal continues to ignore this most frequent category.

If the goal is to deter and punish the most common forms of this crime, the Commission should consider options to apply enhancement based on the *type* of victim as opposed to the number. Basing enhancements on the presence of vulnerable victims, such as abandoned children, pregnant women, or the elderly could be more reflective of the heinous nature of the crime. The Commission could also alternatively focus on the base offense level to reflect the inherent danger of the crime rather than stacking tiers based on volume. A more victim-centered approach could also include addressing role-based activity. The current proposal appears to overlook whether a defendant was a leader of a transnational organization or a low-level participant, which is critical for just sentencing. Better yet, the Commission should highlight through research, data collection, or Guidelines commentary how enhancements and severity of sentences are not actually the most effective measure of crime deterrence. Instead, as described by the Department of Justice itself, it is the certainty of punishment itself that prevents future crime.[23]

Right On Crime greatly appreciate the Commission's thoughtful and thorough review of these comments and looks forward to continuing to work with the Commission to improve our criminal justice system.

Sincerely,

Brett Tolman

Executive Director
Right On Crime

[22] *Supra n*. 1 at p. 51.
[23] U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, "Five Things About Deterrence," (May 2016), available at https://www.ojp.gov/pdffiles1/nij/247350.pdf.

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

gabbie Sheffer foundation

Topics:

1. Sentencing Options

Comments:

The sentencing should be stricter because it keeps our public safer. Longer sentences keep dangerous offenders off the streets for more time. Supporters argue this reduces repeat offenses and protects victims and communities, especially in cases involving violent or habitual criminals.

Submitted on: February 8, 2026

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

TRINITYS GARDEN

Topics:

1. Sentencing Options
2. Career Offender

Comments:

The current sentencing guidelines give no chance for rehabilitation. Housing a no violent offender longer than a person that kills someone is not fair.

Submitted on: February 5, 2026

Gabriella Sanchez, PhD
Georgetown University, Washington D.C.

Luigi Achilli, PhD
Scuola Superiore Sant'Anna, Pisa, Italia

Affiliation provided for identification purposes only

March 8, 2026

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

RE: Comment on 2L1.1 (Smuggling, transporting, or harboring an unlawful alien) amendments

Dear Chair Reeves, Vice Chairs and Commissioners,

It is in our personal capacity that having read the proposed amendments and their rationale, we respectfully provide some thoughts on 2L1.1 (Smuggling, transporting, or harboring an unlawful alien). We urge the Commission to carefully examine and devote significant research resources towards understanding the dynamics of migrant smuggling in the United States prior to the passage of any amendments. The following paragraphs summarize our observations.

1. The proposed amendments reflect the extraordinarily **limited amount of empirical evidence and research concerning migrant smuggling in the United States**.[1] Few researchers have dedicated time to examine its dynamics and actors in depth.[2] While granted, there is an overabundance of journalistic, academic and policy publications that have documented smuggling practices, the vast majority are based on short-term engagements in the field, interviews with well-intentioned but often predisposed law enforcement and government officials, or simply derived from secondary sources. While some researchers and journalists have also sought to unearth the dynamics of smuggling, they often focus on the most lethal or high-profile cases, which leads to reproducing stereotypical notions of smuggling.[3]

[1] Zhang, S.X., 2007. *Smuggling and trafficking in human beings: All roads lead to America*. Bloomsbury Publishing USA. Spener, D., 2009. *Clandestine crossings: Migrants and coyotes on the Texas-Mexico border*. Cornell University Press. Sanchez, G., 2014. *Human smuggling and border crossings*. Routledge.

[2] Aziani, A., 2023. The heterogeneity of human smugglers: a reflection on the use of concepts in studies on the smuggling of migrants. *Trends in Organized Crime*, *26*(1), pp.80-106. Baird, T. and Van Liempt, I., 2016. Scrutinising the double disadvantage: knowledge production in the messy field of migrant smuggling. *Journal of Ethnic and Migration Studies*, *42*(3), pp.400-417.

[3] Achilli, L. and Massari, A., 2023. Enter the boogeyman: Representations of human smuggling in mainstream narratives of migration. *Global human smuggling: Control, complexity, and Creativity in Unauthorized mobility. John Hopkins University*. Achilli, L. and Sanchez, G., 2017. *What does disrupting the business models of people smugglers*

2. Furthermore, access to **official data concerning smuggling is negligible**.[4] To our knowledge, the Commission is the only agency in the Western Hemisphere that systematically publishes official data concerning smuggling. When available, the methodologies employed for data analysis are often not readily available nor disclosed.[5] In the specific case of the amendments, there is no rationale detailing the empirical grounds for the changes related to the so-called "Alien Table" §2L1.1(b)(2). It simply suggests that to a larger number of smuggled people corresponds a harsher sanction. Evidence-based sentencing policy demands transparent, peer-reviewable methodology; without it, the Commission risks building guidelines on untested assumptions rather than on empirical findings.

3. In sum, **data and research concerning smuggling are scant at best, which leads to an imprecise, biased knowledge of its dynamics, and for the most dramatic, lethal cases –which tend to be outliers – to be used or interpreted as the norm**.

4. Concerning the intention of including a transnational crimen organization designation, there is sufficient evidence to conclude **the vast majority of smuggling cases prosecuted in the US do not pertain to the domain of transnational criminal organizations**.[6] The only systematic connection between migrant smuggling and Mexican drug trafficking organizations is the payment of *piso,* a tax-like, individual fee that allows a migrant to enter or use a specific territory. *Piso* is independent of the smuggling fee. This transactional relationship - akin to an extortion tax - does not constitute a sign of organizational membership, operational coordination, or integration into a criminal network, and should not be treated as such for sentencing purposes.

5. Rather than networks, clans or cartels, the legal record and some of the academic evidence show that **the vast majority of smuggling cases involve tasks performed by loosely organized local groups, often comprised by friends and family members,** who profit from their in-depth knowledge of the borderlands' geography.[7] Most smuggling cases in the US involve Latino residents of the areas encompassed by the Western District of Texas, the Southern District of Texas and the District of

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mean? Migration Policy Centre. Florence: European University Institute. https://cadmus.eui.eu/entities/publication/e7a44774-ec6f-5303-ab37-4ca02b49b2f9

[4] UNODC 2018. *Global Report on the Smuggling of Migrants.* Vienna: UNODC. IOM 2024. Smuggling of Migrants. Migration Data Portal. Geneva: IOM. https://www.migrationdataportal.org/themes/smuggling-migrants; Campana, P., 2020. Human smuggling: Structure and mechanisms. *Crime and Justice*, *49*(1), pp.471-519.

[5] Baird, T. and Van Liempt, I., 2016. Scrutinising the double disadvantage: knowledge production in the messy field of migrant smuggling. *Journal of Ethnic and Migration Studies*, *42*(3), pp.400-417.

[6] Izcara Palacios, S.P., 2015. Coyotaje and drugs: Two different businesses. *Bulletin of Latin American Research 34*(3), pp.324-339. Sanchez, G.E. and Zhang, S.X., 2018. Rumors, encounters, collaborations, and survival: The migrant smuggling–drug trafficking nexus in the US Southwest. *The ANNALS of the American Academy of Political and Social Science*, *676*(1), pp.135-151. Loroña-Celaya, S. and Sanchez, G., 2024. Una visión fronteriza sobre la interacción entre el tráfico de migrantes y el tráfico de drogas: El Caso del Valle de Altar. *Reimagining the Migration Protection System*. El Paso: Hope Border Institute. pp.20-27.

[7] Hanna, I. & J. Hepburn, U.S. Department of State, 2024. *Foreign Press Center Briefing: Targeting Human Smuggling and Trafficking in the Northern Triangle and Mexico* (June 5, 2024). https://2021-2025.state.gov/briefings-foreign-press-centers/targeting-human-smuggling-and-trafficking-in-the-northern-triangle-and-mexico/ Sanchez, G. 2014, *Human smuggling and border crossings*. London: Routledge. Loroña-Celaya, S. and Sanchez, G., 2024. Una visión fronteriza sobre la interacción entre el tráfico de migrantes y el tráfico de drogas: El Caso del Valle de Altar. In *Reimagining the Migration Protection System*. El Paso: Hope Border Institute. pp.20-27.

Arizona[8] which are coincidentally, some of the poorest communities in the country.[9] Many are themselves former or current migrants who turned to facilitating smuggling as a means of economic survival, blurring the line between "smuggler" and "smuggled" that the proposed guidelines assume to be clear-cut.

6. Given the aforementioned, **harsher guidelines will not impact transnational criminal organizations, but rather a vast number of already disenfranchised people**. A quick examination of the profiles of the people systematically apprehended for smuggling in these districts shows that they include migrants themselves, low-income households led by women, senior citizens, members of Native American reservations, and caregivers of disabled and ill children, who often turn to smuggling to supplement their meager incomes.[10] Increasing penalties in this context risks deepening cycles of poverty and incarceration in already marginalized communities, without dismantling smuggling infrastructure or deterring the practice itself.

7. Like the Commission, we share the concern over the gravity and frequency of vehicular accidents. Alongside the US Mexico border, multiple law enforcement agencies have also expressed concern over the recruitment of teenagers as drivers in smuggling crews.[11] But it is imperative to note that **drivers do not purposely seek to put their passengers at risk: their goal is to avoid detection**.[12] Given the illicit nature of smuggling, drivers are under constant pressure to avoid any maneuvers that could make them visible to law enforcement, which may impact their ability to drive.

8. **Most cases involving death or serious injury are almost invariably connected to counter-smuggling operations** –law enforcement systematically relies on high-speed chases or aggressive maneuvers to stop vehicles, which ultimately leads to accidents. If at all, law enforcement practices related to counter-smuggling demand closer examination, for they have for decades been identified as

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[8] US Sentencing Commission (2024). *Alien Smuggling Fiscal Year 2024*. Washington DC: USSC. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY24.pdf

[9] According to the US Census Bureau, the poverty rate for Hidalgo County (24.4%), Starr County (40.7%), and Zapata County (38.4 %) double or triple the rate for the State of Texas (13.4%). See https://data.census.gov/profile/Texas?g=040XX00US48 An estimated 35.2% of people in the Tohono O'odham Nation in Arizona live under the poverty line. See https://censusreporter.org/profiles/25200US4200R-tohono-oodham-nation-reservation/

[10] Leutert, S. and M. Rendon. 2023. *Clandestine Migration and Migrant Smuggling in South Texas*. Strauss Center for International Security: The University of Texas at Austin. https://www.strausscenter.org/publications/clandestine-migration-and-migrant-smuggling-in-south-texas/ Leutert, S. (Director) 2025. *Clandestine Migration and Migrant Risk in South Texas*, LBJ School of Public Affair. The University of Texas at Austin. https://www.strausscenter.org/wp-content/uploads/Clandestine-Migration-in-South-Texas-PRP.pdf.

[11] Leutert, S. (director). 2025. *Clandestine Migration and Migrant Risk in South Texas*, LBJ School of Public Affair. The University of Texas at Austin. https://www.strausscenter.org/wp-content/uploads/Clandestine-Migration-in-South-Texas-PRP.pdf. Sanchez, G. and Zhang, S.X., 2021. In their own words: children and the facilitation of migrant journeys on the US-Mexico border. In *Beyond Drugs, Smuggling and Trafficking* (pp. 80-99). Routledge. Secretaría de Gobernación 2023. *Niñas, niños y adolescentes en movilidad de circuito y su relación con el tráfico de migrantes*. Unidad de Política Migratoria. https://portales.segob.gob.mx/es/PoliticaMigratoria/rutas_15

[12] Sanchez, G. and Zhang, S.X., 2021. In their own words: children and the facilitation of migrant journeys on the US-Mexico border. In *Beyond Drugs, Smuggling and Trafficking* (pp. 80-99). Routledge.

critical factors leading to migrant death and injury.[13] For example, between Texas' Operation Lonestar **launch in March 2021 and July 2023, at least 74 people were killed and 189 people were injured during 49 vehicle pursuits by Texas troopers or local law enforcement (or both).[14]** Some of the victims were bystanders not involved in the pursuit, and at least some of the victims were children under the age of 10. Increasing smuggling penalties without simultaneously addressing these enforcement practices will not reduce vehicular fatalities—it will simply ensure that those who survive face harsher sentences.

9. We also share the Commission's concerns involving sexual violence, and recognize its ubiquity along the migration pathway. Our work has documented the multiple forms of violence people encounter in smuggling. We also agree that **sexual violence is vastly underreported**, in part because **it involves a wide range of behaviors and attitudes that often conjure deep shame, stigma and fear.[15]** Most analyses on sexual assault on the migration pathway have focused on the experiences of young women and girls only. Women, girls and LGBTQI people often normalize these violences and tend not to disclose them. Men and young boys are often victims of sexual violence in smuggling contexts, yet may refuse to disclose it fearing being labeled as gay.[16]

10. **While it is common to come across statistics or numbers concerning sexual assault, it is fundamental to examine the source and the politics behind quantification**.[17] When researching morally-charged topics like sexual assault, scholars have warned about the echo-chamber effect – a phenomenon in which an individual's beliefs and views are reinforced by exposure to information that aligns with their preexisting opinions.[18] Stigmatized practices like sex work and sexual violence are often quantified hastily, without sufficient backing or evidence, and it is common for humanitarian organizations or NGOs –which often depend on the identification of potential victims of human trafficking and/or sexual exploitation for their budget – to provide casual estimates or numbers that go unquestioned and are simply assumed as categorical truths.[19] Once these become part of the written record, they tend to be picked up by concerned scholars and policy makers and taken as facts.

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[13] Reineke, R. and D. E. Martinez 2024. Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona*, Journal on Migration and Human Security* (12)243, pp. 247-250; Vega, I. 2022. "Reasonable" Force at the U.S.-Mexico Border, *Social Problems*, (69) 4, pp. 1154–1169 .

[14] Human Rights Watch 2024. *Driver Prosecutions, Immigrants and Smuggling in Texas: fueling a mass incarceration crisi*s.https://www.hrw.org/sites/default/files/media_2024/07/Brief%20-%20Driver%20Prosecutions% 20Immigrants%20and%20Smuggling%20in%20Texas.pdf

[15] Achilli, L., 2018. The "good" smuggler: The ethics and morals of human smuggling among Syrians. *The ANNALS of the American academy of political and social science*, *676*(1), pp.77-96.

[16] Chynoweth, S.K., Buscher, D., Martin, S. and Zwi, A.B., 2022. Characteristics and impacts of sexual violence against men and boys in conflict and displacement: a multi-country exploratory study. *Journal of interpersonal violence*, *37*(9-10), pp.NP7470-NP7501; Russell, W., 2007. Sexual violence against men and boys. *Forced Migration Review*, *27*, pp.22-23.

[17] Merry, S.E., 2016. *The seductions of quantification: Measuring human rights, gender violence, and sex trafficking*. University of Chicago Press.

[18] EBSCO. "*Echo Chamber Effect: Communication and Mass Media:* Research Starters." EBSCO. Accessed March 7, 2026. https://www.ebsco.com/research-starters/communication-and-mass-media/echo-chamber-effect.

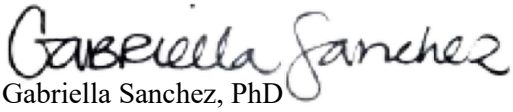
[19] Zhang, S.X., 2009. Beyond the 'Natasha' story–a review and critique of current research on sex trafficking. *Global crime*, *10*(3), pp.178-195. Doezema, J. 2002. 'The Ideology of Trafficking', paper presented at the Work Conference 'Human Trafficking', 15 November 2002, Centre for Ethics and Value Inquiry (CEVI), Ghent University, 2002, p. 2

11. Scholars have also demonstrated that **perceptions of Latino and Black men as hypersexual and predatory are common in smuggling narratives, reinforcing stereotypes that impact their outcomes in the criminal justice system**.[20] While men of color are not more likely to commit these crimes than other groups, they are disproportionately charged with sex-based offenses. The Commission should be attentive to the risk that enhanced penalties for sex-based offenses in smuggling contexts may compound these existing racial disparities rather than correct them.

Lastly, we must emphasize that while the proposed amendments express a clear focus on victims, we must not forget **the main reason behind the reliance on smuggling services is the lack of equal access to legal pathways for migration**.[21] Obscure statistics and references to lurid cartels help generate a sense of crisis, but do not address the issues at the heart of the demand for smuggling. Sentencing guidelines must be proportionate to the actual culpability and role of each individual; a one-size-fits-all approach that conflates minor facilitators with cartel operatives, risks producing deeply unjust outcomes and undermining the credibility of the federal sentencing framework itself.

As researchers, we often lack resources and institutional power to present work that dissents or challenges official narratives or claims. For that reason, we are grateful to the Commission for the opportunity to help realign federal sentencing with evidence-based work.

Respectfully,



Gabriella Sanchez, PhD

Luigi Achilli, PhD

Gabriella Sanchez is affiliated to Georgetown University, and a member of Oxford University's group on Smuggling and Criminalization. She is a socio-cultural anthropologist by training, and holds a PhD in Justice Studies from Arizona State University. For the last 15 years she has researched migrant smuggling dynamics into the United States and Europe. Her research is grounded in long-term ethnographic fieldwork with migrants, smuggling facilitators, and border communities across the Americas, Europe and Africa. Prior to entering academia, she worked for 7 years as a presentence investigations officer in Maricopa County, Arizona, where she conducted investigations concerning drug trafficking and migrant smuggling. She is the author and editor of 3 books, 4 co-edited collections, and several dozen publications and research reports on migrant smuggling and human trafficking practices in the Americas, Africa and Europe. She has served as an advisor and/or consultant to the European Commission, IOM, UNODC, UN Women, US DHS, US ICE, HSI and INL. She frequently provides trainings for law enforcement officials, judiciary personnel and other government staff in Latin America and the Caribbean, as part of their counter-smuggling strategies. She is also a US-Mexico Borderlands resident.

[20] Sanchez, G., 2023. Intersectionality and migrant smuggling research. In Romero, M. editor. *Research Handbook on Intersectionality (*pp. 458-475). Edward Elgar Publishing; Jones, D.M., 2005. *Race, sex, and suspicion: The myth of the black male*. Bloomsbury Publishing USA; Mirandé, A., 2018. *Hombres y machos: Masculinity and Latino culture*. Routledge.

[21] Achilli, L., 2024. The missing link: The role of criminal groups in migration governance. *Journal of Ethnic and Migration Studies*, *50*(20), pp.5045-5066.

Luigi Achilli is Associate Professor at the Scuola Superiore Sant'Anna in Pisa, Italia and Principal Investigator of the ERC Consolidator Grant UNDERGOV – The Underbelly of Migration Governance. She is a social anthropologist by training and holds an M.A. and a Ph.D. in Social Anthropology from SOAS, University of London. He has hold teaching positions at the University of Cambridge, SOAS, and institutions in the Middle East. His research focuses on irregular migration, transnational crime, refugee studies, political engagement, nationalism, and the Palestinian question, with a broader interest in migration governance and transnational mobility. His work is grounded in long-term ethnographic fieldwork in the Middle East, Southern Europe, and Mexico, primarily among refugees, displaced populations, and actors involved in the facilitation of irregular migration. Alongside his academic research, he has also contributed to policy debates on migration governance, humanitarian action, and the regulation of transnational mobility. He is the author and editor of numerous publications on these issues, including Global Human Smuggling (Johns Hopkins University Press, 2023).

Public Comment - Proposed 2026 Amendments (December 2025)

Submitter:

Ben Miller, Mr.

Topics:

8. Miscellaneous

Comments:

I believe the guidelines would produce a more just result if a person's lack of criminal history was a bigger factor. There should be available deductions tied to what we know about crime and recidivism - a person with no history over age 25 a -1, into their 30s a, a -2, etc. Or a -1 if the person had not committed an offense in the previous five years. Yes a court can deviate for these reasons - but that is true for any reason, up or down. Treating a first time offense the same for someone who does so at 20 as if the same offense is committed by someone at 40 (for criminal history purposes) makes little sense. I have seen too many people with no criminal history into their 30s and 40s, suddenly get caught up in something and receive sentences that because of their age are akin to death in prison sentences.

Submitted on: February 3, 2026

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Phillip Sanda, Bureau of Prisons

Topics:

1. Sentencing Options

2. Career Offender

Comments:

Stop letting repeat offenders loose on the streets. They did the crime, they pay. Also, just because they are a first time federal offender, doesn't mean they are a first time offender. If they have been arrested several time on state charges, that should mean something. ALSO, get rid of the First Step Act crap.

Submitted on: February 6, 2026

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Chelsea Sawyer, Missouri, Eastern

Topics:

1. Sentencing Options

Comments:

Please do not restructure the zones in the sentencing table. Home confinement is quite costly to districts and is not always an appropriate option for every defendant depending on their individual situation and residency location.

Submitted on: February 20, 2026