

United States Sentencing Commission

2025-2026 Amendment Cycle

Public Comment on Certain
Proposed Amendments

91 FR 5556



UNITED STATES SENTENCING COMMISSION



**2025-2026 PUBLIC COMMENT ON
CERTAIN PROPOSED AMENDMENTS
91 FR 5556**

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice and request for public comment and hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that proposed amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information section of this notice.

DATES: *Written Public Comment.* Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than **March 18, 2026**. Public comment regarding a proposed amendment received after the close of the comment period may not be considered.

Public Hearing. The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at <https://comment.ussc.gov>. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Proposed Amendments.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts

pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See id.* 2.2; 28 U.S.C. 994(p).

The Commission published a notice of proposed amendments in the *Federal Register* on December 19, 2025 (*see* 90 FR 59660). Those proposed amendments have a public comment period ending on February 10, 2026. The Commission is now considering promulgating additional amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth those proposed amendments.

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy

choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A two-part proposed amendment relating to sentencing options, including (A) (i) amendments to Chapter Five, Part A (Sentencing Table) to add a new Introductory Commentary highlighting the broad range of sentencing options that are statutorily provided and the recognition that different sentencing factors may weigh differently in different cases, and a new guideline at §5A1.1 (Determination of Type of Sentence) providing an overview of the steps necessary for the court to determine an appropriate sentence pursuant to Chapter Five; and (ii) related issues for comment; and (B) amendments to Chapter Five to expand Zones B and C of the Sentencing Table, and related issues for comment.

(2) A proposed amendment relating to the career offender guidelines, including (A) options for amending §4B1.2 (Definitions of Terms Used in Section 4B1.1) to address recurrent criticism of the categorical approach and modified categorical approach in the context of the “crime of violence” definition; (B) options for amending §4B1.2 to

limit the scope of the “controlled substance offense” definition; (C) options for amending the Commentary to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to address the references to the definitions of “crime of violence” and “controlled substance offense” found in §4B1.2; and (D) related issues for comment.

(3) A proposed amendment relating to two circuit conflicts involving the definition of “controlled substance offense” in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) options for amending §4B1.2 and the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) to address both circuit conflicts; and (B) related issues for comment.

(4) A proposed amendment to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) in response to concerns that the guideline does not appropriately account for the consideration of factors such as the number of humans smuggled and whether the offense involved bodily injury or sexual assault, and related issues for comment.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may

apply retroactively under 18 U.S.C. 3582(c)(2). The Background Commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov. In addition, as required by 5 U.S.C. 553(b)(4), plain-language summaries of the proposed amendments are available at <https://www.ussc.gov/guidelines/amendments/proposed-2026-amendments-federal-sentencing-guidelines-published-january-2026>.

AUTHORITY: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

Carlton W. Reeves,

Chair.

PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. SENTENCING OPTIONS

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, “[e]xamination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (*e.g.*, imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263 (Aug. 14, 2025). As part of this examination, the Commission held a Sentencing Options Roundtable in December 2025, which was attended by a wide range of stakeholders. Participants expressed varying views on how the Commission should proceed with the sentencing options priority, ranging from no or very limited action to fundamental restructuring of the sentence type determination.

The proposed amendment is informed by feedback received from stakeholders. It contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive. The proposed amendment would retain the *Guideline Manual*’s zone-based structure, which provides for flexibility in the sentencing options available for defendants whose guideline ranges fall within Zones A through C of the Sentencing Table. Part A of the proposed amendment would provide further guidance on determining the appropriate sentence type

from among those authorized by the guidelines and emphasize the importance of this threshold determination. Part B of the proposed amendment would expand Zones B and C to increase the availability of sentencing options for certain defendants.

In General

Chapter Five (Determining the Sentencing Range and Options Under the Guidelines) of the *Guidelines Manual* sets forth the steps used to determine the applicable sentencing range and sentencing options based upon the guideline calculations made in Chapters Two through Four. It also sets forth “zones” in the Sentencing Table that authorize different sentencing options. The chapter is divided into several parts that set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range.

Part A (Sentencing Table) sets forth the Sentencing Table that is used to determine the applicable guideline range based on the intersection of the offense level (determined pursuant to Chapters Two and Three) and the criminal history category (determined pursuant to Chapter Four) applicable to the defendant. The Sentencing Table sorts all sentencing ranges into four zones, labeled Zones A through D.

Part B (Probation) addresses probation, including the imposition decision itself, the length of a term of probation, and the conditions of probation.

Part C (Imprisonment) sets forth the provisions relating to how the minimum and maximum terms of the applicable guideline range may be satisfied according to the pertinent zone of the Sentencing Table.

Part D (Supervised Release) addresses supervised release, including the imposition decision itself, the length of a term of supervised release, and the conditions of supervised release.

Part E (Restitution, Fines, Assessments, Forfeitures) addresses the determination of whether to impose restitution, fines, forfeiture, and assessments.

Part F (Sentencing Options) sets forth additional conditions that the court may impose as part of the sentence.

The zones of the Sentencing Table generally provide the sentencing options that the courts consider in determining the appropriate sentence. The zones are allocated in the Sentencing Table in Part A of Chapter Five. However, the sentencing options that these zones authorize are set out in provisions distributed throughout several parts of Chapter Five. In general, each zone authorizes different sentencing options, as follows:

Zone A.—All sentencing ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. Zone A

authorizes a sentence that is probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a split sentence (term of imprisonment with term of supervised release with condition of confinement), or imprisonment. Zone A is the only zone that authorizes probation without any conditions of confinement.

Zone B.—Sentencing ranges in Zone B are from 1–7 to 9–15 months of imprisonment. Zone B authorizes a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement sufficient to satisfy the minimum term specified in the guideline range. Zone B also authorizes a term of imprisonment (of at least one month) followed by a term of supervised release with a condition of confinement (*i.e.*, a “split sentence”) or a term of imprisonment only.

Zone C.—Sentencing ranges in Zone C are 10–16 or 12–18 months of imprisonment. Zone C authorizes a “split sentence,” which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.— Zone D authorizes imprisonment only, with sentencing ranges ranging from 15–21 months to life imprisonment.

Part A (Changes to Part A of Chapter Five)

Part A of the proposed amendment would generally amend Part A of Chapter Five to make two changes, either one or both of which could be promulgated. First, Part A of the proposed amendment would add new Introductory Commentary to Part A of Chapter Five. Second, it would add a new guideline at §5A1.1 (Determination of Type of Sentence) and, as a result, would designate the Sentencing Table as §5A1.2 and make technical changes to the existing Introductory Commentary to Chapter Five. The Commission is considering a range of alternatives: only promulgating the new introductory commentary to Part A set forth below; only promulgating the new guideline at §5A1.1 set forth below; promulgating both the new introductory commentary and new §5A1.1 set forth below; or only promulgating a version of new introductory commentary to Part A that also incorporates some of the text that now appears within new §5A1.1 set forth below.

The proposed Introductory Commentary to Part A of Chapter Five draws from the legislative history of the Sentencing Reform Act, highlighting the broad range of sentencing options that are statutorily provided and the recognition that different sentencing factors may weigh differently in different cases. It emphasizes that a sentence of probation serves a punitive function, citing to the legislative history of the Sentencing Reform Act and certain Supreme Court jurisprudence.

The proposed guideline at §5A1.1 would provide an overview of the steps necessary for the court to determine an appropriate sentence pursuant to Chapter Five. New §5A1.1 would contain the following four subsections.

Subsection (a) instructs the court to determine the sentencing options that are *available* under the guidelines by determining the guideline range and zone of the Sentencing Table applicable to the defendant. Paragraphs (1) through (4) summarize the authorized sentencing options in each of Zone A through D with cross-references to the relevant provisions of Chapter Five. Application Note 1 restates the rule currently set forth in the Commentary to §5E1.2 (Fines for Individual Defendants) that “[a] fine may be the sole sanction if the guidelines do not require a term of imprisonment.” USSG §5E1.2, comment. (n.1).

Subsection (b) instructs the court to determine the *appropriate* sentencing options from among those authorized in the guidelines.

Subsection (c) directs the court to the relevant provisions of Chapter Five according to the type of sentence it intends to impose for further guidance on determining the length, conditions, and other aspects of the sentence. More specifically, it directs the court to Part B (Probation) for sentences of probation, Parts C (Imprisonment) and D (Supervised Release) for sentences of imprisonment, Part E (Restitution, Fines, Assessments, Forfeitures) in all cases, Part F (Sentencing Options) in certain cases, and Part G (Implementing the Total Sentence of Imprisonment) if applicable.

Subsection (d) recognizes the court's authority and duty under 18 U.S.C. § 3553, which permits the court to impose any statutorily authorized sentence [even if that same sentence is not authorized by the guidelines].

Issues for comment are also provided.

Part B (Expansion of Zones B and C of the Sentencing Table)

Part B of the proposed amendment would expand Zones B and C of the Sentencing Table. The expanded Zone B would authorize the sentencing options described above for sentencing ranges from four to 57 months for Criminal History Category I and sentencing ranges from one to 18 months for the other criminal history categories. The expanded Zone C would authorize the sentencing options described above for sentencing ranges from 51 to 108 months for Criminal History Category I, sentencing ranges from 15 to 24 months for Criminal History Categories II through IV, and sentencing ranges from 15 to 21 months for Criminal History Categories V and VI.

Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Issues for comment are also provided.

(A) Changes to Part A of Chapter Five

Proposed Amendment:

Chapter Five is amended in the Introductory Commentary by striking “Chapter Five sets forth the steps used to determine the applicable sentencing range based upon the guideline calculations made in Chapters Two through Four. Additionally, the provisions” and inserting “Chapter Five sets forth the steps used to determine the applicable sentencing range and sentencing options based upon the guideline calculations made in Chapters Two through Four. The provisions”.

Chapter Five, Part A is amended—

in the heading by striking “Sentencing Table” and inserting “Determination of Type of Sentence and Sentencing Range”;

by inserting at the beginning the following new Introductory Commentary:

“ *Introductory Commentary*

Congress charged the Commission with promulgating guidelines for sentencing courts to use in determining ‘whether to impose a sentence to probation, a fine, or a term of imprisonment’ (*see* 28 U.S.C. § 994(a)(1)(A)), which ‘may be one of the most

important parts of the guidelines process.’ *See* S. Rep. No. 225, 98th Cong., 1st Sess. 163–64 (1983). The provisions within Chapter Five, in combination, guide all aspects of determining the appropriate sentence under the guidelines, including the initial determination of sentence type. The Commission, however, adopted [Part A of this chapter][this introductory commentary] to further underscore the importance of this critical decision.

[In promulgating the guidelines in this part, the][The] Commission is mindful that Congress decided against establishing a presumption in favor of any particular sentence type, wary that ‘[a] congressional statement of a preferred type of sentence might serve only to undermine the flexibility that the criminal justice system requires in order to determine the appropriate sentence in a particular case in light of increased knowledge of human behavior.’ *Id.* at 92. The Commission likewise recognizes, as Congress did when it enacted the Sentencing Reform Act of 1984, ‘that one [sentencing] purpose may have more bearing on the imposition of sentence in a particular case than another purpose has.’ *Id.* at 68. For example, ‘the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.’ *Id.* At the same time, non-imprisonment sentences undoubtedly serve a punitive function and in many cases would adequately serve the purposes of sentencing when appropriate conditions are imposed. *See, e.g., id.* at 91 (‘It may very often be that release on probation under conditions designed to fit the particular

situation will adequately satisfy any appropriate deterrent or punitive purpose.’); *Gall v. United States*, 552 U.S. 38, 48 (2007) (recognizing that though ‘custodial sentences are qualitatively more severe than probationary sentences of equivalent terms[,]’ individuals ‘on probation are nonetheless subject to several standard conditions that substantially restrict their liberty’); *Esteras v. United States*, 606 U.S. 185, 196 (2025) (juxtaposing the purposes of probation and supervised release, explaining that ‘[f]ines, probation, and imprisonment are a court’s primary tools for ensuring that a criminal defendant receives just deserts for the original offense’). Congress recognized the important role of non-imprisonment sentences when it established probation as a sentence in itself as part of the Sentencing Reform Act. [As 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.] The Commission intends for [§5A1.1 (Determination of Type of Sentence)] [Chapter Five] 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).”;

in the Sentencing Table, by redesignating the Sentencing Table as §5A1.2 and inserting the following new heading “§5A1.2. *Sentencing Table*”;

and by inserting before §5A1.2 (as so redesignated) the following new §5A1.1:

“§5A1.1. *Determination of Type of Sentence*

(a) *Determining the Available Sentencing Options.*—Determine the guideline range and zone applicable to the defendant’s offense level and criminal history category in accordance with the Sentencing Table set forth in §5A1.2 (Sentencing Table). The Sentencing Table is divided into zones (Zones A, B, C, and D), with each providing different sentencing options. Subject to any statutory limitations in an individual case (see, e.g., §5B1.1(b) (statutory eligibility for probation), §§5G1.1, 5G1.2 (statutory minima and maxima)), the sentencing options are generally as follows:

- (1) Zone A authorizes a sentence of probation with or without any conditions of confinement, in addition to the sentencing options authorized in Zones B through D. See §§5B1.1(a)(1), 5C1.1(a)–(b) 5C1.1, comment. (n.2).
- (2) Zone B authorizes a sentence of probation, provided that the minimum term of imprisonment specified in the guideline range is satisfied by a period of intermittent confinement, community confinement, or home detention, as provided by the schedule of substitute punishments at §5C1.1(e). In addition, Zone B provides

for the sentencing options authorized in Zones C and D.

See §§5B1.1(a)(2), 5C1.1(c), 5C1.1, comment. (n.3).

- (3) Zone C authorizes a ‘split sentence’ of imprisonment, in which at least one-half of the minimum term specified in the guideline range is satisfied by a period of imprisonment and the remainder is satisfied by a term of supervised release with a condition substituting community confinement or home detention according to the schedule of substitute punishments provided at §5C1.1(e). In addition, Zone C provides for the sentencing options authorized in Zone D. *See* §5C1.1(d); *id.*, comment. (n.4).

- (4) Zone D authorizes sentences of imprisonment only. *See* §5C1.1(f).

- (b) *Determining the Appropriate Sentencing Option.*—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.
- (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 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. [The court may determine that a sentencing option that is authorized by statute, but not by the guidelines, is appropriate based on the consideration of these sentencing factors.]

Commentary

Application Note:

1. *Fine-Only Sentence.*—A fine may be the sole sanction if the guidelines do not require a term of imprisonment. *See* §5E1.2, comment. (n.1).”.

Issues for Comment

1. Part A of the proposed amendment would amend Part A of Chapter Five to both add new introductory commentary to Part A and a new guideline at §5A1.1 (Determination of Type of Sentence). The Commission seeks comment on whether it should adopt both the new introductory commentary and the new guideline, only the new introductory commentary, or only the new §5A1.1 guideline. If the Commission were to promulgate only the new introductory

commentary to Part A, should it incorporate into the commentary any of the guidance currently provided in proposed §5A1.1?

2. Part A of the proposed amendment would add to Part A of Chapter Five a new guideline at §5A1.1 (Determination of Type of Sentence). The new guideline at §5A1.1 would provide an overview of the steps necessary for the court to determine an appropriate sentence pursuant to Chapter Five. New Subsection (b) instructs the court to determine the appropriate sentencing options from among those authorized in the guidelines. The Commission seeks comment on whether it should list factors in new §5A1.1(b) for courts to consider in determining the appropriate sentencing option under the guidelines. If so, what factors should be listed? The Commission seeks comment on whether the list of factors should include any of the factors listed below:

- Whether a sentence of probation or a term of imprisonment best protects the public and meets the other purposes of sentencing. *See* 18 U.S.C. § 3553(a)(1), (a)(2); §5C1.1(e) (schedule of substitute punishments).
- Whether the seriousness of the defendant's offense, and the nature and degree of harm caused by it, requires a term of imprisonment to provide just punishment, afford adequate deterrence to criminal conduct, promote respect for the law, or adequately address public concern generated by the offense. *See* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 994(c).

- Whether the defendant is in need of educational or vocational training, medical care, or other rehabilitative or correctional treatment, and the setting in which any such treatment would be most effectively provided. *See* 18 U.S.C. §§ 3553(a)(2)(D), 3582(a); 28 U.S.C. § 994(k).
- The nature and capacity of the penal, correctional, and other facilities and services available, the relative cost associated with available sentencing options, and how resources could be most effectively allocated to address the risks and needs of the defendant. 28 U.S.C. § 994(g), (k).
- Whether the defendant is: (1) a “first offender” who has not been convicted of a crime of violence or an otherwise serious offense, for whom a sentence other than imprisonment is generally appropriate; or (2) a person convicted of a crime of violence that results in serious bodily injury, for whom a sentence of imprisonment is generally appropriate. *See* 28 U.S.C. § 994(j).
- Whether the defendant has a history of prior criminal conduct that warrants a substantial term of imprisonment. *See* 28 U.S.C. § 994(h), (i).
- Any developing research and knowledge about the effectiveness of available sentencing options in meeting the needs of individual

defendants, reducing recidivism, and protecting the public. *See* 28 U.S.C. § 991(b)(1)(C).

Should the Commission provide additional or different factors?

3. Section 3553(a) of Title 18 lists some of the factors that the court shall consider to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. In particular, the factors set forth in section 3553(a)(2) include “the need for the sentence imposed . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” The Commission seeks comment on whether proposed new §5A1.1(b) should reference the factors listed in 18 U.S.C. § 3553(a), including the purposes of sentencing in section 3553(a)(2)? If so, how? Would referencing or incorporating these statutory factors into the proposed guideline inadvertently create a procedural requirement that could be subject to litigation?

(B) Expansion of Zones B and C of the Sentencing Table

Proposed Amendment:

Chapter Five, Part A is amended in the Sentencing Table—

by redesignating Zone B to contain all guideline ranges having a minimum of at least four months but not more than 46 months in criminal history category I and a minimum of at least one month but not more than 12 months in criminal history categories II through VI;

by redesignating Zone C to contain all guideline ranges having a minimum of 51 months but not more than 87 months in criminal history category I, a minimum of 15 months but not more than 18 months in criminal history categories II through IV, and a minimum of 15 months in criminal history categories V and VI;

and by redesignating Zone D to contain all guideline ranges having a minimum of 97 months or more in criminal history category I, a minimum of 21 months or more in criminal history categories II through IV, and a minimum of 18 months or more in criminal history categories V and VI.

The Commentary to §5B1.1 captioned “Application Notes” is amended—

in Note 1(B) by striking “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months)” and inserting “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least four months but not more than 46 months in criminal history category I or at least one month but not more than 12 months in criminal history categories II through VI)”;

and in Note 2 by striking “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is ten months or more)” and inserting “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 51 months or more in criminal history category I or 15 months or more in criminal history categories II through VI)”.

The Commentary to §5C1.1 captioned “Application Notes” is amended—

in Note 3 by striking “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months)” and inserting “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least four months but not more than 46 months in criminal history category I or at least one month but not more than 12 months in criminal history categories II through VI)”;

in Note 4 by striking “(*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months)” and inserting “(*i.e.*, the minimum term specified in the applicable guideline range is 51 months but not more than 87 months in criminal history

category I, 15 months but not more than 18 months in criminal history categories II through IV, or 15 months in criminal history categories V and VI”); by striking “For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range” and inserting “For example, where the defendant is in criminal history category II and the guideline range is 15–21 months, a sentence of seven and a half months imprisonment followed by a term of supervised release with a condition requiring seven and a half months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range”; and by striking “For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range” and inserting “For example, where the defendant is in criminal history category II and the guideline range is 15–21 months, both a sentence of seven and a half months imprisonment followed by a term of supervised release with a condition requiring eight months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring five months of community confinement or home detention (also under subsection (d)) would be within the guideline range”;

and in Note 8 by striking “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more)” and inserting “(*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 97 months or more in criminal history category I, 21 months or more in criminal history categories II through IV, or 18 months or more in criminal history categories V and VI)”.

Issues for Comment:

1. Part B of the proposed amendment would expand Zones B and C of the Sentencing Table. The Commission seeks comment on whether it should expand Zones B and C in a different manner than the one set forth in the proposed amendment. Should the Commission expand Zone B to lower or higher offense levels than proposed? Should it expand Zone C to lower or higher offense levels than proposed? What data, statutory provisions, or policy considerations should determine the scope of Zones B and C?
2. The proposed expansion of Zone B would authorize sentences of probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. Similarly, the proposed expansion of Zone C would authorize split sentences for current Zone D defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide

additional guidance to address these new Zone B and C defendants. If so, what guidance should the Commission provide?

3. The proposed expansion of Zones B and C would result in a zone structure that authorizes different sentencing options for certain defendants who are in different criminal history categories but have the same applicable guideline range (*i.e.*, defendants whose guideline range is 15–21 or 18–24 months). The Commission seeks comment on whether authorizing different sentencing options for defendants who have the same applicable guideline range is appropriate. Would doing so raise any legal or policy concerns?

2. CAREER OFFENDER

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, “[c]ontinued examination of the career offender guidelines, including (A) evaluating the impact, feasibility, and uniformity in application of alternative approaches to the ‘categorical approach’ through workshops, field testing, and updating the data analyses set forth in the Commission’s 2016 report to Congress, titled *Career Offender Sentencing Enhancements*; and (B) possible consideration of amendments that might be appropriate.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263 (Aug. 14, 2025).

The proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach in the context of §4B1.1 (Career Offender). It sets forth options that would eliminate the use of the categorical approach for purposes of determining whether a federal offense is a “crime of violence” or “controlled substance offense” by listing federal offenses that qualify as a “crime of violence” or a “controlled substance offense.” The proposed amendment also provides options that would set forth an approach for purposes of determining whether a state offense is a “crime of violence” or “controlled substance offense” that does not impose some of the limitations of the “categorical approach” and “modified categorical approach” adopted by the Supreme Court in the context of certain statutory provisions. These changes are intended to correct some of the “odd” and “arbitrary” results that the categorical approach has produced relating to the “crime of violence” definition (*see, e.g., United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting)). The proposed amendment also sets forth options to limit the scope of the “controlled substance offense” definition.

The Commission anticipates that the revised “crime of violence” definition set forth in the proposed amendment will identify offenses as presumptively violent in an overbroad manner. To counteract this overbreadth, each option provides necessary and critical exclusions and limitations to ensure that §4B1.2 is properly tailored to capture offenses that are actually violent. These exclusions and limitations are necessary to the overall operation of the options set forth in the proposed amendment.

The Categorical Approach as Developed by Supreme Court Jurisprudence

Several statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the “categorical approach” and “modified categorical approach,” as set forth by Supreme Court jurisprudence. The categorical and modified categorical approaches require courts to look only to the elements of the offense, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts may look to certain additional sources of information, now commonly referred to as the “*Shepard* documents,” to determine the elements of the offense of conviction. *See Taylor v. United States*, 495 U.S. 575 (1990) (holding that, under the “categorical approach,” courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); *Shepard v. United States*, 544 U.S. 13 (2005) (holding that courts may use a “modified categorical approach” in cases where the statute of conviction is “overbroad,” that is, the statute contains multiple offenses with different offense elements).

Application of the Categorical Approach in the Guidelines

Supreme Court jurisprudence on this subject pertains to statutory provisions (e.g., 18 U.S.C. § 924(e)), but courts have applied the categorical and modified categorical approaches to guideline provisions. For example, courts have used these approaches to determine if a conviction is a “crime of violence” for purposes of applying the career offender guideline at §4B1.1.

General Criticism of the Categorical Approach as Developed by Supreme Court Jurisprudence

The Commission has received comment over the years regarding the complexity and limitations of the categorical approach as developed by Supreme Court jurisprudence. Courts have criticized the categorical approach as a “legal fiction,” in which an offense that a defendant in fact commits violently is deemed to be a legally non-violent offense because the offense *could* have been committed without violence, often leading to “odd” and “arbitrary” results (e.g., *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting)).

Feedback from Stakeholders

The Commission also has received input in roundtable discussions with several stakeholders with diverse perspectives and expertise within the criminal justice system. Some stakeholders have suggested that the Commission should eliminate the categorical approach to capture violent offenses that are currently excluded while also narrowing the scope of the “controlled substance offense” definition, particularly its reach over predicate offenses. Some stakeholders also have remarked that the Commission should limit the number of qualifying prior offenses overall for purposes of the career offender guideline. Some stakeholders have suggested that the Commission should condition which convictions qualify as predicate offenses by establishing a minimum sentence length threshold.

Changes Relating to “Crime of Violence”

The proposed amendment would make several changes to the definition of “crime of violence.”

First, the proposed amendment would place all provisions related to the definition of “crime of violence” in subsection (a). This includes moving the provision on “inchoate offenses included” as it relates to “crime of violence” into subsection (a) without substantive changes.

Second, the proposed amendment would delete the “force clause” from §4B1.2(a).

Third, the proposed amendment would eliminate the use of the categorical approach for purposes of federal offenses by listing specific federal statutes proscribing violent offenses that qualify as “crime of violence.”

Fourth, the proposed amendment sets forth two options for amending the definition of “crime of violence” for purposes of state offenses.

Crime of Violence Option 1 would eliminate the use of the categorical approach for purposes of state offenses by providing a definition that is based on how an offense is designated (*i.e.*, labeled) under federal or state law. It sets forth a list of violent offenses. A conviction for an offense that is labeled as one of the listed offenses is presumptively a qualifying “crime of violence.” This approach is intended to avoid an analysis requiring a categorical matching between statutory elements, instead capturing convictions for certain types of offenses based on how they are labeled. This option brackets a preliminary list of offense labels, highlighting the Commission’s interest in appropriately tailoring the scope of the offenses included in the list. The Commission also recognizes that jurisdictions name each of these offenses in various ways that may be appropriate to include in the list of qualifying labels. The proposed amendment includes issues for comment regarding any other offenses or labels that should be included in the definition to adequately capture these offenses in Crime of Violence Option 1.

Crime of Violence Option 2 would set forth an approach for purposes of determining whether a state offense is a “crime of violence” that does not impose some of the limitations of the “categorical approach” and “modified categorical approach.” It would provide that a state offense is presumptively a “crime of violence” if the statute of conviction [meets each of the elements (other than federal jurisdictional requirements)] [proscribes [conduct][an act or omission] that [is described by][satisfies][meets] the elements (other than federal jurisdictional requirements)] of an offense set forth in the proposed definition, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense. It sets forth a list of violent offenses and defines most of these enumerated offenses by referring to a federal statute. Many of the listed offenses qualify as a “serious violent felony” under 18 U.S.C. § 3559(c). Crime of Violence Option 2 also brackets the possibility of including additional offenses. It would define some of these additional offenses, either by referring to a statutory provision or providing a guidelines definition of such an offense. These changes are intended to eliminate the categorical approach’s requirement that courts compare only the elements of the predicate offense as described in the statute of conviction to the elements of a generic, contemporary definition of the applicable enumerated offense. Instead, courts would be allowed to look to any part of a statute of conviction—the elements of any offense, *and* the means of committing any element of such offense, as described in the statute—and determine whether any

part of the statute of conviction includes an offense that constitutes one of the enumerated offenses as defined in §4B1.2.

Finally, the proposed amendment includes exclusions and limitations to the scope of the “crime of violence” definition. These exclusions and limitations are integral to the operation of the proposed amendment. For example, the proposed amendment adopts as an exclusion sentence length criteria similar to those relating to petty and minor offenses from subsection (c)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History). In addition, as an important step in determining whether an offense is a “crime of violence,” the proposed amendment provides that, after the government has met its burden to establish that an offense presumptively qualifies as a “crime of violence” under subsections (a)(1) through (a)(3), the defendant may rebut such presumption by establishing any of the following: (i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison; (ii) the acts for which the defendant is criminally liable [did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant’s conduct during the commission of the offense was limited to reckless or negligent conduct.

Changes Relating to “Controlled Substance Offense”

The proposed amendment would make several changes to §4B1.2 relating to the definition of “controlled substance offense.”

First, the proposed amendment would place all provisions related to the definition of “controlled substance offense” in subsection (b). This includes moving the provision on “inchoate offenses included” as it relates to “controlled substance offense” into subsection (b) without substantive changes. In addition, it would move to subsection (b) the provision currently located in the Commentary to §4B1.2 stating that a violation of 18 U.S.C. § 924(c) or § 929(a) is a “controlled substance offense” if the offense of conviction established that the underlying offense was a “controlled substance offense.”

Second, the proposed amendment sets forth two options for limiting the scope of the “controlled substance offense” definition.

Controlled Substance Offense Option 1 would revise the definition of “controlled substance offense” to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. It lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes. The list includes the federal drug trafficking statutes that are specifically referenced in the

career offender directive at 28 U.S.C. § 994(h). The federal drug trafficking statutes that appear in brackets are not cited in the directive.

Controlled Substance Offense Option 2 would maintain the current definition of “controlled substance offense” but would limit its scope by setting a minimum sentence length requirement for a prior conviction to qualify as a “controlled substance offense.” It provides three suboptions for limiting prior convictions.

Controlled Substance Offense Suboption 2A would limit qualifying prior “controlled substance offense” convictions to only those convictions that are counted separately under §4A1.1(a). **Controlled Substance Offense**

Suboption 2B would limit qualifying prior convictions to only convictions of a controlled substance offense that resulted in a sentence imposed of [five years][three years][one year] or more that are counted separately under §4A1.1(a) [or (b)]. Both Controlled Substance Offense Suboptions 2A and 2B bracket the possibility of including a provision that provides that a conviction for a controlled substance offense shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison.

Controlled Substance Offense Suboption 2C would limit qualifying prior convictions to only convictions of a controlled substance offense that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted separately under §4A1.1(a) [or (b)].

Changes to Other Guidelines

The current definitions of “crime of violence” and “controlled substance offense” at §4B1.2 are incorporated by reference in several other guidelines in the *Guidelines Manual*. See Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

Absent additional changes to these other guideline provisions, all revisions to the definitions in §4B1.2 would be incorporated into those guidelines that currently reference the “crime of violence” and “controlled substance offense” definitions found in §4B1.2.

Thus, the proposed amendment effectively sets forth three alternatives for addressing the references to “crime of violence” and “controlled substance offense” in §2K2.1. First, absent additional changes to §2K2.1, any revisions to the definitions in §4B1.2 would be incorporated by reference to §2K2.1. In addition to this approach of maintaining the current operation of §2K2.1 by incorporating the definitions from §4B1.2, two options are presented. **Firearms Option 1** would maintain the status quo by amending the

Commentary to §2K2.1 to incorporate the relevant part or parts of the current definitions from §4B1.2. **Firearms Option 2** would amend the Commentary to §2K2.1 to provide that “controlled substance offense” has the meaning given the term “serious drug offense” in 18 U.S.C. § 924(e) and “crime of violence” has the meaning given the term “violent felony” in 18 U.S.C. § 924(e). The proposed amendment also provides an issue for comment on how the references to “crime of violence” and “controlled substance” in the other guidelines cited above should be addressed.

Issues for Comment

The proposed amendment also sets forth issues for comment.

Proposed Amendment:

Section 4B1.2 is amended—

in subsection (a) by striking the following:

“Crime of Violence.—The term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or 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).”;

and inserting the following:

“Crime of Violence.—

- (1) *In General.*—The term ‘crime of violence’ means any of the following offenses:

(A) *Federal Offenses.*—

- (i) An offense under any of the following—

18 U.S.C. §§ 113(a), [844(i)], 1111, 1112, 1201, 1951, [2111,]
[2113,] [2118,] [2119,] 2241, 2242, 2244(a)(1)–(a)(2)[;
49 U.S.C. § 46502].

- (ii) An offense under federal law, punishable by imprisonment for a term exceeding one year, 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).

**[Crime of Violence Option 1 for Definition Applicable to State Offenses (List of
Offense Labels):**

(B) *State Offenses.*—Any offense, punishable by imprisonment for a term
exceeding one year, that is designated under state law as one of the
following:

[Aggravated Assault;

Arson;

Extortion;

Kidnapping;

Murder;

Rape;

Robbery;

Sexual assault;

Voluntary manslaughter.]]

[Crime of Violence Option 2 for Definition Applicable to State Offenses (List of Enumerated Offenses as Described in Federal Statutes with Bracketed Additional Offenses):

- (B) *State Offenses*.—An offense under state law by whatever designation, punishable by imprisonment for a term exceeding one year, is presumptively a ‘crime of violence’ if the statute of conviction [meets each of the elements (other than federal jurisdictional requirements)] [proscribes [conduct]][an act or omission] that [is described by] [satisfies][meets] the elements (other than federal jurisdictional requirements)] of one of the following offenses, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense:

Murder (as described in 18 U.S.C. § 1111); manslaughter other than involuntary manslaughter (as described in 18 U.S.C. § 1112); aggravated assault or battery (as described in 18 U.S.C. § 113(a) (but not to include a state offense that would otherwise be simple or misdemeanor assault or simple or misdemeanor battery but for the identity of the victim or perpetrator)); [assault with intent to commit rape (as described below);] rape or aggravated sexual abuse (as described in 18 U.S.C. §§ 2241); [sexual abuse (as described in 18 U.S.C. § 2242);] abusive sexual contact (as described in 18 U.S.C. § 2244(a)(1), (a)(2)); [child abuse (as described

below);] [domestic violence (as described below);] kidnapping (as described in 18 U.S.C. § 1201); [hostage taking (as described below);] [human trafficking (as described below);] [aircraft piracy (as described in 49 U.S.C. § 46502);] robbery (as described in 18 U.S.C. § 1951(b)[, § 2111, § 2113, or § 2118]); carjacking (as described in 18 U.S.C. § 2119); [extortion (as described in 18 U.S.C. § 1951(b)(2));] [coercion (as described below);] [arson (as described in 18 U.S.C. § 844(i) (but not to include arson of property other than a building));] [firearms use (as described below);] [firearms possession (as described in 18 U.S.C. § 924(c));] [or using weapons of mass destruction (as described in 18 U.S.C. §2332a)].

For purposes of offenses listed in subsection (a)(1)(B), use the following descriptions:

[‘Assault with intent to commit rape’ is engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in 18 U.S.C. § 2241 and 2242).]

[‘Child abuse’ is any of the following: the intentional infliction of physical injury to a minor; the commission of any sexual act against a child under the age of 14 by any person 18 years of age or older; online enticement or

coercion of a minor to engage in illegal sexual activity; or the production of child pornography or livestreaming of child sexual abuse.]

['Coercion' is causing the performance or non-performance of any act by another person, which such other person has a legal right to do or to abstain from doing, by the use of actual or threatened force, violence, or fear thereof, including the use, or an express or implicit threat of use, of violence to cause harm to the person, reputation, or property of any person.]

['Domestic violence' is committing any act with the intent to kill or injure a spouse, intimate partner, or dating partner.]

['Firearms use' is an offense described in 18 U.S.C. § 924(c) or § 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon during and relation to the offense in which the firearm was used.]

['Hostage taking' is the seizure or detention with threats to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained.]

[‘Human trafficking’ is any of the following: the recruitment, harboring, transportation, provision, or obtaining of a person for labor, services, or a commercial sex act, through the use of force, threat of force, fraud, or coercion; the recruitment, harboring, transportation, provision, or obtaining of a minor for the purpose of a commercial sex act; or the subjection of a person to involuntary servitude, peonage, debt bondage, or slavery.]]

- (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.
- (3) *Exclusion.*—The term ‘crime of violence’ under subsections (a)(1) and (a)(2) does not include any offense where the sentence imposed was (i) a term of unsupervised probation; (ii) a term of [supervised] probation [of less than [one year][three years][five years]]; or (iii) a term of imprisonment of less than [60 days][30 days].
- (4) *Limitations.*—An offense of conviction shall not qualify as a ‘crime of violence’ under subsections (a)(1) and (a)(2) if the defendant can establish any of the following:

- (A) *Sentence Served*.—The conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison.
- (B) *[[Serious] Bodily Injury*.—During 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 [serious] bodily injury to another person[. *Provided*, however, that this limitation shall not apply to extortion and arson offenses].][*Physical Harm*.—During the commission of the offense, the acts for which the defendant is criminally liable did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person[. *Provided*, however, that this limitation shall not apply to extortion and arson offenses].]
- (C) *Recklessness and Negligence*.—The defendant’s conduct during the commission of the offense was limited to reckless or negligent conduct. [However, an offense is not excluded under this provision if the defendant’s conduct included extreme reckless conduct.]”;

by striking subsections (b) and (c) as follows:

- “(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.*”;

and inserting the following new subsections (b) and (c):

[Controlled Substance Offense Option 1 for Limiting Scope of Controlled Substance Offense Definition (Limiting Definition to Federal Offenses):

“(b) *Controlled Substance Offense.*—

(1) *In General.*—The term ‘controlled substance offense’ means an offense under 21 U.S.C. § 841, § 952(a), § 955, or § 959, or 46 U.S.C. § 70503(a) or § 70506(b), [or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)].

(2) *Aiding and Abetting, Inchoate Offenses Included.*—The term ‘controlled substance offense’ includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(3) *Additional Consideration.*—A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense was a ‘controlled substance offense.’

(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*.”]

[Controlled Substance Offense Option 2 for Limiting Scope of Controlled Substance Offense Definition (Limiting Prior Convictions for Controlled Substance Offenses):

“(b) *Controlled Substance Offense.*—

(1) *In General.*—The term ‘controlled substance offense’ means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(A) 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

(B) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b).

(2) *Aiding and Abetting, Inchoate Offenses Included.*—The term ‘controlled substance offense’ includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(3) *Additional Consideration.*—A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense was a ‘controlled substance offense.’

[Controlled Substance Offense Suboption 2A (Limiting Prior Convictions to Sentences Receiving Points under §4A1.1(a)):

(c) *Two Prior Felony Convictions.*—The term ‘two prior felony convictions’ means 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). 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. For purposes of determining whether the defendant sustained a felony conviction of a ‘crime of violence,’ use only any such felony conviction that is counted separately under §4A1.1(a), (b), or (c). For purposes of determining whether the defendant sustained a felony conviction of a ‘controlled substance offense,’ use only any such felony conviction that is counted separately under §4A1.1(a).

[A conviction for a controlled substance offense shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years] [three years][one year] in prison.]]

[Controlled Substance Offense Suboption 2B (Limiting Prior Convictions Through a Sentence-Imposed Approach):

- (c) *Two Prior Felony Convictions.*—The term ‘two prior felony convictions’ means 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). 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. For purposes of determining whether the defendant sustained a felony conviction of a ‘crime of violence,’ use only any such felony conviction that is counted separately under §4A1.1(a), (b), or (c). For purposes of determining whether the defendant sustained a felony conviction of a ‘controlled substance offense,’ use only any such felony conviction that (1) is counted separately under §4A1.1(a) [or (b)], and (2) resulted in a sentence imposed of [five years][three years][one year] or more. For purposes of this provision, ‘sentence imposed’ has the meaning given the term ‘sentence of imprisonment’ in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

[A conviction for a controlled substance offense shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years] [three years][one year] in prison.]]

[Controlled Substance Offense Suboption 2C (Limiting Prior Convictions Through a Time-Served Approach):

- (c) *Two Prior Felony Convictions.*—The term ‘two prior felony convictions’ means 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). 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*. For purposes of determining whether the defendant sustained a felony conviction of a ‘crime of violence,’ use only any such felony conviction that is counted separately under §4A1.1(a), (b), or (c). For purposes of determining whether the defendant sustained a felony conviction of a ‘controlled substance offense,’ use only any such felony conviction that (1) is counted separately under §4A1.1(a) [or (b)], and (2) resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison.]”;

by striking subsections (d) and (e) as follows:

“(d) *Inchoate Offenses Included.*—The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) *Additional Definitions.*—

- (1) *Forcible Sex Offense.*—‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
- (2) *Extortion.*—‘Extortion’ is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.
- (3) *Robbery.*—‘Robbery’ is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase ‘actual or threatened force’ refers to force that is sufficient to overcome a victim’s resistance.

- (4) *Prior Felony Conviction.*—‘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. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).”;

and by inserting the following new subsection (d):

- “(d) *Prior Felony Conviction.*—‘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. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior

to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).”.

The Commentary to §4B1.2 captioned “Application Notes” is amended—

in the heading by striking “Notes” and inserting “Note”;

by striking Notes 1 and 2 as follows:

“1. *Further Considerations Regarding ‘Crime of Violence’ and ‘Controlled Substance Offense’*.—For purposes of this guideline—

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a ‘controlled substance offense.’

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a ‘controlled substance offense.’

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense (the offense facilitated) was a ‘controlled substance offense.’

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a ‘controlled substance offense.’

A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘crime of violence’ or a ‘controlled substance offense’ if the offense of conviction established that the underlying offense was a ‘crime of violence’ or a ‘controlled substance offense’. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

2. *Offense of Conviction as Focus of Inquiry.*—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.”;

by redesignating Note 3 as Note 1;

and in Note 1 (as so redesignated) by inserting after “under §4B1.1.” the following:

“Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2.”.

The Commentary to §4B1.2 is amended by inserting at the end the following new Commentary captioned “Background”:

“Background: Section 4B1.2 defines the terms ‘crime of violence,’ ‘controlled substance offense,’ and ‘two prior felony convictions’ for purposes of §4B1.1 (Career Offender). Prior to [amendment year], to determine if an offense met the definition of ‘crime of violence’ in §4B1.2, courts typically used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. *See, e.g., 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). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

In [amendment year], the Commission amended §4B1.2 to set forth an approach for determining whether an offense is a ‘crime of violence’ or ‘controlled substance offense’ that does not require the application of the *categorical approach* and *modified categorical approach* established by Supreme Court jurisprudence, or the use of a generic-offense analysis, where courts must determine whether the elements of the instant

offense or prior offense match the elements of the ‘generic definition’ of certain offenses.
See USSG App. C, Amendment [____] (effective [Date]).”.

The Commentary to §2K2.1 captioned “Application Notes” is amended—

**[Firearms Option 1 (Preserving Current Definitions of “Crime of Violence” and
“Controlled Substance Offense” for §2K2.1):**

in note 1 by striking the following:

“ ‘Controlled substance offense’ has the meaning given that term in §4B1.2(b) and
Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in
Section 4B1.1).

‘Crime of violence’ has the meaning given that term in §4B1.2(a) and Application Note 1
of the Commentary to §4B1.2.”;

by redesignating Notes 3 through 13 as Notes 4 through 14, respectively;

by inserting after Note 2 the following new Note 3:

“3. ‘*Crime of Violence*’ and ‘*Controlled Substance Offense*’.—

(A) *Crime of Violence*.—

- (i) *Definition*.—‘Crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or 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).

(ii) *Additional Considerations*.—

- (I) The term ‘crime of violence’ includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.
- (II) ‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and

statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) ‘Extortion’ is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) ‘Robbery’ is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase ‘actual or threatened force’ refers to force that is sufficient to overcome a victim’s resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘crime of violence’ if the offense of conviction established that the underlying offense was a ‘crime of violence.’ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) *Controlled Substance Offense.*—

(i) *Definition.*—‘Controlled substance offense’ means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) 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 (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) *Additional Considerations.*—

- (I) The term ‘controlled substance offense’ includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.
- (II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a ‘controlled substance offense.’
- (III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a ‘controlled substance offense.’
- (IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense (the offense facilitated) was a ‘controlled substance offense.’

- (V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a ‘controlled substance offense.’
- (VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘controlled substance offense’ if the offense of conviction established that the underlying offense was a ‘controlled substance offense.’ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)
- (VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.”;

and in Note 13 (as so redesignated) by striking the following:

“ ‘Crime of violence’ and ‘controlled substance offense’ have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).”.]

[Firearms Option 2 (Providing Statutory Definitions of “Crime of Violence” and “Controlled Substance Offense” for §2K2.1):

in Note 1 by striking the following:

“ ‘Controlled substance offense’ has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

‘Crime of violence’ has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.”;

and inserting the following:

“ ‘Controlled substance offense’ has the meaning given the term ‘serious drug offense’ in 18 U.S.C. § 924(e).

‘Crime of violence’ has the meaning given the term ‘violent felony’ in 18 U.S.C. § 924(e).”;

and in Note 12 by striking the following:

“ ‘Crime of violence’ and ‘controlled substance offense’ have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).”.]

Issues for Comment:

1. As explained in the synopsis of the proposed amendment, courts use the “categorical approach” and the “modified categorical approach,” as set forth in Supreme Court jurisprudence, to determine whether a conviction is a “crime of violence” or a “controlled substance offense” for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

The Commission seeks comment on whether determinations under the career offender guideline should use a different approach, such as the approaches provided above. What are the advantages and disadvantages of the “categorical approach” as opposed to the approaches set forth in the proposed amendment above?

2. The proposed amendment would amend §4B1.2(a) to eliminate the use of the categorical approach, for purposes of federal offenses, by listing specific federal

statutes that qualify as a “crime of violence.” Are there federal offenses that are covered by the proposed “crime of violence” definition but should not be? Are there federal offenses that are not covered by the proposed definition but should be?

3. The proposed amendment sets forth two options for amending the definition of “crime of violence” for purposes of state offenses. Crime of Violence Option 1 would eliminate the use of the categorical approach for purposes of state offenses by identifying a crime of violence solely based on how an offense is designated (*i.e.*, labeled) under state law. Crime of Violence Option 2 would provide that a state offense is presumptively a “crime of violence” if the statute of conviction [meets each of the elements (other than federal jurisdictional requirements)] [proscribes [conduct]][an act or omission] that [is described by] [satisfies][meets] the elements (other than federal jurisdictional requirements)] of an offense set forth in the proposed definition, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense. It sets forth a list of violent offenses and defines most of these enumerated offenses by referring to how that offense is described in a federal statute. Many of the listed offenses qualify as a “serious violent felony” under 18 U.S.C. § 3559(c). Crime of Violence Option 2 also brackets the possibility of including additional offenses. It would define some of these additional offenses, either by referring to how that offense is described in a statute or by providing a guidelines definition of such an offense.

The Commission seeks comment generally on each option and whether either of the approaches provided for purposes of the “crime of violence” definition is appropriate and would cover most violent offenses under state law. Which of the options, if either, should the Commission adopt? Should the Commission consider a different approach to revise the “crime of violence” definition? Are there specific state offenses that would be included in the definition of “crime of violence” set forth in these options that should not be considered crimes of violence? Are there specific state offenses that would not be included in the definition set forth in these options, but should be? For example, should the Commission include offenses such as terroristic threats and resisting arrest in the list of offenses that should qualify as a “crime of violence”?

The Commission also seeks comment on whether the list of offenses included for purposes of federal offenses and state offenses should generally capture the same offenses. Should the Commission differentiate between the types of federal offenses and state offenses that should qualify as crimes of violence by providing different list of offenses?

Finally, the Commission seeks comment on the proposed definitions for the enumerated offenses listed in Crime of Violence Option 2. Are these definitions appropriate? Should the Commission provide different definitions? If so, what definitions should the Commission provide?

4. Crime of Violence Option 1 for amending the definition of “crime of violence” for purposes of state offenses would eliminate the use of the categorical approach by providing a definition that is based on how an offense is designated (*i.e.*, labeled) under state law. This option brackets a preliminary list of offense labels. The Commission recognizes that jurisdictions name each of these offenses in various ways that may be appropriate to include in the definition of crime of violence. For example, the Commission has identified that jurisdictions use different labels for the highest degree of murder, including such labels as *First Degree Murder*, *Murder in the First Degree*, *Deliberate Homicide*, *First Degree Intentional Homicide*, *Aggravated Murder*, and *Capital Murder*. Similarly, the Commission has identified the same issue with robbery; states and United States territories use different labels such as *Robbery in the First Degree*, *Robbery in the Second Degree*, *Robbery in the Third Degree*, *Aggravated Robbery*, *First Degree Aggravated Robbery*, *Armed Robbery*, *Carjacking*, *Armed Carjacking*, *Robbery Involving Occupied Motor Vehicle*, *Aggravated Vehicular Hijacking*, *Vehicular Hijacking*, *Robbery by Intimidation*, *Robbery with a Dangerous Weapon*, *Assault with Intent to Rob*, and *Robbery with Firearms or Other Dangerous Weapons*. The Commission anticipates identifying similar issues with the other offenses listed in Crime of Violence Option 1.

For purposes of Crime of Violence Option 1, the Commission intends that violent offenses, such as aggravated assault, arson, extortion, kidnapping, murder, rape,

robbery, sexual assault, and voluntary manslaughter, by whatever name they are known under state law, are included in the crime of violence definition. The Commission seeks comment on whether the list of offenses provided as part of the “crime of violence” definition should include the different ways in which these offenses are labeled by different jurisdictions. If so, to what level of specificity should the Commission include any such offense labels? The Commission also seeks comment on how each of the states and United States territories name each of these offenses. Finally, the Commission seeks comment on whether other labels should be included in the definition to adequately capture these offenses in Crime of Violence Option 1. Are there states that do not include names, labels, or titles in their criminal code that would need to be addressed in another way? As an alternative, instead of listing offense labels, should the Commission provide a list of the specific state statutes that should qualify as “crime of violence”? Would an approach that lists specific state statutes as crimes of violence be more easily administered? If so, which state statutes should be included?

5. The proposed amendment provides an exclusion to limit the scope of the definition of “crime of violence” by adopting a sentence length criteria similar to the one relating to petty and minor offenses from subsection (c)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and sets limitations if the defendant can establish that: (i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days]

in prison; (ii) the acts for which the defendant is criminally liable [did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct.

The Commission seeks comment on whether these limitations are appropriate. Do these limitations appropriately exclude prior convictions that should not qualify as crimes of violence under §4B1.2? Are there additional or different limitations that the Commission should include? For example, should the Commission exclude prior convictions for robbery and extortion offenses if the defendant can establish that no firearm or other dangerous weapon was used in the offense, no threat of use of a firearm or other dangerous weapon was involved in the offense, and the offense did not result in death or serious bodily injury to any person? Should the Commission exclude prior convictions for arson offenses if the defendant can establish that the offense posed, and the defendant reasonably believed the offense posed, no threat to human life?

One of the limitations provides that an offense of conviction shall not qualify as a "crime of violence" if the defendant can establish that the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. With this limitation, the Commission intends to require a *mens rea* more

culpable than recklessness or negligence for the offense to qualify as a crime of violence. The Commission seeks comment on whether the language of this limitation accomplishes this goal or whether there is a better way to do so.

6. The proposed amendment sets forth two options for limiting the scope of the “controlled substance offense” definition. Controlled Substance Offense Option 1 would revise the definition of “controlled substance offense” to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The list includes the federal drug trafficking statutes that are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The federal drug trafficking statutes that appear in brackets are not cited in the directive. The Commission seeks comment generally on whether the approach set forth in this option is appropriate. Are there federal drug offenses that are covered by the proposed amendment but should not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?
7. Controlled Substance Offense Option 2 for limiting the scope of the “controlled substance offense” definition would maintain the current definition but would limit its scope by setting a minimum sentence length requirement for a prior conviction to qualify as a “controlled substance offense.” It provides three suboptions for such limitation. The Commission seeks comment on whether it

should adopt Controlled Substance Offense Option 2 by keeping the current definition of “controlled substance offense” and limiting qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served. If so, how should the Commission set that limit and on what basis? The Commission also seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a “controlled substance offense” is consistent with the Commission’s authority under 28 U.S.C. § 994(h). Should the Commission differentiate between “crimes of violence” and “controlled substance offenses” in setting a minimum sentence length requirement?

The Commission also seeks comment on each of the suboptions. Which suboption, if any, should the Commission adopt?

8. Controlled Substance Offense Suboptions 2A and 2B for setting a minimum sentence length requirement for a prior conviction to qualify as a “controlled substance offense” bracket the possibility of including a provision that states that a conviction of a controlled substance offense shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison. The Commission seeks comment on what types of sentences should be counted for purposes of this provision. For example, should

revocation sentences count to determine whether the defendant served less than [five years][three years][one year] in prison?

9. The Commission seeks comment on whether the definitions of “crime of violence” and “controlled substance offense” should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?

10. As indicated above, several guidelines use the terms “crime of violence” and “controlled substance offense” and define these terms by making specific reference to §4B1.2. *See* the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

The proposed amendment effectively sets forth three alternatives for addressing the references to “crime of violence” and “controlled substance offense” in

§2K2.1. First, absent additional changes to §2K2.1, any revisions to the definitions in §4B1.2 would be incorporated by reference to §2K2.1. In addition to the approach of maintaining the current operation of §2K2.1 by incorporating the definitions from §4B1.2, two options are presented. Firearms Option 1 would maintain the status quo by amending the Commentary to §2K2.1 to incorporate the relevant part or parts of the current definitions from §4B1.2. Firearms Option 2 would amend the Commentary to §2K2.1 to provide that “controlled substance offense” has the meaning given the term “serious drug offense” in 18 U.S.C. § 924(e) and “crime of violence” has the meaning given the term “violent felony” in 18 U.S.C. § 924(e). The Commission seeks comment on each of these options, or, in the alternative, whether §2K2.1 should continue to define the terms “crime of violence” and “controlled substance offense” by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment.

Similarly, the Commission seeks comment on the approach it should take to address the references to “crime of violence” and “controlled substance offense” in the other guidelines cited above. Should the Commission maintain the status quo by amending the Commentary to any or all of these guidelines to incorporate the relevant parts of §4B1.2? Should the Commission instead continue to define these terms by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the “crime of violence” and “controlled substance offense” definitions contained in §4B1.2? Should the

Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

3. CIRCUIT CONFLICTS CONCERNING §4B1.2(b)

Synopsis of Proposed Amendment: The proposed amendment addresses two circuit conflicts involving the definition of “controlled substance offense” in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

Section §4B1.2(b) defines a “controlled substance offense” as “an offense under federal or state law . . . that 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.” Several other guidelines incorporate this definition by reference, often providing for higher base offense levels if the defendant committed the instant offense after sustaining a conviction for a “controlled substance offense.” *See* §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 4B1.4 (Armed Career Criminal), 7B1.1 (Classification of Violations (Policy Statement)), and 7C1.1 (Classification of Violations (Policy Statement)).

The first circuit conflict concerns whether the definition of a “controlled substance offense” in §4B1.2(b) only includes substances controlled by the federal Controlled Substances Act (“CSA”) (21 U.S.C. § 801 *et seq.*), or whether the definition also includes substances controlled by applicable state law. This circuit conflict prompted Justice Sotomayor, joined by Justice Barrett, to call for the Commission to “address this division to ensure fair and uniform application of the [g]uidelines.” *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting the denial of certiorari); *Wiggins v. United States*, 145 S. Ct. 2621, 2622 (2025) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting denial of certiorari) (collecting cases).

The Second, Fifth, and Ninth Circuits have held that a “controlled substance offense” only includes offenses involving substances controlled by federal law (the CSA), not offenses that include substances that a state schedule lists as a controlled substance, but the CSA does not. *See United States v. Minor*, 121 F.4th 1085, 1089–1090 (5th Cir. 2024) (holding that state-law offense counts only if it is a categorical match for a federal offense); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (conviction under Arizona statute criminalizing hemp as well as marijuana is not a “controlled substance offense” because hemp is not listed in the CSA); *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) (conviction under New York statute prohibiting the sale of Human Chorionic Gonadotropin (“HCG”) is not a “controlled substance offense” because HCG is not controlled under the CSA). In these circuits, a state drug offense will not qualify as a “controlled substance offense” if the state statute includes any substance not controlled

under federal law, even if the offense involved a controlled substance that is covered by the CSA. Because the lists of substances controlled under federal and state law rarely match, and many state statutes do not require proof of the exact substance as an element of the offense, this approach has the practical effect of eliminating many state offenses involving controlled substances under federal law.

By contrast, the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that a state conviction that includes a controlled substance that is not identified in the CSA can qualify as a “controlled substance offense” under the guidelines. *See United States v. Dubois*, 94 F.4th 1284, 1294–96 (11th Cir. 2024) (“A drug regulated by state law is a ‘controlled substance’ for state predicate offenses, even if federal law does not regulate that drug.”), *cert. granted, judgment vacated sub nom. Dubois v. United States*, 145 S. Ct. 1041 (2025), reinstated by 139 F.4th 887 (11th Cir. 2025); *United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023) (“a ‘controlled substance’ under [§4B1.2(b)] is a drug regulated by either state or federal law”); *United States v. Jones*, 81 F.4th 591, 598–99 (6th Cir. 2023) (controlled substance offense includes “state-law controlled substance offense[s]”); *United States v. Jones*, 15 F.4th 1288, 1295 (10th Cir. 2021) (definition of “controlled substance offense” includes “state-law controlled substance offenses, involving substances not found on the CSA”); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) (“There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law.”); *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) (“[T]he Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify [as a

controlled substance offense].”); *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (“The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to include state-law offenses[.]” (citation and quotation omitted)).

The second circuit conflict concerns which temporal version of the applicable drug schedule (whether federal or state) should be used to decide if a prior offense qualifies as a predicate “controlled substance offense”: (1) the schedule in place at the time of defendant’s prior conviction; or (2) the schedule in place at the time of the instant offense or sentencing for the instant federal offense. The interpretations of the Third, Fourth, Sixth, Eighth, and Eleventh Circuits conflict with those of the First, Second, Fifth, and Ninth Circuits. *Compare* *United States v. Nelson*, 151 F.4th 577 (4th Cir. 2025); *Dubois*, 94 F.4th at 1296; *Lewis*, 58 F.4th at 771–73; *United States v. Perez*, 46 F.4th 691, 703 (8th Cir. 2022); *United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022) (all using time of the prior convictions), *with* *United States v. Minor*, 121 F.4th 1085 (5th Cir. 2024); *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021), *and* *United States v. Abdulaziz*, 998 F.3d 519, 523 (1st Cir. 2021) (all using time of sentencing); *see also* *United States v. Gibson*, 55 F.4th 153, 165 (2d Cir. 2022), *adhered to on reh’g*, 60 F.4th 720 (2d Cir. 2023) (*not* time of prior conviction).

The Sixth Circuit has concluded that courts should use the drug schedule in place at the time of defendant’s prior conviction, reasoning that the guideline’s 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.” *See* *United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022) (“controlled substance” should be defined with reference to “the drug schedules in place at the time of the prior convictions at issue”). Likewise, the Third, Eighth, and Eleventh Circuits have held that whether a conviction qualifies as a controlled substance offense depends on the law at the time of the prior conviction. *Dubois*, 94 F.4th at 1298 (“We adopt a time-of-state-conviction rule: the term ‘controlled substance,’ . . . means a substance regulated by state law when the defendant was convicted of the state drug offense, even if it is no longer regulated when the defendant is sentenced for the federal firearm offense.”); *Lewis*, 58 F.4th at 771–73 (“Simply put, controlled substances include those regulated at the time of the predicate conviction.”); *United States v. Perez*, 46 F.4th 691, 703 (8th Cir. 2022) (“And this court has also held that whether a prior state conviction is a controlled substance offense for Guidelines purposes is based on the law at the time of conviction, without reference to current state law.” (citation omitted)). More recently, the Fourth Circuit held that courts must consult the federal drug schedules in effect at the time of the prior conviction when determining whether a prior offense qualifies as a “controlled substance offense” under §4B1.2(b). *United States v. Nelson*, 151 F.4th 577 (4th Cir. 2025).

By contrast, the First, Fifth, and Ninth Circuits use the schedule in place at the time of sentencing for the instant federal offense. Accordingly, these circuits compare the elements of the statute of conviction with the current version of the CSA and do not treat a prior conviction as a controlled substance offense if the statute of conviction encompasses conduct that is not currently criminalized by the CSA. *See Minor*, 121 F.4th

1085 (holding that the term “controlled substance” hinges on the definition of “controlled substance” in the CSA “in place at the time of sentencing for the instant offense.”); *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) (“[A] court must ask whether [a] prior crime qualifies as a ‘controlled substance offense’ under the CSA and the corresponding [g]uideline *at the time of sentencing*.”); *United States v. Abdulaziz*, 998 F.3d 519, 523 (1st Cir. 2021) (“[I]nsofar as the CSA’s drug schedules were incorporated into the guideline itself at the time of [] sentencing, . . . we must look to the version of those drug schedules that were ‘in effect’ at that time to determine what constituted a ‘controlled substance’ at that time.” (citations omitted)).

The proposed amendment would amend §4A1.2(b) to address both circuit conflicts.

The proposed amendment would first address the circuit conflict relating to whether a substance involved in an offense must be controlled under federal law by the CSA to qualify as a “controlled substance offense” under §4B1.2(b). Two options are provided:

Option 1 would set forth a definition of “controlled substance” that adopts the approach of the Second, Fifth, and Ninth Circuits. It would limit the definition of the term to substances that are specifically included in the CSA. This option would resolve the circuit conflict so as to preserve the status quo in circuits that categorically exclude violations of those state statutes that control substances not included in the CSA.

Option 2 would set forth a definition of “controlled substance” that adopts the approach of the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. It would provide that the term “controlled substance” refers to substances either included in the CSA or otherwise controlled under applicable state law.

The proposed amendment would then address the circuit conflict relating to which version of the applicable drug schedule determines whether a prior conviction qualifies as a “controlled substance offense” under §4B1.2(b). Two options are provided.

Option 1 would adopt the First, Fifth, and Ninth Circuits’ approach of using the schedule in place at the time of sentencing for the instant federal offense.

Option 2 would adopt the Third, Fourth, Sixth, Eighth, and Eleventh Circuits’ approach of using the schedule in place at the time of defendant’s original conviction.

The proposed amendment would also amend the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which contains a definition for the term “drug trafficking offense” that closely tracks the definition of “controlled substance offense” in §4B1.2(b). It sets forth the same options discussed above for §4B1.2(b).

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2(b) is amended by striking the following:

*“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).”;

and inserting the following:

*“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).

[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))]**

[Option 1 (Second, Fifth, and Ninth Circuits—Controlled Substances under Federal Law):

For purposes of this provision, the term ‘controlled substance’ refers to a drug or other substance, or immediate precursor, listed in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*).]

**[Option 2 (Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—
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.]

**[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))]**

**[Option 1 (First, Fifth, and Ninth Circuits—Schedule at Time of Sentencing of
Instant Offense):**

For purposes of this provision, the term ‘controlled substance’ refers to a drug or other substance, or immediate precursor, that is controlled under the applicable law at the time of sentencing for the instant offense.]

[Option 2 (Third, Fourth, Sixth, Eighth, and Eleventh Circuits—Schedule at Time of Original Conviction):

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.]”.

The Commentary to §2L1.2 captioned “Application Notes” is amended in Note 2 by striking the following:

“ ‘Drug trafficking offense’ means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.”;

and inserting the following:

“ ‘Drug trafficking offense’ means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.

[CIRCUIT CONFLICT 1

**(WHETHER A SUBSTANCE INVOLVED IN AN OFFENSE MUST BE
CONTROLLED BY THE CONTROLLED SUBSTANCES ACT TO QUALIFY AS
A “DRUG TRAFFICKING OFFENSE” UNDER §2L1.2)]**

**[Option 1 (Second, Fifth, and Ninth Circuits—Controlled Substances under Federal
Law):**

For purposes of this provision, the term ‘controlled substance’ refers to a drug or other substance, or immediate precursor, listed in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*.)]

**[Option 2 (Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—
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.]

[CIRCUIT CONFLICT 2
(WHICH VERSION OF THE APPLICABLE DRUG SCHEDULE DETERMINES
WHETHER A PRIOR CONVICTION QUALIFIES AS A “DRUG TRAFFICKING
OFFENSE” UNDER §2L1.2)]

[Option 1 (First, Fifth, and Ninth Circuits—Schedule at Time of Sentencing of Instant Offense):

For purposes of this provision, the term ‘controlled substance’ refers to a drug or other substance, or immediate precursor, that is controlled under the applicable law at the time of sentencing for the instant offense.]

[Option 2 (Third, Fourth, Sixth, Eighth, and Eleventh Circuits—Schedule at Time of Original Conviction):

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.]”.

Issues for Comment

1. The proposed amendment would amend subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) to address the circuit conflicts described in the

synopsis above by providing two options for each circuit conflict. The Commission seeks comment on whether it should address the circuit conflicts in a manner other than the options provided in the proposed amendment. If so, how?

2. Several guidelines use the term “controlled substance offense” and define the terms by making specific reference to §4B1.2. *See, e.g.*, the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §4B1.4 (Armed Career Criminal), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

If the Commission were to promulgate any of the options set forth in the proposed amendment for each circuit conflict, should any or all of these guidelines continue to define the term “controlled substance offense” by making specific references to §4B1.2? Should the Commission maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant parts of §4B1.2? Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

4. HUMAN SMUGGLING

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s “[e]xamination of §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to ensure the guidelines appropriately account for the consideration of factors such as the number of humans smuggled and whether the offense involved bodily injury or sexual assault.” *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39264 (Aug. 14, 2025).

Offenses involving the smuggling, transporting, and harboring of unlawful aliens and aiding, abetting, and conspiring to commit such offenses, are referenced to §2L1.1. The guideline contains a specific offense characteristic that provides a tiered enhancement based on the number of unlawful aliens who were smuggled, transported, or harbored. USSG §2L1.1(b)(2). Offenses involving 6–24 aliens receive a 3-level increase, those involving 25–99 aliens receive a 6-level increase, and those involving 100 or more aliens receive a 9-level increase. *Id.* Commission data show that almost sixty percent (59%) of cases sentenced under §2L1.1 in fiscal year 2024 did not receive an enhancement under §2L1.1(b)(2) for the number of aliens involved in the offense. On average, those cases involved three aliens. When the enhancement was applied, the substantial majority of cases received the 3-level increase at subsection (b)(2)(A) (6–24 aliens). In those cases that received the 3-level enhancement, the offense involved an average of 12 aliens, while cases that received the 6-level enhancement at subsection (b)(2)(B) involved an average of 50 aliens. For those cases that received the highest increase of nine levels at

subsection (b)(2)(C) because the offense involved 100 or more aliens, the average number of aliens was 832. However, the median number of aliens for that group was 175.

For an offense in which any person died or sustained a bodily injury, §2L1.1(b)(7) provides a tiered enhancement based on the severity of the injury sustained. USSG §2L1.1(b)(7). Under the tiered enhancement, “bodily injury” results in a 2-level increase, “serious bodily injury” results in a 4-level increase, “permanent or life-threatening injury” results in a 6-level increase, and “death” results in a 10-level increase. *Id.* The Commentary to §2L1.1 refers to the definition of “serious bodily injury” in Application Note 1 of §1B1.1 (Application Instructions). That definition provides that “‘serious bodily injury’ is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 [(Aggravated sexual abuse)] or § 2242 [(Sexual abuse)] or any similar offense under state law.” USSG §1B1.1, comment. (n.1(L)).

In comments to the Commission, the Department of Justice expressed concerns regarding §2L1.1. The Department opined that the guideline does not reflect a congressional intent “to provide increased punishment for each alien smuggled.” 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. The Department also

expressed that §2L1.1 does not adequately address human smuggling cases in which a victim was sexually abused or otherwise sexually assaulted. *Id.*

The proposed amendment would revise §2L1.1 to respond to these concerns.

The proposed amendment would amend §2L1.1(b)(2) based on the Commission's sentencing data by creating more tiers based on the number of aliens involved and decreasing the number of aliens in each tier. Under the proposed amendment, offenses involving [6]–12 aliens would receive a 3-level enhancement, offenses involving 13–18 aliens would receive a [4]-level enhancement, offenses involving 19–24 aliens would receive a [5]-level enhancement, offenses involving 25–49 aliens would receive a [6]-level enhancement, offenses involving 50–99 aliens would receive a [7]-level enhancement, and offenses involving 100 or more aliens would receive a 9-level enhancement.

The proposed amendment would insert a new subsection (b)(6) applying a 2-level enhancement if the offense involved concealing persons in the trunk or engine compartment of a motor vehicle or carrying substantially more passengers than the rated capacity of a motor vehicle or vessel. If the resulting offense level is less than 18, then the new provision would provide that the offense level be increased to level 18. The existing subsection (b)(6) would be renumbered as subsection (b)(7) and would be amended to provide that it does not apply to conduct for which the defendant received an enhancement under subsection (b)(5) or new subsection (b)(6). Subsection (b)(7) (as

renumbered) would also expressly provide that “serious bodily injury” includes criminal sexual abuse.

The proposed amendment would amend subsection (b)(8) (as renumbered) providing an enhancement for an offense involving death or bodily injury. It would bracket the possibility of amending subsection (b)(8) (as renumbered) so that a 2-level enhancement would apply to an offense in which a person was subjected to conduct constituting criminal sexual contact under 18 U.S.C. § 2244. It would also clarify that the 4-level enhancement for serious bodily injury applies to cases involving criminal sexual abuse.

The proposed amendment provides two options for adding a provision to subsection (b)(8) (as renumbered) providing for an enhancement for cases in which multiple people die or sustain an injury.

Option 1 would add a new subdivision to (b)(8) (as renumbered) providing a new tiered enhancement if additional people died or sustained an injury. It contains two bracketed possibilities for the enhancement. The first bracketed possibility would apply if the offense resulted in death, any degree of bodily injury[, or criminal sexual contact] to additional people. The second bracketed possibility would apply if the defendant intentionally or knowingly caused death, any degree of bodily injury[, or criminal sexual contact] to additional people. Under both possibilities, an offense would be subject to a [1]-level increase if one or two additional people died or sustained any degree of bodily injury; and an offense

would be subject to a [2]-level increase if three or more people died or sustained any degree of bodily injury.

Option 2 would add a new subdivision to (b)(8) (as renumbered) providing a new tiered enhancement if additional people died or sustained permanent or life-threatening injury. It contains two bracketed possibilities for the enhancement. The first bracketed possibility would apply if the offense resulted in death or permanent or life-threatening bodily injury to additional people. The second bracketed possibility would apply if the defendant intentionally or knowingly caused death or permanent or life-threatening bodily injury to additional people. Under both possibilities, an offense would be subject to a [3]-level increase if one or two additional people died or sustained permanent or life-threatening injury; and an offense would be subject to a [6]-level increase if three or more people died or sustained permanent or life-threatening injury.

Finally, the proposed amendment brackets two possibilities for adding a new cross reference at §2L1.1(c)(2) instructing courts to apply the appropriate guideline from Chapter Two, Part A, Subpart 3 depending on whether there was conduct described in 18 U.S.C. §§ 2241–2244. Under the first bracketed possibility, the cross reference would apply if the offense involved such conduct. Under the second bracketed possibility, the cross reference would apply if the defendant engaged in such conduct.

Issues for comment are also provided.

Proposed Amendment:

Section 2L1.1(b) is amended—

in paragraph (2) by striking the following:

“ <i>Number of Unlawful Aliens</i>		
	<i>Smuggled, Transported, or Harbored</i>	<i>Increase in Level</i>
(A)	6–24	add 3
(B)	25–99	add 6
(C)	100 or more	add 9.”;

and inserting the following:

“ <i>Number of Unlawful Aliens</i>		
	<i>Smuggled, Transported, or Harbored</i>	<i>Increase in Level</i>
(A)	[6]–12	add 3
(B)	13–18	add [4]
(C)	19–24	add [5]
(D)	25–49	add [6]
(E)	50–99	add [7]
(F)	100 or more	add 9.”;

by redesignating paragraphs (8) and (9) as paragraphs (9) and (10), respectively;

by striking paragraphs (6) and (7) as follows:

“(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<i>Death or Degree of Injury</i>	<i>Increase in Level</i>
(A) Bodily Injury	add 2 levels
(B) Serious Bodily Injury	add 4 levels
(C) Permanent or Life-Threatening Bodily Injury	add 6 levels
(D) Death	add 10 levels.”;

and inserting before paragraph (9) (as so redesignated) the following new paragraphs (6), (7), and (8):

“(6) If the offense involved (A) concealing persons in the trunk or engine compartment of a motor vehicle, or (B) carrying substantially more passengers than the rated

capacity of a motor vehicle or vessel, increase by [2] levels, but if the resulting offense level is less than level 18, increase to level 18.

- (7) If the offense involved conduct (other than conduct for which the defendant received an enhancement under subsection (b)(5) or (b)(6)) that intentionally or recklessly created a substantial risk of death or serious bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law) to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

- (8) (A) If any person died, sustained bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law)[, or was subjected to conduct constituting criminal sexual contact under 18 U.S.C. § 2244], increase the offense level according to the seriousness of the injury:

<i>Death or Degree of Injury</i>		<i>Increase in Level</i>
(i)	Bodily Injury [or Criminal Sexual Contact]	add 2 levels
(ii)	Serious Bodily Injury (Including Criminal Sexual Abuse)	add 4 levels
(iii)	Permanent or Life-Threatening Bodily Injury	add 6 levels
(iv)	Death	add 10 levels.

[Option 1 (increase for any additional injuries):

(B) If subsection (b)(8)(A) applies and [the offense resulted in][the defendant intentionally or knowingly caused] death, any degree of injury listed above[, or criminal sexual contact under 18 U.S.C. § 2244]—

(i) to one or two additional people, increase by [1] level; or

(ii) to three or more additional people, increase by [2] levels.]

[Option 2 (increase for additional deaths or permanent or life-threatening injuries):

(B) If subsection (b)(8)(A) applies and [the offense resulted in][the defendant intentionally or knowingly caused] death or permanent or life-threatening bodily injury—

(i) to one or two additional people, increase by [3] levels; or

(ii) to three or more additional people, increase by [6] levels.]”.

Section 2L1.1(c) is amended by inserting at the end the following new paragraph (2):

“(2) If the [offense involved][defendant engaged in] conduct described in 18 U.S.C. §§ 2241–2244, apply the appropriate guideline from Chapter Two, Part A, Subpart 3, if the resulting offense level is greater than that determined under this guideline.”.

The Commentary to §2L1.1 captioned “Application Notes” is amended—

by striking Notes 3 and 4 as follows:

“3. *Application of Subsection (b)(6).*—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (*e.g.*, transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).

4. *Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.*—Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), ‘serious bodily injury’ is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.”;

and inserting the following new Notes 3 and 4:

“3. *Application of Subsection (b)(7).*—

- (A) *Reckless Conduct.*—Reckless conduct to which the adjustment from subsection (b)(7) applies includes a wide variety of conduct (e.g., harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements).
- (B) *Interaction with Other Guideline Provisions.*—If subsection (b)(7) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight).

4. *[Application of Subsections (b)(7) and (b)(8) to Conduct Constituting Criminal Sexual Abuse.—If subsection (b)(8) applies on the basis of conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law, then subsection (b)(7) should also apply.]”;*

and in Note 5 by striking “subsection (b)(8)(A)” and inserting “subsection (b)(9)(A)”.

Issues for Comment

1. The proposed amendment would amend the table at §2L1.1(b)(2) providing an enhancement based on the number of unlawful aliens involved in the offense. Is the proposed number of unlawful aliens in each category appropriate given the corresponding offense-level enhancement? Should the Commission revise the number of unlawful aliens for any of the categories? If so, what should the number of unlawful aliens be for each category? Should an enhancement apply to offenses involving fewer than six aliens? If so, what number of aliens should trigger application of the enhancement? Is the proposed level enhancement for each category appropriate? If not, what should each level enhancement be?
2. The proposed amendment brackets the possibility of amending §2L1.1(b)(8) (as renumbered) to apply a 2-level enhancement to an offense involving criminal sexual contact under 18 U.S.C. § 2244. The Commission seeks comment on

whether offenses involving criminal sexual contact should receive an enhancement. If so, what level should the enhancement be?

3. The proposed amendment provides two options for adding an enhancement at §2L1.1(b)(8)(B) (as renumbered) that would apply if there were multiple deaths or injuries. Option 1, which would apply if there were multiple people who sustained an injury of any type covered under the existing table in subsection (b)(8)(A) (as renumbered), would apply a [1]-level enhancement if there were one or two additional injured persons, or a [2]-level enhancement if there were three or more injured persons. Option 2, which would apply if there were multiple people who died or sustained a permanent or life-threatening bodily injury, would apply a [3]-level enhancement if one or two people died or sustained such an injury, or a [6]-level enhancement if three or more people died or sustained such an injury. Both options bracket the possibility of either making the enhancement offense-based or defendant-based. The Commission seeks comment on the following:

- (A) Does either of the options appropriately account for offenses resulting in multiple deaths or injuries? Do the enhancements appropriately account for the severity of any additional injuries?
- (B) Should the enhancement be either offense-based or defendant-based, or should the Commission consider another approach? If the enhancement is

defendant-based, should the Commission include the *mens rea* requirement that the defendant “intentionally or knowingly” caused the injury?

- (C) Is there another approach the Commission should consider? For example, should the Commission create an enhancement that treats an offense resulting in multiple injuries of a lesser degree the same as an offense resulting in fewer, but more severe, injuries? If so, how should that enhancement work?

- 4. The Commission seeks comment on whether it should add—either in addition to or in lieu of the changes in the proposed amendment—a specific offense characteristic to §2L1.1 to further address the risks associated with human smuggling offenses committed by members of transnational criminal organizations. For example, should the Commission add a specific offense characteristic providing an enhancement if the defendant “committed the offense in connection with the defendant’s participation in an organization, knowing [or with reckless disregard of the fact] that the organization was a transnational criminal organization (as defined in 21 U.S.C. § 2341(5))”? The Commission seeks comment on the following:

- (A) Should the Commission add a specific offense characteristic to §2L1.1 addressing transnational criminal organizations, such as the language

proposed above? If so, at what level should the Commission set the enhancement?

- (B) The proposed language above would apply to offenses involving a “transnational criminal organization,” as defined in 21 U.S.C. § 2341(5). That statutory definition comprises three subsections, each describing a type of criminal organization. Is this an appropriate definition for purposes of the proposed enhancement? If so, should the Commission use the full statutory definition, or should the Commission use only part of the statutory definition? Should the Commission use a different definition? If so, what definition should the Commission use? Alternatively, should the Commission limit application of the enhancement to specifically enumerated criminal organizations, such as those listed in 21 U.S.C. § 2341(5)(B) or a list of organizations specifically identified by the Commission?
- (C) The proposed language above would apply to a defendant who participates in a transnational criminal organization. Should the Commission limit application of the enhancement to a defendant who receives an adjustment under §3B1.1 (Aggravating Role), or who holds a leadership or organizing role (or some other role) within a transnational criminal organization?

- (D) The proposed language would include a requirement that the defendant participated in an organization “knowing [or with reckless disregard of the fact]” that the organization was a transnational criminal organization. Is this *mens rea* requirement appropriate, or should the Commission revise or remove the requirement?
- (E) If the Commission were to promulgate a new specific offense characteristic related to transnational criminal organizations, could it result in unwarranted sentencing disparities? If so, how should the Commission address those disparities?
5. Are there any other aggravating or mitigating circumstances in cases sentenced under §2L1.1 that the Commission should address? If so, what are those circumstances, and how might the Commission account for them?



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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.

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.

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 2B 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

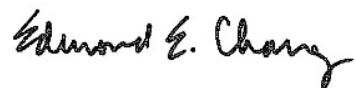
The proposed Human Smuggling amendment would expand the tiers in §2L1.1(b)(2) for the number of persons smuggled, providing better gradation of the impact of the offense. It also adds a new 2-level increase for certain forms of concealing or carrying persons in a vehicle or vessel, and adds provisions 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,

A handwritten signature in black ink, reading "Edmond E. Chang". The signature is written in a cursive, flowing style.

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

UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL
2026 AMENDMENT CYCLE

PROPOSED AMENDMENT: SENTENCING OPTIONS

ISSUES FOR COMMENT
THE HONORABLE DAVID COUNTS, U.S. DISTRICT JUDGE
WESTERN DISTRICT OF TEXAS

Sentencing Options – Changes to Part A of Chapter 5 – Issues for Comment

1. Part A of the proposed amendment would amend Part A of Chapter Five to both add new introductory commentary to Part A and a new guideline at §5A1.1 (Determination of Type of Sentence). The Commission seeks comment on whether it should adopt both the new introductory commentary and the new guideline, only the new introductory commentary, or only the new §5A1.1 guideline. If the Commission were to promulgate only the new introductory commentary to Part A, should it incorporate into the commentary any of the guidance currently provided in proposed §5A1.1?

I support implementing both the new introductory commentary and the new guideline at §5A1.1 as long as a reference to the court's duty under 18 U.S.C. § 3553(a) remains notated as in the proposed §5A1.1(d). One seems to complement the other.

2. Part A of the proposed amendment would add to Part A of Chapter Five a new guideline at §5A1.1 (Determination of Type of Sentence). The new guideline at §5A1.1 would provide an overview of the steps necessary for the court to determine an appropriate sentence pursuant to Chapter Five. New Subsection (b) instructs the court to determine the appropriate sentencing options from among those authorized in the guidelines. The Commission seeks comment on whether it should list factors in new §5A1.1(b) for courts to consider in determining the appropriate sentencing option under the guidelines. If so, what factors should be listed? The Commission seeks comment on whether the list of factors should include any of the factors listed below:
 - a. Whether a sentence of probation or a term of imprisonment best protects the public and meets the other purposes of sentencing. *See* 18 U.S.C. § 3553(a)(1), (a)(2); §5C1.1(e) (schedule of substitute punishments).
 - b. Whether the seriousness of the defendant's offense, and the nature and degree of harm caused by it, require a term of imprisonment to provide just punishment, afford adequate deterrence to criminal conduct, promote respect for the law, or adequately address public concern generated by the offense. *See* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 994(c).
 - c. Whether the defendant is in need of educational or vocational training, medical care, or other rehabilitative or correctional treatment, and the setting in which any such treatment would be most effectively provided. *See* 18 U.S.C. §§ 3553(a)(2)(D), 3582(a); 28 U.S.C. § 994(k).

- d. The nature and capacity of the penal, correctional, and other facilities and services available, the relative cost associated with available sentencing options, and how resources could be most effectively allocated to address the risks and needs of the defendant. 28 U.S.C. § 994(g), (k).
- e. Whether the defendant is: (1) a “first offender” who has not been convicted of a crime of violence or an otherwise serious offense, for whom a sentence other than imprisonment is generally appropriate; or (2) a person convicted of a crime of violence that results in serious bodily injury, for whom a sentence of imprisonment is generally appropriate. *See* 28 U.S.C. § 994(j).
- f. Whether the defendant has a history of prior criminal conduct that warrants a substantial term of imprisonment. *See* 28 U.S.C. § 994(h), (i).
- g. Any developing research and knowledge about the effectiveness of available sentencing options in meeting the needs of individual defendants, reducing recidivism, and protecting the public. *See* 28 U.S.C. § 991(b)(1)(C).

Should the Commission provide additional or different factors?

The proposed section §5A1.1(b) is sufficient. Instead of listing factors, perhaps a simple reference to 18 U.S.C. § 3553(a) would be most appropriate. However, should the Commission decide otherwise, those reflected above are adequate. No additional factors are recommended.

3. Section 3553(a) of Title 18 lists some of the factors that the court shall consider to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. In particular, the factors set forth in section 3553(a)(2) include “the need for the sentence imposed . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” The Commission seeks comment on whether proposed new §5A1.1(b) should reference the factors listed in 18 U.S.C. § 3553(a), including the purposes of sentencing in section 3553(a)(2)? If so, how? Would referencing or incorporating these statutory factors into the proposed guideline inadvertently create a procedural requirement that could be subject to litigation?

A simple reference to 18 U.S.C. § 3553(a) would be sufficient. There is no need to incorporate each of those factors into the guideline.

Sentencing Options – Expansion of Zone B and C of the Sentencing Table – Issues for Comment

1. Part B of the proposed amendment would expand Zones B and C of the Sentencing Table. The Commission seeks comment on whether it should expand Zones B and C in a different manner than the one set forth in the proposed amendment. Should the Commission expand Zone B to lower or higher offense levels than proposed? Should it expand Zone C to lower or higher offense levels than proposed? What data, statutory provisions, or policy considerations should determine the scope of Zones B and C?

I do not support expanding Zones B or C. Instead, the Commission should maintain the current sentencing table. Courts are to consider factors under 18 U.S.C. § 3553(a) when arriving at a reasonable sentence and have authority to pronounce any sentence allowed under the statute, even if that sentence is not allowed under the guidelines. The guidelines are only advisory. There is no need to adjust these zones. Does the Commission expect that courts will impose probation or split sentences more often due to expanding these zones? I suspect there will be very little, if any, noticeable difference. For those courts who are more inclined to impose a sentence of probation or a split sentence, I suspect those courts already do so.

2. The proposed expansion of Zone B would authorize sentences of probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. Similarly, the proposed expansion of Zone C would authorize split sentences for current Zone D defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B and C defendants. If so, what guidance should the Commission provide?

If those zones are expanded, the Commission should consider the impact on the supervision of those defendants. For example, under the proposed sentencing table, a defendant with a total offense level 23 and criminal history category I, would have a guideline range of 46-57 months, yet be in Zone B. The Commission should provide guidance on what community confinement or home detention looks like for such a defendant. Should a defendant be on electronic monitoring for 46 months? The Commission should provide guidance on how long defendants should remain on electronic monitoring versus home confinement without monitoring, etc.

Also of note, is a 46-month sentence to home detention a just sentence? Courts already have at their disposal 3553(a) factors to address unique circumstances on a case-by-case basis. Manipulation of the sentencing table is not warranted.

3. The proposed expansion of Zones B and C would result in a zone structure that authorizes different sentencing options for certain defendants who are in different criminal history categories but have the same applicable guideline range (*i.e.*, defendants whose guideline range is 15–21 or 18–24 months). The Commission seeks comment on whether authorizing different sentencing options for defendants who have the same applicable guideline range is appropriate. Would doing so raise any legal or policy concerns?

I take no issue with those who are in different criminal history categories, but who have the same guideline ranges, being subjected to different sentencing options. Otherwise, we dilute the importance of the criminal history score. Why should a defendant who is a criminal history category VI enjoy the same sentencing options as a defendant in criminal history category I simply because their guideline ranges are the same (See proposed table: Offense Level 15, CH I (18-24 months – Zone B) versus Offense Level 8, CH VI (18-24 months- Zone D))? Any legal or policy concern can be addressed via the 3553(a) factors.



U.S. Department of Justice

Criminal Division

Appellate Section

Washington, DC 20530

March 18, 2026

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

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on its proposed amendments to the Sentencing Guidelines and issues for comment published in the Federal Register on February 6, 2026.¹ The letter supplements the Department's testimony from the Commission's hearing on March 9, 2026.

The Department appreciates the careful and deliberative process that the Commission undertook in proposing this set of amendments. Two of the proposals—those concerning sentencing options and the career offender guideline—follow roundtables where the Commission heard various views from stakeholders and other participants. And the third proposal, which addresses the alien smuggling guideline (§2L1.1), responds to repeated requests from the Department and other executive agencies to address that guideline's inadequacies. The Department appreciates the Commission's publication of proposed amendments that address those requests and supports the Commission's proposed amendments to §2L1.1 in substantial part.

Specifically, we support the changes that: (1) would add more gradations to the table by providing offense level enhancements based on the number of aliens smuggled, and (2) the amendments addressing conduct creating a risk of injury or death, though we fear that the latter changes may have limited effect. We support, with modifications, the proposed changes to how the guideline addresses additional injuries or deaths, as well as the final two measures that the Commission published: a cross reference to the criminal sexual abuse guidelines and an enhancement for smuggling associated with transnational criminal organizations.

The Department appreciates the Commission's continuing efforts to address the categorical approach's harmful effects on recidivism provisions, such as the career offender guideline (§4B1.2). As we understand the Commission's current proposal, it would not entirely eliminate the categorical approach's focus on the statutory definition of an offense, as opposed to the facts of

¹ Notice of request for public comment and hearing, 91 Fed. Reg. 25, 5556 (Feb 6, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-02-06/pdf/2026-02441.pdf>; see also U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (January 30, 2026) ("Proposed Amendments"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202512_rf-proposed.pdf.

the crime. The Department nonetheless sees real promise in several aspects of the proposal, including the idea of defining the federal predicates that qualify as crimes of violence by reference to a list of specific statutes. We also view favorably the proposal to presumptively classify certain state offenses as crimes of violence, subject to exclusions that a defendant would have to establish. The ultimate viability of the proposal, though, will turn on how the Commission resolves some of the policy choices before it, including the scope of the predicate list and the breadth and nature of the exclusions from the crime-of-violence definition that are adopted.

At a minimum, the Commission should resolve the two circuit conflicts regarding the definition of “controlled substance offense” in §4B1.2. In line with our comments last year and in 2023, we support Option Two under both proposals. Option Two would treat state crimes as controlled substance offenses regardless of whether the drug at issue is controlled under state or federal law and would limit the inquiry to the state of the law at the time of the prior conviction. No sound policy reasons justify the minority views on either question, which instead highlight the most pernicious aspects of the categorical approach and perpetuate unwarranted disparities.

Finally, the Department does not support either part of the sentencing options amendment. We see no pressing need for new Introductory Commentary that reminds judges of sentencing options that are very familiar to them and are concerned that the proposed commentary, rather than serving as an outcome-neutral reminder, is designed to drive judges toward particular sentencing outcomes. Likewise, we oppose the creation of the new §5A1.1, which risks injecting an additional procedural step into the sentencing process—and one that appears to overlap substantially with the sentencing judge’s existing consideration of the § 3553(a) factors. The Department also does not support the proposed zone expansion, especially the expansion of Zone C all the way to offense level 29 for offenders in criminal history category I.

We elaborate on these views below, addressing the proposed amendments in the order in which they appear in the Commission’s publication.

* * *

I. Sentencing Options

The Commission has proposed amendments to Chapter Five that emphasize non-incarceration sentencing options. Part A of the proposed amendment posits both an expanded Introductory Commentary to Chapter Five and a new guideline at §5A1.1. For defendants whose guidelines ranges fall within Zones A through C on the Sentencing Table, the new §5A1.1 would encourage courts to determine the sentence type (*e.g.*, imprisonment, probation, intermittent confinement, fine) before determining the length of a sentence. The factors that courts would consider in making this determination closely resemble those that courts typically consider under 18 U.S.C. § 3553(a). Part B of the proposed amendment would expand Zones B and C on the Sentencing Table (now at a new §5A1.2), particularly at Criminal History Category (“CHC”) I. Specifically, at CHC I, the bottom of Zone B would expand from offense level 11 to offense level 23, and Zone C would expand from level 13 to level 29. For other CHCs, Zones B and C would expand by one or two levels.

The Department appreciates the deliberative process that the Commission has undertaken

in proposing these amendments, including the convening of a roundtable in December 2025.² Ultimately, however, the Department does not support either part of the proposal.

Starting with the Introductory Commentary to Chapter Five: although the Department sees no need for the new proposed Introductory Commentary, we do not object to changes designed to remind district courts, in an outcome-neutral manner, of the various sentencing options that exist under statutes and the guidelines—similar to the supervised release amendment that the Commission promulgated last cycle.³ However, we do not support Introductory Commentary that drives judges toward any particular type of sentence, and the latter lines of the current proposal put extra emphasis on non-incarceration. In our view, this commentary is unnecessary and potentially creates problems, rather than solving them.

District judges know well the sentencing options before them, including non-incarceration options. Presentence Reports identify these options before every sentencing, and parties routinely argue them. With those materials in hand, judges thoughtfully exercise their discretion in making individualized sentencing determinations. Nothing in the sentencing data suggests that judges reflexively refuse non-incarceration options. Rather, the data showing that most federal defendants are sentenced to terms of imprisonment reflect, among other things, the focus of limited federal resources on the most serious offenses and the statutory limitations on probation. Thus, an enhanced emphasis on non-incarceration options is unnecessary.

Turning to the proposed §5A1.1, the Department opposes this addition. We are concerned that the proposed §5A1.1 risks confusion and procedurally complicating the two-step post-*Booker* sentencing process, which the Commission cemented into §1B1.1 of the guidelines with last year’s simplification amendment. For defendants in Zones A through C, §§5A1.1(b) and (c) risk injecting a separate procedural step in the sentencing process—in between determining the advisory guidelines range and imposing the sentence under § 3553(a)—that courts must discuss in open court during the sentencing hearing or else commit procedural error. If the Commission’s goal is to remind courts of the full range of sentencing options, we think carefully crafted changes to the Introductory Commentary would be a better option than a new guideline.

The Department also opposes the proposed significant expansion of Zones B and C at CHC I. The proposed expansion risks lengthy periods of supervision, which can be counterproductive for defendants and burdensome on probation officers; and it runs counter to sentences appropriately reflecting the seriousness of the offense and providing just punishment.

A. Substantial Changes to Chapter Five Are Unnecessary

It is often said—typically by judges themselves—that sentencing is the most challenging and weighty part of a judge’s job.⁴ Cognizant of this, judges approach with seriousness and thoughtfulness the task of imposing a sentence that is “sufficient but not greater than necessary”

² Proposed Amendments at 1.

³ U.S.S.G. Ch. 5, Pt. D, intro. cmt.; U.S.S.G. App. C, amend. 835 (effective Nov. 1, 2025).

⁴ See, e.g., Timothy J. Corrigan, “Who appointed me God? Reflections of a Judge on Criminal Sentencing,” JUDICATURE, Vol. 100, No. 3, at 1 (2016) (“Sentencing is the most multifaceted, emotional, and challenging task a judge performs.”).

to accomplish the goals of sentencing in an individual case—as the existing Introductory Commentary to Chapter Five reminds them to do.⁵

Our current post-*Booker* system ensures judges know the sentencing options available to them. Section 3553(a) instructs judges to consider the “kinds of sentences available.”⁶ As do the Sentencing Guidelines, including in the current Introductory Commentary to Chapter Five’s sentencing table,⁷ and in the current §§5B1.1 and 5C1.1’s discussion of probation and split sentences. Also, Presentence Reports identify in detail the various types of sentences available in each case, as they are required to by law.⁸ Probation officers, who are themselves well versed in sentencing options, provide guidance as appropriate. And counsel will zealously advocate for non-incarcerative sentences when appropriate and available. Simply put, when a non-prison sentence might be “sufficient but not greater than necessary” in a case, the current system effectively flags it for the court’s consideration.

The fact that most federal defendants receive imprisonment does not show a reflexive judicial tendency toward prison over other options. Rather, it is attributable to several factors, including that (1) most prosecuted federal crimes warrant a prison sentence due to their nature and seriousness and, relatedly, (2) probation applies in limited circumstances as prescribed by statute.⁹ Taking the latter point first, it is worth remembering that probation is not a legally available sentencing option for a large swath of federal offenders—by our estimate, approximately half of the cases sentenced in Fiscal Year 2024.¹⁰ Congress has entirely excluded from probation eligibility defendants convicted of serious felonies,¹¹ as well as many defendants convicted of frequently prosecuted crimes such as violations of the Controlled Substances Act.¹²

⁵ U.S.S.G., Ch. 5, intro. cmt. (“After applying the provisions of this chapter to determine the sentencing options recommended under the guidelines . . . the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine the length and type of sentence that is sufficient but not greater than necessary.”).

⁶ 18 U.S.C. § 3553(a)(3) (“The court, in determining the particular sentence to be imposed, shall consider—the kinds of sentences available.”).

⁷ U.S.S.G., Ch. 5, intro. cmt. (“[T]he provisions in this chapter set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range. For example, for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions.”)

⁸ Fed. R. Crim. P. 32(d)(1)(C)-(D).

⁹ See also Brent E. Newton, *The Story of Federal Probation*, 53 Am. Crim. L. Rev. 311, 334–43 (2016) (attributing the modern rate of probation sentences to, among other factors, the nature of the federal caseload since 1987, the changing nature of federal offenders, and other statutory restrictions on probation).

¹⁰ Compare U.S. Sent’g Comm’n, *2024 Sourcebook of Federal Sentencing Statistics*, Table 11 (showing approximately 60,000 sentencings for FY2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Sentencing-Section.pdf>; with U.S. Sent’g Comm’n, *Public Data Briefing on 2026 Sentencing Options*, at Slide 6 (listing approximately 27,600 probation eligible defendants) (“Sentencing Options Public Data Briefing”), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026-Sentencing-Options.pdf>.

¹¹ 18 U.S.C. § 3561(a)(1) (excluding individual defendants convicted of Class A and B felonies); U.S.S.G. §5B1.1 (incorporating these limitations).

¹² 18 U.S.C. § 3561(a)(2) (excluding defendants convicted of “an offense for which probation has been expressly precluded”); 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) (barring courts from “plac[ing] on probation or suspend[ing] the sentence of any person sentenced under” certain provisions of the Controlled Substances Act).

Additionally, the Department directs its limited resources to prosecuting the most serious and consequential crimes, which inherently means crimes warranting incarcerative sentences. Long ago, then-Attorney General Robert H. Jackson described such cases as “those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”¹³ And today, the Principles of Federal Prosecution stated in the Justice Manual require federal prosecutors to consider at the charging stage “[t]he probable sentence or other consequences if the person is convicted,” including “whether such a sentence or other consequence would justify the time and effort of prosecution” and the possible sentence that an offender may face if prosecuted under another jurisdiction’s laws.¹⁴ Convictions for offenses that federal prosecutors choose to pursue after considering these criteria will, and should, mostly yield prison sentences. Moreover, given the substantial overlap between state and federal criminal law, those cases where the offense is not the most flagrant—*i.e.*, those that might be more apt to yield probationary or split sentences—are far more often handled at the state level. The federal sentencing data reflects this dynamic and does not indicate a problem that the Commission should implement significant changes to address.

Data about deviations from the guidelines provides further proof that the proportion of non-incarceration sentences is not attributable to rote or reflexive sentencing determinations. In Fiscal Year 2024, for instance, the Commission’s sentencing data show that less than half of all sentences were within the guidelines range. A third of all sentences were variances,¹⁵ a rate that has been relatively stable for the past several years.¹⁶ Of those, nearly 90% were downward variances.¹⁷ Variances, particularly downward variances, indicate judges made individualized determinations about what sentences they believed were “sufficient but not greater than necessary.” And in a substantial number of cases, judges continue to opt for probation or other split sentences: in Fiscal Year 2024, 12% of eligible defendants were sentenced to probation only, with an additional 4% sentenced to a fine only or probation plus confinement conditions.¹⁸

These numbers, moreover, do not necessarily capture all cases in which the punishment imposed at sentencing is analogous to probation in that it consists of supervision but no imprisonment. Rather, time-served sentences “followed by terms of supervised release have effectively replaced probationary sentences in many cases,” but “such sentences are not counted as ‘probation’ in federal sentencing data.”¹⁹

¹³ Attorney General Robert H. Jackson, “The Federal Prosecutor,” address delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

¹⁴ U.S. Dep’t of Justice, Justice Manual 9-27.230 (“Initiating and Declining Charges—Substantial Federal Interest”); *id.* at 9-27.240 (“Initiating and Declining Charges—Prosecution in Another Jurisdiction”).

¹⁵ U.S. Sent’g Comm’n, “Sentence Imposed Relative to the Guideline Range: Fiscal Year 2024,” <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Table29.pdf>.

¹⁶ U.S. Sent’g Comm’n, “Sentence Imposed Relative to the Guideline Range Over Time: Fiscal Years 2015–2024,” <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Figure09.pdf>.

¹⁷ Sentence Imposed Relative to the Guideline Range: Fiscal Year 2024, *supra* n.15.

¹⁸ Sentencing Options Public Data Briefing at Slide 6.

¹⁹ Newton, *The Story of Probation*, *supra*, 53 Am. Crim. L. Rev. at 340; *see id.* at 341–42 (explaining why counsel for a defendant who has been detained for even a single day “ordinarily would ask for an incarceration sentence of ‘time-served’ followed by a term of supervised release rather than a sentence of probation”).

In sum, viewing the proportion of imprisonment sentences as “too high,” and thus requiring significant changes to Chapter Five, misses the mark. Such a perspective runs counter to the seriousness with which judges approach sentencing, the legal and procedural safeguards that ensure judges are fully informed of all sentencing options, and data showing that judges are not reluctant to exercise their discretion.

B. Part A—Chapter Five Introductory Language and §5A1.1

The considerations above inform the Department’s view that no changes to the guidelines to further emphasize sentencing options are needed, and correspondingly, that any changes should be modest. For that reason, the Department would not object to changes to the Introductory Commentary of Chapter Five, Part A that are carefully crafted, in an outcome-neutral manner, to remind judges of the various sentencing options available. We are concerned, however, that the Introductory Commentary as proposed does not meet the key criterion of outcome neutrality and could instead be read as nudging judges toward probation and other non-incarceration sentences.

The most evident example is the treatment of deterrence. The Introductory Commentary as drafted makes only a passing mention of deterrence in a parenthetical quote of the legislative history of the Sentencing Reform Act.²⁰ But Congress cemented deterrence as a central consideration for the sentencing judge under 18 U.S.C. § 3553(a)(2)(B). And the same Senate Report quoted in the proposal makes clear that Congress thought the need for deterrence was a particularly important factor to weigh before deciding to impose a probationary sentence—and one that courts had neglected in “many cases” under the pre-Act system.²¹ Any new commentary highlighting the availability of probation should also reflect Congress’s concerns that probation was a poor fit for certain offenders and offenses.

Further, the proposed §5A1.1 risks unnecessarily complicating the familiar two-step post-*Booker* sentencing process. Courts are accustomed to (1) correctly calculating the advisory guidelines range and, while remaining cognizant of the advisory range, (2) imposing sentence under the factors set forth in § 3553(a).²² The proposed § 5A1.1—particularly subsections (b) and (c), when coupled with the reference in the Introductory Commentary about an “initial determination of sentence type”—could be viewed as interjecting another mandatory procedural step between the existing two-step process. Would courts commit reversible error if, after calculating the guidelines range, they proceeded to the familiar § 3553(a) analysis without first articulating their rationale as to the selection of sentence type? Would it be error to consider sentence length contemporaneous with sentence type (notwithstanding such a consideration being typical and natural)?

Adding more confusion, the analysis that proposed §5A1.1 appears to contemplate at this intermediate step is difficult to distinguish from the ordinary § 3553(a) analysis itself. The list of

²⁰ Proposed Amendments at 5–6.

²¹ S. Rep. No. 98–225 (1983), at 91–92 (explaining the Senate Judiciary Committee’s view that, in “many cases, particularly in instances of major white collar crime,” courts had granted probation “without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance”); *id.* at 92 (stating that probation “may be grossly inappropriate ... in cases in which the circumstances mandate the sentence’s carrying substantial deterrent or punitive impact”).

²² *Rita v. United States*, 551 U.S. 338, 347–348 (2007); *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

possible factors under Issue for Comment #2, which are replete with citations to § 3553(a), illustrates this point.²³ In effect, proposed §5A1.1 could require the judge to evaluate those factors and exercise discretion in determining the sentence type and sentence length *under the guidelines*, before again evaluating those same factors and exercising discretion under § 3553(a) to finally impose sentence. But collapsing the § 3553(a) analysis at step two into the guidelines calculation at step one not only fosters redundancy, it runs counter to the two-step process articulated by the Supreme Court in *Rita* and *Gall*—and enshrined in §1B1.1 of the guidelines themselves via last year’s simplification amendment.

In this way, proposed §5A1.1 could undermine the Commission’s recent efforts at simplifying the guidelines, particularly the removal of most departure provisions. In excising departures, the Commission explicitly acknowledged the “growing shift” among courts post-*Booker* to exercise their discretion in the form of variances under § 3553(a) rather than in the form of departures under the guidelines.²⁴ The proposed §5A1.1, however, risks undoing this work and re-injecting these kinds of discretionary determinations back into the guidelines framework.

For similar reasons, if the Commission were to adopt some version of §5A1.1, the Department opposes including the bracketed language in proposed §5A1.1(d). That language would tell sentencing judges that they may determine that “a sentencing option that is authorized by statute, but not by the guidelines, is appropriate based on the consideration of the [§ 3553(a)] sentencing factors.”²⁵ We are not sure how to read that language as anything other than a statement that judges can impose a probationary sentence even if Chapter 5 of the guidelines would not provide for one. Even putting aside the strangeness of reminding judges that they are free to discard the advice in the Guidelines Manual, such a suggestion is neither necessary nor appropriate in our view.

To sum up our view on Part A of the proposed amendment: the Department does not see a pressing need to remind courts of their sentencing options or suggest an analytical framework for thinking through those options. But if the Commission pursues that route, carefully and neutrally crafted Introductory Commentary could accomplish that goal within the two-step process that the Commission recently cemented into the guidelines. The proposed §5A1.1, by contrast, risks procedurally complicating the sentencing process or injecting back into the guidelines the very type of substantive advice that the Commission excised just last year when deleting all departures from the Guidelines Manual.

* * *

The views expressed above respond to most of the Issues for Comment for Part A. We elaborate, however, on one specific point under Issue #2. The last bullet-point factor in determining sentence type suggests consideration of “[a]ny *developing* research and knowledge about the effectiveness of available sentencing options in meeting the needs of individual defendants,

²³ Proposed Amendments at 9–10.

²⁴ U.S.S.G. §1A1.1 (“The Commission envisioned and framed this 2025 amendment to be outcome neutral, intending that judges who would have relied upon facts previously identified as a basis for a departure would continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).”).

²⁵ Proposed Amendments at 7–8.

reducing recidivism, and protecting the public. See 28 U.S.C. § 991(b)(1)(C).”²⁶

We have two comments on courts considering such a factor in sentencing as a general matter. First, while Congress afforded the Commission the authority to consider the “advancement in knowledge of human behavior as it relates to the criminal justice process” in crafting the guidelines,²⁷ it is unclear the extent to which Congress authorized sentencing courts to do so under § 3553(a) in a particular case. We do not suggest that research may never be considered by sentencing courts. Rather, we simply point out that the roles of—and the legal authority for—the Commission and sentencing courts are different. Thus, we would be hesitant to endorse any provision suggesting sentencing courts should consider facts and circumstances not closely tethered to § 3553(a).

Second, and more pointedly, the Department would oppose the notion that courts should consider “developing” research in imposing sentences in individual cases. Such a provision could invite parties to cite, and courts to rely on, outlier, non-peer reviewed studies or papers that have limited reliability. But reliability of evidence is a touchstone of sentencing proceedings.²⁸ Inviting consideration of “developing” research could produce unnecessary side litigation over the reliability of the research being introduced. At worst, if the conclusions in the research turn out wrong, relying on it could result in a miscarriage of justice. Instead, to the extent courts consider research in making sentencing determinations, they should be encouraged to rely only on high-quality studies that bear the usual indicators of reliability, such as peer review, replicability, and other similar studies reaching the same conclusions.

C. Expansion of Zones B and C of the Sentencing Table

The Department opposes the significant expansion of Zones B and C at CHC I for several reasons. First, expanding Zones B and C so extensively at CHC I would not reflect the seriousness of the offense and provide just punishment at the proposed expanded offense levels. For instance, the notion that the average first-time fraud defendant, a corporate executive, who embezzled \$3 million in a sophisticated scheme and pleaded guilty (resulting in offense level 22)²⁹ would not serve any time in prison runs contrary to common-sense notions of justice. The same could be said of a defendant who committed three Hobbs Act robberies each involving the threat of death and pleaded guilty (resulting in offense level 22)³⁰ or a defendant who straw purchased 200 or more handguns for a person they knew was prohibited and pleaded guilty (resulting in offense level 23).³¹ Each of these examples would fit within the proposed expanded Zone B.

At the expanded Zone C (up to offense level 29 at CHC I), examples of conduct for which split sentences would be authorized are even more egregious. The first-time fraud defendant could embezzle up to 25 million.³² The note-job robber could commit many more robberies. The 200+

²⁶ Proposed Amendments at 10 (emphasis added).

²⁷ 28 U.S.C. § 991(b)(1)(C).

²⁸ U.S.S.G. §6A1.3(a) & cmt.

²⁹ U.S.S.G. §§2B1.1(a)(2), (b)(1)(I); (b)(10)(C); §3B1.3; §§3E1.1(a), (b); §4C1.1.

³⁰ U.S.S.G. §§2B3.1(a), (b)(2)(F); §3D1.4; §§3E1.1(a), (b).

³¹ U.S.S.G. §§2K2.1(a)(6)(B), (b)(1)(E), (b)(6)(B)(i)(I); §§3E1.1(a), (b).

³² U.S.S.G. §§2B1.1(a)(2), (b)(1)(N), §3E1.1(a), (b); §4C1.1.

firearm straw purchaser could supply assault rifles capable of accepting large capacity magazines.³³ We think that probation would be insufficient for the seriousness of such offenses.

The same anomalous results can be seen for crimes that affect the public fisc. Tax prosecutions present one concerning example. Most tax cases involve defendants with no criminal history. In many cases, this happens despite the fact that the defendant has been committing tax offenses for years or even decades before finally being detected, investigated, and successfully prosecuted. Yet the proposed Zone adjustments, in conjunction with the potential inflationary adjustments to the tax table proposed in December 2025,³⁴ will mean that even very large tax losses result in a Zone B or Zone C sentence where an alternative to a prison-only sentence is a recommended option.

For instance, even in a case with a tax loss of \$15 million, which corresponds to a base offense level of 26 under the new table, a first-time tax offender who received a two-level reduction under §4C1.1 and a two-level reduction for acceptance of responsibility would still, with an adjusted offense level of 22, fall within Zone B of the proposed table. And a similar offender responsible for a tax loss of over \$200 million, corresponding to a base offense level of 32 under the new tax table, would still fall into Zone C with an adjusted offense level of 28. Encouraging courts to impose alternatives to incarceration for tax offenders with such high tax losses would undermine a primary goal of sentencing in tax cases: deterring others from violating the tax laws.³⁵

In short, the expansion of Zones B and C is disproportionate to the societal harm caused by a defendant's criminal conduct at those expanded offense levels. So much so that it seems difficult to square such outcomes with the commands of 18 U.S.C. § 3553(a)(2)(A).

Second, extensive periods of intensive supervision or community confinement are known to hamper the rehabilitative process and lead to a revolving door of violations.³⁶ Indeed, in our experience, defendants at supervised release violation hearings who are given the choice between a period of incarceration with no supervision to follow or a longer period of supervision with additional constraints will choose the incarceration option. For some defendants, then, serving extended periods of non-incarcerative confinement would not further the goal of promoting reintegration into society.

Third, such a system would impose a significant burden on already overworked probation officers. Probation officers would be responsible for monitoring compliance of defendants who receive these non-incarcerative sentences. Such monitoring is time-intensive for these officers, possibly even more so than supervising defendants on supervised release.

Fourth, as acknowledged in Issue for Comment #3, expanding Zones B and C at CHC I risks offending fundamental notions of fairness where defendants at identical guidelines ranges are treated differently. For instance, under the proposed amendments, the guidelines would authorize only imprisonment (Zone D) for a defendant at offense level 15 and CHC II but would

³³ U.S.S.G. §§2K2.1(a)(4)(B)(i)(I) and (ii)(II), (b)(1)(E), (b)(6)(B)(i)(I); §3E1.1(a), (b).

³⁴ U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines*, at 52 (December 12, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202512_rf-proposed.pdf.

³⁵ U.S.S.G. §2T1.1, intro. cmt.

³⁶ See, e.g., Alex Roth, et al., *The Perils of Probation: How Supervision Contributes to Jail Populations*, 5 & n.17 (Oct. 2021), at <https://vera-institute.files.svdcn.com/production/downloads/publications/the-perils-of-probation.pdf>.

authorize probation (Zone B) for a defendant at offense level 16 and CHC I—notwithstanding that the advisory guidelines range for both defendants is 21–27 months. Accordingly, the proposed expansions to Zones B and C risk creating a further windfall for those with limited criminal history (on top of the recently promulgated zero-point offender reduction in §4C1.1).

Finally, the Commission’s public data briefing indicates that the proposed expansion of Zones B and C would make far more violent offenders eligible for probation.³⁷ For instance, presently at Zone B, 5% of individuals were convicted of a violent offense and 1% of cases involved a weapon. At the proposed expanded Zone B, however, 12% would have been convicted of a violent offense and 8% involved a weapon. Similarly, presently at Zone C, 6% of offenders were convicted of a violent offense, and 4% involved a weapon. At the proposed expanded Zone C, 12% would have been convicted of a violent offense and 12% involved a weapon. Thus, from a public safety perspective, the proposed expansion would significantly increase the number of individuals with greater indicators of dangerousness who are eligible for probation or split sentences under the guidelines.

The Department believes that these significant downsides to the proposed expansion of Zones B and C at CHC I outweigh any potential benefit. As a general matter, the Department believes such extensive expansion is unnecessary for the reasons described above—namely, that judges are cognizant of their obligation to impose a sentence “sufficient but not greater than necessary,” and given that a third of all sentences in FY 2024 were variances, judges are fulfilling that obligation. As we see it, there is no need to encourage judges to consider non-incarcerative sentencing options already familiar to them, and any desire to do so could be met through changes far less drastic than the zone expansion that the Commission has proposed.

II. Career Offender

The Department commends the Commission’s continuing efforts to address the pernicious effects of the categorical approach in federal sentencing, particularly regarding what constitutes a “crime of violence” that warrants an enhanced sentence to protect the public from violent recidivists. The shortcomings of the approach are, in our view and that of countless judges, beyond dispute: it assesses an offender’s culpability based not on what he or she did, but based on whether some other hypothetical person could commit the same offense with less violence; it requires an often arduous examination of case law in search of nonviolent examples; and identification of the defendant’s offense of conviction relies on judicial records that are inconsistently maintained and often insufficiently specific.³⁸ The result is grossly different treatment of identical offenders, based

³⁷ Sentencing Options Public Data Briefing, at Slides 16, 23. We acknowledge that the Commission data cited here is not limited to individuals in CHC I. Nevertheless, given that the proposed expansion in CHC I would draw into Zones B or C significantly more individuals than at all other CHCs combined, the data seem directionally relevant to the analysis.

³⁸ See, e.g., *United States v. Taylor*, 596 U.S. 845, 861, 863, 867, 872 (2022) (Thomas, J., dissenting) (describing the exercise as a “30-year excursion into the absurd,” observing that Supreme Court “precedents have compelled courts to hold that heinous crimes are not ‘crimes of violence’ just because someone, somewhere, *might* commit that crime without using force,” and “[i]t is hard to fathom why this makes sense or why any rational Congress would countenance such an outcome so divorced from reality,” as “[n]o rational legislature would have implicitly imposed this byzantine and resource-depleting legal doctrine that so encumbers federal courts and threatens public safety”); *Mathis v. United States*, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring) (“Congress . . . could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions.”); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149–50 (9th Cir. 2020) (Graber, J., concurring) (joining “the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach.”);

on discrepancies in states’ drafting of offenses and maintenance of records, and the failure to properly sentence many defendants who unquestionably committed violent crimes—including murder, carjacking, and rape.³⁹ Such results defeat Congress’s express intent that those who repeatedly commit violent and other aggravated offenses should be “at or near the maximum term authorized” and that the guidelines “provid[e] certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities.”⁴⁰

Further, as the Department previously explained,⁴¹ there is no reason that the Sentencing Guidelines should require courts to use only the categorical approach when assessing whether a defendant’s conviction qualifies as a “controlled substance offense” or a “crime of violence.” The constitutional concern that has animated the Supreme Court’s decisions on the categorical approach—*i.e.*, that judges cannot make factual findings that increase the applicable statutory penalties—is not present when applying advisory guidelines. Indeed, eliminating that concern is the entire point of the Court’s remedial holding in *United States v. Booker*.⁴² Post-*Booker*, when selecting a sentence within the statutory range, sentencing courts continue to make all manner of factual determinations regarding a defendant’s conduct, both current and past, so long as they rest on reliable evidence.⁴³

The Commission’s proposed amendments contain some promising paths toward correcting this unfortunate situation. As to the crime-of-violence definition, the Department generally supports the idea of defining federal predicates by reference to a list of federal statutes, though an effective list must be considerably longer than the Commission’s proposal. For state predicates, we do not support a listed-offenses approach (Option 1) but do see promise in Crime of Violence Option 2. The ultimate viability of the Commission’s proposal, though, would depend on how the Commission resolves some of the many policy choices before it, including both the scope of the initial list and the breadth and nature of the exclusions.

A. Crime of Violence

At a conceptual level, the Commission’s proposal is, in effect, the inverse of the solution that the Department has repeatedly advocated for: a categorical-plus-conduct combination. The

United States v. Scott, 14 F.4th 190, 200–02 & nn.6–24 (3d Cir. 2021) (Phipps, J., dissenting) (providing a lengthy compendium of the unflattering descriptions and pejorative labels justices and judges have assigned to the doctrine). *United States v. Doctor*, 842 F.3d 306, 313–15 (4th Cir. 2016) (Wilkinson, J., concurring) (similar).

³⁹ See, e.g., *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder); *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (California carjacking); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape).

⁴⁰ 28 U.S.C. §§ 994(f), (h).

⁴¹ See Jonathan J. Wroblewski, U.S. Dep’t of Justice, Letter to Hon. Carlton Reeves, Chair, at 28 (Feb. 27, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=457.

⁴² 543 U.S. 246 (2005); See also *Peugh v. United States*, 569 U.S. 530, 550 (2013) (“The *Booker* remedy was designed [and] ... is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation.”).

⁴³ See 28 U.S.C. § 994(c) (the Guidelines must address various factual factors); 18 U.S.C. § 3661 (no limitations on information a court can use at sentencing); U.S.S.G. §6A1.3 (Resolution of Disputed Factors); *Pepper v. United States*, 562 U.S. 476, 489–91 (2011) (citing federal statutes and guideline provisions instructing courts to consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law).

Department's long-standing proposal is a modest expansion of the current crime-of-violence definition that would retain the current categorical-approach system (including the elements clause and the list of enumerated offenses) but, for statutes of conviction that are overbroad, allow courts to consider any reliable evidence to determine whether the actual offense conduct involved violence.⁴⁴ Under the Commission's proposal, the court would still begin by determining whether the offense presumptively qualifies as a "crime of violence" because the statute of conviction, categorically, is either a specific listed federal statute or a state statute that meets certain criteria (based on either its title or its elements). The court would then address the possible overbreadth of this approach through the proposed exclusions and limitations, some of which put the burden on the defendant to show that the conduct for which he or she was responsible did not actually involve violence or was limited to reckless or negligent conduct. Both approaches are a mix of applying the categorical approach and considering the facts of each case, and we are gratified to see the Commission proposing an approach along these lines.

By continuing to focus on the statute of conviction (rather than the offender's conduct), the Commission's approach still stands in contrast to the guidelines' general approach, which focuses on offense conduct and which allows the sentencing court to "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."⁴⁵ The guidelines are faithful to this approach even in other situations where the court must determine whether a prior offense meets a particular definition.⁴⁶

Yet by allowing some consideration of the facts of a case, the Commission's proposal—like the Department's longstanding one—does ameliorate some of the categorical approach's most pernicious effects. At this high level, therefore, the Department supports the Commission's exploring this type of solution. We remain concerned, however, that the Commission's proposal would discard the decades of experience and precedent that has developed around the elements clause and enumerated offenses and institute a new framework that would undoubtedly engender significant litigation as parties and courts flesh it out.

1. Federal Offenses

The Commission's proposal first presents a list of federal offenses that would qualify as "crimes of violence." The Department agrees that such an approach to federal offenses is eminently sensible and administrable, removing the need for any elements-based analysis of indisputably violent crimes. But the Department submits that the list's contents must be complete to effectuate the statutory and policy goals of the career offender enhancement. Because the definitions in §4B1.2 apply to both prior and instant offenses, and because federal law contains numerous variations on quintessentially violent offenses (such as murder and robbery), treating similar offenders alike requires either a lengthy list or an alternative method.

⁴⁴ This proposal is set forth in Appendix B to this letter.

⁴⁵ U.S.S.G. §6A1.3; *see also, e.g.*, U.S.S.G. §1B1.3 cmt. (n.7) (noting that "conviction under [a particular] statute is not required" to apply a guideline factor absent an "express direction" otherwise).

⁴⁶ U.S.S.G. §4A1.2(c) & App. C, amend. 709 (2007) (adopting the "common sense approach" that considers all relevant factors over an "elements" test).

The Commission's proposed list is as follows, with some offenses presented by the Commission in brackets.

18 U.S.C. § 113(a) (assault)
[18 U.S.C. § 844(i) (arson)]
18 U.S.C. § 1111 (murder)
18 U.S.C. § 1112 (manslaughter)
18 U.S.C. § 1201 (kidnapping)
18 U.S.C. § 1951 (robbery and extortion)
[18 U.S.C. § 2111 (robbery)]
[18 U.S.C. § 2113 (bank robbery)]
[18 U.S.C. § 2118 (robberies and burglaries involving controlled substances)]
[18 U.S.C. § 2119 (carjacking)]
18 U.S.C. § 2241 (aggravated sexual abuse)
18 U.S.C. § 2242 (sexual abuse)
18 U.S.C. § 2244(a)(1)–(a)(2)) (abusive sexual abuse with a child)
[49 U.S.C. § 46502 (aircraft piracy)]

A list of qualifying federal crimes should feature all of these offenses, including those listed by the Commission in brackets. All of the bracketed offenses similarly involve violence against persons or property that has long been sanctioned by the law. There are two caveats:

- Option 2 for assessing state offenses suggests invoking the elements of assault in violation of 18 U.S.C. § 113(a), but would exclude “a state offense that would otherwise be simple or misdemeanor assault or simple or misdemeanor battery but for the identity of the victim or perpetrator.” The Department does not object to a similar exclusion from the list of federal offenses, that is, excision of 18 U.S.C. § 113(a)(5) (simple assault).
- With respect to 18 U.S.C. § 1112 (manslaughter), the Department maintains its long-standing position that only voluntary manslaughter, not involuntary manslaughter, should qualify as a “crime of violence.”

As stated, the Department supports presenting listed federal offenses, but only if a proper list of heartland qualifying federal crimes is included. By our estimate, approximately 1 in 8 defendants who qualified as career offenders in FY2024 on the basis of an instant offense that was a crime of violence would not be covered by the Commission's list of offenses.⁴⁷ These defendants' offenses represent each of the four reasons that the Commission's list is underinclusive: jurisdictional bases, umbrella offenses, missing analogs to covered state offenses, and other violent offenses. The Department suggests including on the list the offenses set forth in Appendix A to this letter, which we view as the heartland of violent crimes.⁴⁸ These additional offenses currently qualify (or historically qualified) as crimes of violence and are variations on those already included on the Commission's lists of federal offenses or state offenses in Option 2, such as murder, assault,

⁴⁷ This data is drawn from the Sentencing Commission's FY2024 Datafile (USSCFY24) and 2024 Criminal History Datafile (CRIMHIST24NID).

⁴⁸ The Department here responds to Issue for Comment #2, regarding whether additional federal offenses should be included.

sexual abuse, and child endangerment.⁴⁹ These variations often rest on different federal interests or bases for jurisdiction, but they are no less serious than the offenses included on the Commission’s short list.

For instance, with respect to murder, the code also includes the following provisions: 18 U.S.C. § 351 (murder, kidnapping, or assault of member of Congress, the Cabinet, or the Supreme Court); 18 U.S.C. § 924(j); 18 U.S.C. § 930(c) (killing in the course of an attack on a federal facility); 18 U.S.C. § 1091 (genocide); 18 U.S.C. § 1114 (murder of officer or employee of the United States); 18 U.S.C. § 1116 (murder of foreign officials, official guests, or internationally protected persons); 18 U.S.C. § 1118 (murder by a federal prisoner); 18 U.S.C. § 1119 (foreign murder of United States nationals); 18 U.S.C. § 1120 (murder by escaped prisoner); 18 U.S.C. § 1121 (killing persons aiding Federal investigations or State correctional officers); 18 U.S.C. § 1512(a)(1) (murder of a witness); 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire); and 21 U.S.C. § 848(e) (intentional killing in furtherance of a continuing criminal enterprise or narcotics trafficking). The Commission’s exclusion of major crimes committed in Indian country, including murder, robbery, aggravated assault, and sexual assault, in violation of 18 U.S.C. § 1153, is another example of this arbitrariness.

These jurisdictional differences are not a rational basis on which to differentiate career offender status.

It is also essential that the list includes umbrella offenses. A defendant who commits a series of murders or aggravated assaults as part of a criminal enterprise and is convicted for violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, or Violent Crimes in Aid of Racketeering Act (VICAR), 18 U.S.C. § 1959, is an equally violent (and often more dangerous) offender. Relatedly, some federal offenses require commission of a “crime of violence,” as defined under 18 U.S.C. § 16 (which is more restrictive than §4B1.2(a)), and are inherently violent.⁵⁰ There is no reason to exclude these offenses.

Notably, the Commission has included on the list for state crimes in Option 2 many offenses that have federal analogs—e.g., the production of child sexual abuse material and various forms of human trafficking and sex trafficking. To properly align the lists, it is necessary to include those federal offenses on the federal list.

The Department’s list also includes various other serious and violent offenses, many of which require injury, force, or threats. These include the felony version of deprivation of rights under color of law, which applies when “bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire,” 18 U.S.C. § 242; and a slew of terrorism-related offenses.⁵¹

⁴⁹ As the Commission’s data show, the proportion of career offenders who qualify due to current or prior “crime of violence” convictions has fallen steadily since *Johnson v. United States*, 559 U.S. 133, 140 (2010). Despite the guidelines’ including more enumerated offenses than, for example, ACCA or 18 U.S.C. § 924(c), many violent offenses still are not covered.

⁵⁰ See 18 U.S.C. § 1952(a)(2).

⁵¹ If the Commission is concerned that including a lengthy list in the text of the guideline is unwieldy, the Commission could list the qualifying offenses in a table akin to those appearing elsewhere in the Guidelines Manual. See, e.g., U.S.S.G. §§2D1.1(c) and 2D1.1(d), (e).

2. State Offenses

a. Qualifying Offenses

The Commission presents two options for determining which prior state offenses should qualify as crimes of violence: (a) an approach that looks to the title or label that the state offense carries; and (b) one under which one certain state offenses presumptively qualify as crimes of violence, subject to a series of exclusions. We view this second option as preferable because it would be more administrable, more consistent in including all the necessary offenses, and would eliminate the worst feature of the categorical approach, under which violent conduct is excluded because of the overbreadth of the statute of conviction.

i. Option 1: Labels

Option 1 provides that a qualifying offense is one “punishable by imprisonment for a term exceeding one year, that is designated under state law” under one of nine labels (Aggravated Assault, Arson, Extortion, Kidnapping, Murder, Rape, Robbery, Sexual Assault, and Voluntary Manslaughter). The Department does not support this option for multiple reasons.

First, without further definitions, this approach would generate significant confusion about—and, accordingly, litigation over—which of thousands of possibly qualifying state offenses fall within these labels. As stated in the introductory comment in the amendment package, “jurisdictions name each of these offenses in various ways,” and the Commission recognizes some states do not label offenses at all. The only way to reliably include all the relevant offenses by “whatever name they are known under state law,”⁵² is to define the offenses, either by allowing courts to develop “generic” definitions or explicitly within the guidelines. This is, of course, how §4B1.2(a)(2) currently works. If the Commission wishes to pursue Option 1, we recommend that it elaborate on the existing list of offenses and definitions.⁵³

Second, and relatedly, not all identically named offenses are identical, which all but guarantees that this approach will result in unequal application of §4B1.2 to offenders based on the happenstance of geography—replicating one of the core problems wrought by the current categorical approach. For example, in Issue for Comment No. 4, the Commission identifies six different labels states use “for the highest degree of murder.” But this observation obscures several important facts. The highest degree of murder is often not the only offense that should count.⁵⁴ Next, although many states use labels such as degrees of murder, what constitutes first-degree murder in one state is second-degree murder in another.⁵⁵ Similarly, in almost all jurisdictions, one variety or another of “murder” includes some version of felony murder but which felonies count

⁵² Proposed Amendments at 38 (Issue for Comment No. 4).

⁵³ Issue for Comment No. 4 also asks whether, “[a]s an alternative, instead of listing offense labels, [the Commission] should ... provide a list of the specific state statutes that should qualify as ‘crime of violence.’” The Department believes that these projects would be unduly arduous and also require constant attention by the Commission, more frequent than the Commission cycle may allow, as any of the 50 states revises its criminal statutes. It is more efficient and effective to rely on definitions as addressed above. That said, if the Commission wishes to create a list of qualifying state statutes, the Department would provide whatever assistance we can.

⁵⁴ *E.g.*, 18 Pa. Stat. and Cons. Stat. Ann. 2502(c) (2019) (third-degree murder, which includes knowingly, as opposed to intentionally, causing the death of another).

⁵⁵ *Compare, e.g.*, Wash. Rev. Code Ann. 9A.32.030 (1990) (intentionally causing the death of another is first-degree murder), with N.Y. Penal Law 125.25(1) (2024) (same offense is second-degree murder).

and how those offenses are described varies.⁵⁶ Under the current version of §4B1.2(a)(2), many but not all felony murder convictions qualify as crimes of violence.⁵⁷ Complicating matters, felony murder (as traditionally conceived) is just one of many of offenses that provide heightened penalties (often life imprisonment) for criminal conduct resulting in death. In some jurisdictions, these offenses are included in “murder.”⁵⁸ In others, the same conduct is similarly penalized but not called “murder.”⁵⁹ For §4B1.2(a) to be applied evenly and fairly, either such death-results offenses should be included in every jurisdiction or the guideline would need to embody some sort of divisibility analysis—reviving one of the problems with the current categorical approach that Option 1 seeks to eliminate. Finally, in some states certain conduct, such as medical-aid-in-dying, constitutes murder that, in other states, is not even illegal.⁶⁰

Third, the list would require more frequent updating than the Commission’s amendment cycle allows to avoid inconsistent results across jurisdictions. The need for pertinent updates could arise at times when the Commission lacks a quorum, leading to further inconsistencies.

Accordingly, while the labels approach has some superficial appeal, we do not view it as a viable or advisable path forward. If the Commission proceeds with Option 1, it should add more labels to capture appropriately violent offenses. At a minimum, the list should include the offenses listed in Option 2: aggravated battery (*i.e.*, an assault resulting in injury); human trafficking, including sex trafficking; and the production of “child pornography” or child sexual abuse material.

ii. Option 2: Elements of State Offense

Option 2 provides that a state offense presumptively qualifies if it proscribes conduct that either is addressed by a qualifying federal statute or is specifically defined in the guideline. We see this as a superior proposal in comparison to Option 1.

For ease of application, the Department suggests that the qualifying federal and state offenses should largely match; there is no reason for one set to be materially broader than the other.⁶¹ At the same time, the Option 2 proposal, following and copying language from 18 U.S.C.

⁵⁶ See 14 U.S.V.I. Code § 922(a)(2) (2019) (listing eight felonies, including “assault in the third degree and larceny”); Wash. Rev. Code § 9A.32.050 (2003) (any felony).

⁵⁷ See, e.g., *United States v. Manzano*, 112 F.4th 915, 923 (10th Cir. 2024) (felony murder predicated on a “dangerous felony” qualifies; Oklahoma second-degree murder, which can be based on “any felony,” does not).

⁵⁸ E.g., Colo. Revised Stat. Ann. § 18-3-102 (2024) (Colorado “murder in the first degree” includes death resulting from drug trafficking to minors on school grounds).

⁵⁹ N.H. Rev. Stat. § 318-B:26(IX) (2025).

⁶⁰ Compare H.B. 408, 2025 RS BR 1539, (KY. 2025) (bill to amend murder statute), with Or. Rev. Stat. Sections 127.800-127.897 (2025) (legalizing medical aid in dying). For as complicated as this analysis is for murder, it is even more complicated for aggravated assault: many jurisdictions label this offense, as generically conceived, as some form of “battery” or “injuring,” and there is wide variation about what makes the offense “aggravated” and where the cutoff points are between the levels of offenses.

⁶¹ The Department here responds to Issue for Comment No. 3: which state offenses should be included and whether the lists of federal and state offenses should differ. The request also asks whether the Commission should “include offenses such as terroristic threats and resisting arrest to the list of offenses that should qualify as a ‘crime of violence.’” The Department believes that both should be included. We propose above including the federal threat offenses in 18 U.S.C. § 875(b) and (c) and assault on an officer in 18 U.S.C. § 111, which would automatically include state offenses that prohibit conduct that could establish the elements of those offenses.

§ 3559(c), includes and defines additional terms that capture violent state crimes that are not a general match for federal offenses. The Department supports that additional list and the suggested definitions. Therefore, we propose the following language:

(B) An offense under state law, by whatever designation, punishable by imprisonment for a term exceeding one year, that proscribes at least some conduct that could establish the elements (other than federal jurisdictional requirements) of one of the following offenses, regardless of whether the state statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the listed offense, or also proscribes conduct that would not establish the elements of the listed offense:

- (i) Any federal offense listed in subparagraph (A).
- (ii) [the Commission’s list of defined offenses: assault with intent to commit rape, child abuse, coercion, domestic violence, firearms use, hostage taking, and human trafficking].

The Commission proposed, in bracketed language, two basic formulations for comparing state offenses to target offenses. The first option—“meets each of the elements (other than federal jurisdictional requirements)” —is unlikely to accomplish the Commission’s goal of including overbroad offenses. Courts likely would interpret this language as simply the categorical approach in different linguistic clothing. An “offense” is defined by its elements; if those elements “meet” the elements of the listed offense, the state offense is a categorical match. Courts are likely to conclude that an overbroad “offense” cannot “meet each of the elements” of a listed offense.

The second option, which focuses on the conduct proscribed by the state offense, would capture overbroad offenses because a statute can, and usually does, proscribe multiple types of conduct—whether by alternative elements or alternative means—and some of that conduct can establish the elements of a listed offense, even if other covered conduct does not. The Department suggests additional language to fully clarify this point.

The Commission asks whether “conduct” or “acts or omissions” is better; either is acceptable, but “conduct” is clearer. The existing legal landscape on this topic—*i.e.*, the categorical approach—is based on “the minimum conduct criminalized by the state statute.”⁶² Using a similar formulation here would be the clearest repudiation of that case law.⁶³ And, for the same reason, the conduct “proscribed” by the statute could not reasonably be read to consider the defendant’s conduct as opposed to the statute’s legal scope in the abstract. Accordingly, any concern that using “conduct” directs the court to consider the facts of the defendant’s offense, at this stage of the process, is misplaced. The remaining changes in the Department’s proposed wording above are grammatical so that subparagraph (B) fits within paragraph (1)’s structure.

As noted, the proposed definitions of the terms in subsection (a)(1)(B) of Option 2 are largely copied from 18 U.S.C. § 3559(c) and are appropriate. The proposal, however, departs from Section 3559(c)’s definition of arson. It should not.

The proposal includes “arson (as described in 18 U.S.C. § 844(i) (but not to include arson of property other than a building).” The definition of “arson” in 18 U.S.C. § 3559(c)(2)(B)—“an

⁶² *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

⁶³ Using “conduct” does not create ambiguity about whether acts of omission are covered; case law now makes clear that the former includes the latter. *See, e.g., Delligatti v. United States*, 604 U.S. 423, 435 (2025).

offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive”—is more consistent with the contemporary understanding of the offense.⁶⁴ The Commission should use that definition.

The proposed definition of child abuse should be refined to ensure that it includes all relevant sex offenses against children. The Department suggests that the Commission use the definition from §4B1.5, relating to Repeat and Dangerous Sex Offenders Against Minors. That definition incorporates a statutory definition that is used to enhance sentences for certain sex offenses against children and includes offenses against minors in violation of Title 18, Chapters 109A (sexual abuse), 110 (child sexual abuse material), 117 (transportation for illegal sexual activity, and Section 1591 (sex trafficking), as well as similar state offenses.

Using this definition is appropriate both because it covers the full universe of sexual offenses against children, which are inherently violent, and because it creates consistency in the guidelines. The two provisions are largely parallel: both apply to repeat offenders and use the same offense-level table; §4B1.5 applies even if the defendant has only one prior conviction but requires that the instant offense also be a sex offense against a minor; and §4B1.1 increases the criminal history score to category VI, whereas §4B1.5 uses category V. A defendant who has twice engaged in sexual contact against a child and then sexually assaults an adult is a career offender and should be treated as such. We recommend the following definition:

“Child abuse” is any of the following: the intentional infliction of physical injury to a minor or any offense that would qualify as a sex offense conviction under §4B1.5.

3. Inchoate Offenses (§4B1.2(a)(2))

The Commission next proposes moving the current language addressing inchoate offenses from subsection (d) into subsection (a)(2). The Department supports this change.⁶⁵ Given the revised structure of subsection (a), it might make more sense to move this provision into subsection (a)(1)(C) because it clarifies which offenses are included, generally, as crimes of violence. As modified, the provision would read:

(C) AIDING AND ABETTING, INCHOATE OFFENSES INCLUDED.—Any offense of aiding and abetting, attempting to commit, or conspiring to commit any offense in subparagraphs (A) or (B).

Paragraphs (3) and (4) would then be renumbered and references to “subsection (a)(2)” stricken.

One last note on the governing definitions. The Commission asks, Issue for Comment No. 5, whether it should “exclude prior convictions for robbery and extortion offenses if the defendant can establish that no firearm or other dangerous weapon was used in the offense, no

⁶⁴ See, e.g., *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) (identifying the “contemporary” definition of arson “as involving the malicious burning of property, personal or real, without requiring that the burning threaten harm to a person.”).

⁶⁵ Issue for Comment No. 9 asks whether this provision should remain at all and whether “the Commission provide additional requirements or guidance to address these types of offenses?” These issues were fully explored during the 2023 amendment cycle, resulting in the adoption of Amendment 822, which moved this language from the commentary to §4B1.2(d) thereby confirming the Commission’s decades-long position that such offenses count. U.S.S.G. App. C., amend. 822 (effective Nov. 1, 2023). The Department does not see a reason to revisit this issue or this long-standing and sensible rule, for all the reasons set forth at that time.

threat of use of a firearm or other dangerous weapon was involved in the offense, and the offense did not result in death or serious bodily injury to any person.”⁶⁶ It should not.

Robbery and extortion are classic violent crimes that rest on a threat to cause injury to a person or property. There is no reason to limit such qualifying offenses, in contrast to the treatment of other violent crimes, where the threat did not involve a firearm or other dangerous weapon, or the offense did not result in more extreme injury. The same Issue for Comment also asks whether the Commission should “exclude prior convictions for arson offenses if the defendant can establish that the offense posed, and the defendant reasonably believed the offense posed, no threat to human life.”⁶⁷ Again, no.

Arson is a violent crime because it involves damage to property and, in the ordinary case, presents a great risk of injury to people, including those public servants charged with extinguishing a fire. We recognize that such limitations, at least as to robbery and arson, appear in 18 U.S.C. § 3559(c)(3) to exclude certain offenses from qualifying as predicates that trigger the mandatory life three-strikes penalty. That penalty is qualitatively different from application of §4B1.2 in the advisory guidelines, where the sentencing court can vary downward in response to a showing that the career-offender range overstates the gravity of the defendant’s criminal history. Even the ACCA, with its 15-year mandatory minimum penalty, does not include these exceptions; arson and extortion are enumerated offenses under the ACCA, and robbery is “the quintessential ACCA-predicate crime.”⁶⁸

4. Exclusions

To balance expanding the list of presumptively qualifying offenses, the Commission proposes adding a series of exclusions that ensure that qualifying convictions are limited to violent conduct. The Department understands the need for exclusions but has some concerns about the scope of those that the Commission has proposed.

a. Length of Sentence Imposed (§4B1.2(a)(3))

The first proposed exclusion aims to exclude arguably petty offenses based on one of three criteria:

[A]ny offense where the sentence imposed was

- (i) a term of unsupervised probation;
- (ii) a term of [supervised] probation [of less than [one year][three years][five years]]; or
- (iii) a term of imprisonment of less than [60 days][30 days].

Section 4B1.2 already excludes convictions that the sentencing court determined were truly minor or far in the past—those that do not receive criminal history points under §4A1.1. It is not unusual for violent crimes, particularly first offenses in state court, to result in light sentences. But the fact that the court showed a defendant mercy on his first conviction and granted him a second chance does not mean that his recidivist behavior is any less culpable or dangerous.

⁶⁶ Proposed Amendments at 39.

⁶⁷ Proposed Amendments at 39.

⁶⁸ *Stokeling v. United States*, 586 U.S. 73, 80 (2019).

Moreover, this focus could exacerbate intrastate and interstate sentencing disparities. For example, it is not unusual for local prosecutors or local judges within the same state to have differing views and practices regarding sentencing. Thus, the same conduct in one county could receive a prison sentence, but a probationary sentence in another. A fairer approach is to focus on the fact of the underlying conviction itself without allowing career offender status to turn on variations in local sentencing practices. This keeps the focus simply on the defendant's ongoing recidivist conduct when determining career offender status.

Accordingly, the Department objects to a broad exclusion on this basis. At most, offenses that resulted in a term of probation of less than one year should be excluded.

b. Length of Sentence Served (§4B1.2(a)(4)(A))

The next suggested exclusion would apply where: “The conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison.” This exclusion is also undesirable. The criminal history rules in the guidelines typically turn on “the sentence pronounced, not the length of time actually served.”⁶⁹

We see no reason to deviate from the practice here, especially because time served is not necessarily a useful proxy for severity. Prisoners are released early for various reasons, including overcrowding and other budget issues, that are unrelated to the offense's severity. Reliable proof of time served, as opposed to the length of a sentence imposed, is also often difficult to find, requiring the existence and examination of local records, the quality of which varies greatly between and even within jurisdictions, particularly when dealing with older sentences.

c. Injury or Harm (§4B1.2(a)(4)(B))

The next proposed exclusion states that a crime will not qualify if the defendant establishes that the offense was not, in fact, violent, as defined by reference to injury or harm as follows:

- [[SERIOUS] BODILY INJURY.—During 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 [serious] bodily injury to another person[. *Provided*, however, that this limitation shall not apply to extortion and arson offenses].]
- [PHYSICAL HARM.—During the commission of the offense, the acts for which the defendant is criminally liable did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person[. *Provided*, however, that this limitation shall not apply to extortion and arson offenses].]

The Department favors the bodily injury formulation (without limitation to “serious” bodily injury). That language is consistent with the Supreme Court's long-standing definition of violent force as force “capable of causing physical pain or injury to another person” or overcoming a victim's resistance.⁷⁰ Retaining this standard definition also promotes efficiency. Notwithstanding the oddities produced by the categorical approach, courts have identified numerous state offenses that categorically qualify as crimes of violence under the prior “elements clause” because they categorically—that is, in all instances—require proof of the infliction,

⁶⁹ U.S.S.G. §4A1.2 cmt. (n.2).

⁷⁰ *Johnson v. United States*, 559 U.S. 133, 140 (2010) (general definition); *Stokeling v. United States*, 586 U.S. 73, 77 (2019) (overcoming resistance).

attempted infliction, or threatened infliction of bodily injury. That conclusion will necessarily preclude an assertion that such a prior offense was committed without violence.

The stated exception for extortion and arson offenses is also appropriate, as those crimes classically involve acts or threats of violence toward property. In fact, the Department proposes expanding and simplifying this exception to apply to any offense involving property damage (consistent with those statutes, like 18 U.S.C. § 924(c), that recognize that violent crimes include those directed at property, such as extortion and arson). The passage should also make clear that the analysis focuses on all conduct related to the commission of the offense, consistent with the guidelines' general approach.⁷¹

Finally, the exclusion should establish that sexual abuse—which may involve conduct not causing physical injury, such as crimes committed by coercion or against incapacitated persons or children—constitutes a violent crime. The guidelines' overarching definition of “serious bodily injury” includes “conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.”⁷² We therefore suggest adding “including any serious bodily injury” to the provision for the avoidance of doubt, and exempting “child abuse,” as defined above, altogether.

The Department suggests this language:

BODILY INJURY OR PROPERTY DAMAGE.—Neither the defendant nor another for whose conduct the defendant is criminally liable inflicted, intended to inflict, or threatened to inflict physical pain or injury to another person (including any serious bodily injury), or damage to property, or employed force sufficient to overcome a victim's resistance, during the commission of the offense, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for the offense. Provided, however, that this limitation shall not apply to any conduct constituting child abuse, as defined in subsection (a)(1)(B).

5. Recklessness or Negligence (§4B1.2(a)(4)(C))

Finally, the proposal provides an exclusion if the defendant establishes:

(C) RECKLESSNESS AND NEGLIGENCE.—The defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. [However, an offense is not excluded under this provision if the defendant's conduct included extreme reckless conduct.]

In principle, the Department does not object to this limitation. However, this provision should be rephrased as:

The offense, including all relevant conduct [as defined in §1B1.3], involved only reckless or negligent conduct. However, an offense is not excluded under this provision if it involved extreme reckless conduct.

⁷¹ U.S.S.G. §1B1.3(a)(1).

⁷² U.S.S.G. §1B1.1 cmt. (n.1(L)) (“In addition, ‘serious bodily injury’ is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 [which includes a sexual act against an unconscious victim or without consent, even if the victim did not resist or sustain injuries] or any similar offense under state law.”).

This change is necessary to ensure consistent treatment in the guideline in addressing accomplice liability. The exception for extreme reckless conduct is consistent with the universal judicial recognition that such conduct, often termed malice, is a heightened *mens rea* akin to knowledge.⁷³

B. Controlled Substance Offense

The proposals regarding controlled substance offenses resemble those published (and not acted upon) in 2025. The Department's positions, which are more fully set forth in our February 2025 comment letter, remain the same.⁷⁴

Option 1 would exclude state drug offenses from the definition of "controlled substance offense." The Department strongly objects. This would upend years of federal sentencing practice, is not supported by the Commission's publicly released data, would create unnecessary disparities between similarly situated defendants based merely on which jurisdiction (federal or state) previously prosecuted them, and would be in tension with the congressional directive in 28 U.S.C. § 994(h).⁷⁵ Most notably, given that exceedingly few defendants qualify as career offenders based on convictions for controlled substance offenses in three separate federal cases, this change would essentially erase controlled substance offenses as a basis for career offender liability, in derogation of the plain congressional intent. The new data analysis that the Commission released in connection with this year's amendment does not support the proposed change any more than the one released last year.

Option 1 would again also limit the range of qualifying federal offenses. As with the 2025 version, this proposal continues to inadequately treat like offenders alike. At the very least, if the Commission were to limit the career offender provision to federal drug offenses, it should ensure that all felonies under Title 21 and all Title 18 offenses that involve drug trafficking qualify as controlled substance offenses.

Option 2 would not narrow the definition of a "controlled substance offense," and is, in that limited sense, preferable to Option 1. But Option 2 would limit qualifying convictions by setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense." It provides three suboptions for limiting prior convictions. The Department continues to oppose each of these proposals but recommends that, if the Commission adopts one, it should exclude only one-point convictions under §4A1.1(c) (sentence of imprisonment of less than 60 days; Suboption 2B, including §4A1.1(b) and excluding the additional bracketed language); this limitation should apply only to controlled substance offenses.⁷⁶ Each proposal is

⁷³ See, e.g., *United States v. Báez-Martínez*, 950 F.3d 119, 127–28 (1st Cir. 2020); *United States v. Delgado*, 149 F.4th 244, 253–54 (2d Cir. 2025); *United States v. Manley*, 52 F.4th 143, 150–51 (4th Cir. 2022); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *Janis v. United States*, 73 F.4th 628, 632–633 (8th Cir. 2023); *United States v. Begay*, 33 F.4th 1081, 1091 (9th Cir. 2022) (en banc); *United States v. Kepler*, 74 F.4th 1292, 1303–12 (10th Cir. 2023); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1344–45 (11th Cir. 2022).

⁷⁴ Letter from Scott A.C. Meisler, U.S. Dep't of Justice, to Hon. Carlton W. Reeves, Chair, at 12–19 (Feb. 3, 2025) ("2025 DOJ Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=716.

⁷⁵ The Department here responds to Issue for Comment No. 6, which asks whether state drug offenses should be excluded, and which federal offenses should be included.

⁷⁶ The Department here responds to Issue for Comment Nos. 7 and 8, which seek comment on whether a minimum sentence length requirement for prior offenses to qualify as a "controlled substance offense" should apply, and whether

also in some tension with the congressional directive in Section 994(h), which does not suggest that otherwise qualifying convictions can or should be cabined based upon the sentence imposed or served.

Of particular note, Suboptions 2A and 2B both include bracketed language that would exclude convictions if the defendant could “establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison;” Suboption 2C would require the government to prove the inverse. For the reasons stated earlier, the Department objects to any limitation based on the period of time served, as opposed to the length of the sentence imposed (which is the measure currently used in the guidelines to gauge the severity of a prior conviction).

To the extent the Commission believes the proposal responds to a concern that many defendants are found to be career offenders based upon insubstantial criminal histories, the Commission’s own statistics suggest otherwise. The Commission’s FY 2024 datafile, for example, estimates that approximately 88% of career offenders with prior drug trafficking convictions had “three point” convictions (meaning that their prior sentences were over one year and one month, *see* §4A1.1(a)). That data also suggest that only approximately 7% of career offenders received that designation for a prior qualifying drug conviction that involved a “one point” sentences of less than 60 days, *see* §4A1.1(c).⁷⁷

C. Consistency of Definitions in the Guidelines

Section 4B1.2’s definitions of “crime of violence” and “controlled substance offense” also apply to the firearms guideline (§2K2.1), as well as several other provisions in the Guidelines Manual. The Commission has offered two options for §2K2.1: (a) incorporate the relevant parts of current definitions in §4B1.2 of “crime of violence” and “controlled substance offense” into the commentary to §2K2.1, thereby maintaining the current state of the law (“Firearms Option 1”); or (b) amend the commentary to §2K2.1 to define, for purposes of that guideline, the terms “controlled substance offense” and “crime of violence” by reference to the terms “serious drug offense” and “violent felony,” respectively, in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (“Firearms Option 2”). A third option is also available: make no changes to §2K2.1 and allow the changes in §4B1.2 to cross-apply by default. The Commission also presents Issue for Comment No. 10, which asks how other guidelines that currently incorporate the §4B1.2 definitions should be treated.

In principle, the Department believes that the same definitions of “controlled substance offense” and “crime of violence” should apply consistently throughout the Guidelines Manual. Accordingly, with two critical caveats, we endorse not making any change to the cross-references to §4B1.2 in other guidelines. Both Firearms Options 1 and 2, by contrast, would present significant complexity and confusion in applying the guidelines.⁷⁸

the Commission should differentiate between “crimes of violence” and “controlled substance offenses” in setting a minimum sentence length requirement.

⁷⁷ This data is drawn from the Sentencing Commission’s FY2024 Datafile (USSCFY24) and 2024 Criminal History Datafile (CRIMHIST24NID).

⁷⁸ Issue for Comment No. 10 also seeks comment on whether, if definitions are moved to other guidelines, they should appear in the guideline text rather than commentary. In the Department’s view, all substantive changes to a guideline should generally be incorporated in the text rather than an application note, as the Commission has recognized in

Notably, the terms at issue apply far more frequently outside the career-offender context than within it. For example, according to Commission data for FY 2024, approximately three times as many offenders received an enhancement under the firearm provision (§2K2.1) for prior commission of a “crime of violence” or “controlled substance offense” than were subject to the career offender guideline.⁷⁹ Thus, if the Commission adopts one of the improvements to §4B1.2 discussed above, there could be particular benefit to applying that change to all applications of the term “crime of violence” in the guidelines. Retaining the current definitions or resorting to the ACCA definitions, on the other hand, would do little to decrease the amount of categorical-approach litigation or the resulting disparities. Further, Firearms Options 1 and 2 would both produce a Guidelines Manual that defines identical terms differently in different places, which would result in significant confusion for litigants and courts as the case law inevitably becomes increasingly muddled.

As mentioned above, however, the Department’s general preference for consistent definitions of the two terms across the Guidelines Manual comes with two critical caveats. First, if the Commission were to exclude state drug crimes entirely from the definition of “controlled substance offense” under §2K2.1, or substantially narrow the number of such crimes that qualify under that provision, the amendment could run afoul of a congressional directive specific to that provision. The pertinent directive refers to the definition of “serious drug offense” in the ACCA,⁸⁰ and that definition expressly reaches some “offense[s] under State law.”⁸¹ And for reasons the Department has previously stated,⁸² we see no merit in the recurring suggestion in recent stakeholder submissions that directives such as the one in the Violent Crime Control and Law Enforcement Act of 1994 do not bind the Commission, when, as here, they are not “codified” and/or the Commission has previously taken measures to implement the directive.⁸³

recent cycles by responding to the rulings of some appellate courts that an application note is ineffective if it expands on otherwise unambiguous guideline text. *See* 2025 DOJ Letter, *supra*, at 19 n.50, 28.

⁷⁹ Specifically, according to the Commission’s *Use of Guidelines and Specific Offense Characteristics (Guideline-Based)* tables, during FY 2024, 3,747 defendants received higher base offense levels under §2K2.1(a)(1), (a)(2), (a)(3), or (a)(4)(A) based on prior convictions for crimes of violence or controlled substance offenses. U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2024/Ch2_Guideline_FY24.pdf. While 1,280 defendants were sentenced under §4B1.1, according to the *2024 Sourcebook of Federal Sentencing Statistics*. (Table 23).

⁸⁰ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 110513, 108 Stat. 1796, 2019.

⁸¹ 18 U.S.C. § 924(e)(2)(A)(ii).

⁸² Scott A.C. Meisler, U.S. Dep’t of Justice, Letter to Hon. Carlton Reeves, Chair, at 17 (Mar. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf#page=248.

⁸³ U.S. Sent’g Comm’n Public Hearing March 9, 2026 (Testimony of Shelley Fite, National Sentencing Resource Counsel, Federal Public and Community Defenders), at 21 (Mar. 2, 2026), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/fite.pdf>; *see also* Federal Public and Community Defenders Comment on Career Offender, at 34 (Feb. 3, 2025) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=753; Federal Defender Sentencing Guidelines Committee Letter, Defender Comment on Simplification of the Three-Step Process, at Appendix p. 4 (Feb. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=753.

Second, maintaining consistent definitions across the guidelines might not be advisable as a policy matter if the Commission makes certain substantive changes to these important definitions based on considerations specific to the career offender guideline. For example, if the Commission were to substantially revise the definitions in §4B1.2 in a manner likely to generate litigation or short-term uncertainty, it may wish to confine the changes to the career offender guideline and study carefully whether the changes are workable in practice before spreading them to the entire Guidelines Manual.

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

The Commission proposes resolving two circuit conflicts concerning the definition of “controlled substance offense” in §4B1.2. The first concerns whether the term is limited to drugs regulated by the federal Controlled Substances Act or instead may also be defined by state law. The second involves which temporal version of the applicable drug schedule should be used to decide if a prior offense qualifies as a controlled substance offense: the schedule in place at the time the defendant committed the predicate offense or the one in effect at the time of the instant offense or the sentencing for that offense.⁸⁴

The Department supports proposed amendments that would make clear that (A) the definition of “controlled substance” in §4B1.2(b) rests on either federal or state law (as the plain language of the provision has long provided),⁸⁵ and (B) the term refers to any substance that was controlled under applicable law at the time the defendant was originally convicted for the predicate offense. On each question, Option 2 is the clearest, simplest, and fairest choice.

A. Which Controlled Substances Count

Option 2—that a controlled substance is any substance “either included in the [federal Controlled Substances Act (CSA)] or otherwise controlled under applicable state law”—is readily administrable and logical. In assessing a prior state conviction, the court need look only to the state statute defining the offense: if the offense conduct qualifies, the fact that the defendant was convicted suffices. There is no need to dig through any drug schedules to compare chemical compounds.

In contrast, Option 1—that the definition must align with that provided in the federal Controlled Substances Act (CSA)—is a recipe for complication, irrationality, and unfairness. It produces a system in which state definitions are deemed overbroad based on meaningless distinctions with federal definitions.

It cannot be emphasized strongly enough that the current minority view of circuits, that the state definition of a controlled substance at issue in a state offense cannot be broader than the federal definition of that substance, produces nothing other than nonsensical results. That is because the controlled substances at issue in nearly all predicate state convictions—such as

⁸⁴ Proposed Amendments 43–44.

⁸⁵ Section 4B1.2(b) defines the term “controlled substance offense” to mean “an offense under *federal or state law*, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense” (emphasis added).

methamphetamine, cocaine, heroin, and marijuana—are proscribed by both federal and state law, and any distinctions in definitions are utterly meaningless to any trafficker.⁸⁶

That overlap is not a coincidence. Contemporaneous with the drafting and consideration of the federal CSA in 1970, state and federal authorities worked together to create a model state law that would “complement the comprehensive drug legislation being proposed to Congress at the national level.”⁸⁷ That model law—the Uniform Controlled Substances Act (1970) (UCSA), 9 U.L.A. 853 (2007)—sought, by mirroring the CSA, to create “an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem.”⁸⁸ The UCSA created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for states to add or remove drugs, based on the same criteria employed by the Attorney General under the CSA.⁸⁹ The UCSA was widely adopted.⁹⁰

The absurdities of the minority view are already apparent in litigation under ACCA, where the statutory definition of a “serious drug offense” rests on comparison to the federal schedules. A prominent example involves cocaine. In 2015, federal authorities made one exceedingly minor adjustment to the definition of cocaine on the federal schedule, removing [¹²³I]ioflupane from the definition. [¹²³I]ioflupane is a radiated form of ioflupane that is derived from cocaine. It was recently developed to serve as the active pharmaceutical ingredient in DaTscan, which was approved by the FDA in 2011 as an injectable radiopharmaceutical used in performing brain scans of adult patients with Parkinson’s syndrome. It has a single purpose: diagnosis of Parkinson’s disease. DEA concluded that it presents no potential for abuse (in part because meaningful extraction of [¹²³I]ioflupane from DaTscan would be impossible due to its limited production and availability and because extraction is technically complex and would require advanced equipment not available to the general public). And indeed, we are unaware of any federal or state prosecution anywhere, ever, regarding trafficking in this substance. The authorities thus agreed to remove this substance from the federal schedule.⁹¹

Yet courts that insist on using only the federal schedule to define a “controlled substance” under § 4B1.2(b) necessarily must conclude that for any state that did not adopt the same exclusion of [¹²³I]ioflupane contemporaneously with the federal government, a state conviction for cocaine trafficking after 2015 presents a conviction based on an overbroad definition of a controlled substance (as has occurred in applications of ACCA). Similar results have followed where states

⁸⁶ In fiscal year 2024, seven drugs accounted for 96.8% of federal drug trafficking offenses: methamphetamine (45.7%), fentanyl and analogues (22%), powder cocaine (19.4%), crack cocaine (3.8%), heroin (3.3%), marijuana (2.6%). U.S. Sent’g Comm’n, *2024 Sourcebook of Federal Sentencing Statistics*, Figure D-1.

⁸⁷ President Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs, Pub. Papers 513, 514 (July 14, 1969) (Presidential Message), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-control-narcotics-and-dangerous-drugs>.

⁸⁸ UCSA Prefatory Note, 9 U.L.A. 854; see Presidential Message 514 (describing federal and state law as an “interlocking trellis”).

⁸⁹ UCSA § 201 & cmt., 9 U.L.A. 866–70.

⁹⁰ See, e.g., *Com. v. Santiago*, 340 A.2d 440, 444 n.8 (Pa. 1975) (stating that “Pennsylvania’s legislation is an adoption of the Uniform Controlled Dangerous Substances Act. The Uniform Act was drafted to achieve a coordinated, codified uniformity between state and federal legislation and enforcement.”)

⁹¹ 80 Fed. Reg. 54715–01 (Sept. 11, 2015).

define the isomers that qualify as cocaine and heroin in a manner that differs slightly from the federal definitions.⁹²

This makes little sense. [¹²³I]ioflupane is certainly unknown to any offender who ever trafficked in powder or crack cocaine. Yet cocaine traffickers in states that did not make this minor adjustment would be excluded, under Option 1, from application of the career-offender guideline and other guideline provisions keyed to the definitions in §4B1.2. The same is true for offenders who have no idea what an isomer is but who reside in states that present slightly different definitions of applicable isomers. Indeed, every case in which courts have adopted the minority view, limiting a controlled substance definition to the federal CSA, has involved a similarly meaningless distinction having nothing to do with the conduct of the offender before the court or any comparable offender.⁹³

There is no sensible policy rationale for this view. By magnifying such meaningless distinctions, Option 1 embodies all the pernicious effects of the categorical approach: the resulting assessment often demands extensive litigation that includes complex scientific analysis of substances not actually involved in the case before the court,⁹⁴ it absolves offenders based on a hypothetical possibility having nothing to do with their actual conduct, and it produces striking disparities between identical offenders that rest only on differences in regulatory drafting in different states.

The Department urges the Commission instead to adopt Option 2, confirming the Commission's longstanding dictate that controlled substance offenses under either federal or state law qualify as career offender predicates.

⁹² See, e.g., *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022) (Iowa delivery of cocaine, Iowa Code § 124.401(1)(c)(2), is not an ACCA “serious drug offense”; the court compares the state drug schedule in effect at the time of the offense (2013) to the federal schedule at the time of the federal gun crime (2019), and finds the state offense as previously defined to be currently overbroad because the federal schedule no longer includes [¹²³I]ioflupane in the definition of cocaine); *United States v. Miller*, 157 F.4th 1365, 1378 (11th Cir. 2025) (2017 Florida offenses of delivery of cocaine in violation of Fla. Stat. § 893.13(1)(a) do not qualify as “serious drug offenses” under ACCA because at the time the state definition of cocaine included [¹²³I]ioflupane and was therefore overbroad in relation to federal law).

⁹³ See, e.g., *United States v. Chaires*, 88 F.4th 172, 178–79 (2d Cir. 2023) (sale of cocaine, in violation of N.Y. Penal Law § 220.39, is not a §4B1.2 “controlled substance offense,” because the New York definition of cocaine presents no limitation on the types of isomers it reached, and was thus categorically broader than the federal definition, which expressly limited itself to only “optical and geometric” isomers); *United States v. Wright*, 163 F.4th 469, 476–78 (8th Cir. 2025) (same reasoning in determining that Arkansas cocaine trafficking convictions, Ark. Code § 5-64-401, do not qualify as “felony drug offenses” under 21 U.S.C. § 841; adding that “[a] drug statute that criminalizes even ‘one additional isomer’ of cocaine cannot produce a predicate felony drug offense”); *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 453 (7th Cir. 2022) (ruling that dealing methamphetamine under Indiana Code § 35-48-4-1.1, prior to a 2020 amendment limiting the definition of methamphetamine to optical isomers, is overbroad in relation to federal law and therefore does not qualify as an “aggravated felony” under immigration law); *United States v. Heard*, 62 F.4th 1109, 1114 (8th Cir. 2023) (prior to 2011, the Minnesota statute addressing MDMA distribution, Minn. Stat. § 152.02(2)(3), reached any isomer, and was thus overbroad and did not qualify as an ACCA “serious drug offense,” as the federal definition of MDMA only reached “optical, positional, or geometric” isomers).

⁹⁴ An example appears in *United States v. Wilkes*, 78 F.4th 272 (6th Cir. 2023), *supplemented*, 133 F.4th 600 (6th Cir. 2025), where the court was compelled to assess whether “diastereomers” of cocaine addressed in Michigan law fall within the “geometric isomers” cited in the federal definition.

B. Time of Offense Versus Time of Sentencing

As to the question of timing regarding the definition of the controlled substance, the Department supports Option 2: the schedule in effect at the time of the predicate crime controls. That is the conclusion the Supreme Court recently reached on this question under the ACCA in *Brown v. United States*, 602 U.S. 101 (2024), and there is no sound reason for the Commission to diverge from this conclusion. As with the ACCA, the career offender enhancement is principally a recidivist provision “that gauges what a defendant’s ‘history of criminal activity’ says about his or her ‘culpability and dangerousness.’”⁹⁵ This requires a “backward-looking examination of previous convictions,” as “a defendant’s history of criminal activity does not cease to exist merely because the crime was later redefined.”⁹⁶ The guidelines elsewhere embrace this reality: convictions that are set aside or pardoned “unrelated to innocence or errors of law” still count as measures of the defendant’s criminal history.⁹⁷ Section 4B1.2 should not be any different.

Once again, experience teaches that a focus on the current definition would simply absolve all traffickers of a particular substance of responsibility based on a meaningless change. The most prominent example (which was at issue in *Brown*) involves the definition of marijuana. In 2018, Congress removed hemp from the definition under federal law. ACCA defendants argued that courts should use the current, revised definition of marijuana, rendering overbroad any conviction under a statute that, at the time of conviction, included hemp in the definition—including any marijuana conviction ever in a state that has not made the hemp exclusion.⁹⁸ That outcome is particularly absurd given that, to our knowledge, no authority has ever prosecuted the distribution of hemp. This compounds the harmful effects of the categorical approach in producing inconsistent and inexplicable results that vary between jurisdictions and ignore the defendant’s actual conduct.

The proper solution is adoption of Option 2, which focuses on the definition in effect at the time of the predicate offense.

C. Other Guidelines

The Commission also inquired whether the changes should apply to all of the guideline provisions that currently define the term “controlled substance offense” by reference to §4B1.2(b). Subject to the caveats described above, the Department generally prefers a uniform definition of the term throughout the guidelines and believes that resolving the circuit conflicts in line with the majority views would likely yield a definition administrable across the various provisions that reference §4B1.2(b).⁹⁹

IV. §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

Alien smuggling is nefarious on multiple fronts. It undermines border security. It is often linked to transnational criminal organizations. And it inherently exploits those who are vulnerable.

⁹⁵ *Brown*, 602 U.S. at 111–12 (quoting *McNeill v. United States*, 563 U.S. 816, 823 (2011)).

⁹⁶ *Id.* at 112–14 (citation omitted).

⁹⁷ U.S.S.G. §4A1.2 comment. n.10.

⁹⁸ See, e.g., *United States v. Minor*, 121 F.4th 1085, 1088–93 (5th Cir. 2024) (holding, based on the 2018 exclusion of hemp, that the defendant’s 2010 federal convictions for possessing marijuana with intent to distribute and importing marijuana did not qualify as controlled substance offenses at his sentencing on four more drug charges in 2022).

⁹⁹ See 2025 DOJ Letter at 18-19.

That is why 8 U.S.C. § 1324, the primary statute prohibiting alien smuggling, provides punishment “for each alien” smuggled and increased statutory maximums for “any person” who suffers serious bodily injury or is killed or put at risk of death “during” or “resulting” from a smuggling offense.¹⁰⁰ It is also why the Department has urged the Commission to ensure that the guidelines reflect aggravating aspects of these offenses—the number of aliens smuggled, the risks and resulting injuries to those aliens, and sexual assault against them.

Alien smuggling cases have changed substantially over the last five to seven years. As commercialization and globalization of smuggling enterprises have increased, the Department has seen an increase in the severity of the criminality involved.¹⁰¹ Smuggling methods and scale vary, but there are a few trends worth noting. First, smuggling organizations have gotten bigger and seek ways to move more people for more money. This has led to an increase in injuries and deaths, sexual assaults, and mass casualty events like those in which dozens of people are packed into tractor trailers for transport, usually without air conditioning, water, or an effective means of communication leading to dozens of deaths and injuries.¹⁰² Second, with decreasing access to

¹⁰⁰ 8 U.S.C. §§ 1324(a)(1)(B)(i)-(iv).

¹⁰¹ See, e.g., *United States v. Hernandez-Alcudia*, 5:25-cr-1291 (S.D. Tex. 2025); U.S. Dept. of Justice, Press Release, *Mexican national sentenced in cartel-linked smuggling resulting in death* (Mar. 9, 2026) (“Hernandez-Alcudia admitted taking orders from an individual linked to Cartel del Noreste. He further acknowledged being paid to smuggle illegal aliens across the Rio Grande and guide them through the brush.”), <https://www.justice.gov/usao-sdtx/pr/mexican-national-sentenced-cartel-linked-smuggling-resulting-death>; *United States v. Navarro Sanchez*, 3:23-cr-1842 (W.D. Tex. 2023); U.S. Dept. of Justice, Press Release, *Mexican National and Alleged Alien Smuggler Indicted on First Material Support of Terrorism Charges Against CJNG Member* (May 16, 2025) (“An indictment unsealed today in the Western District of Texas is the first in the nation to charge a Mexican national with providing material support to a designated foreign terrorist organization based on her involvement with the Cartel de Jalisco Nueva Generación (CJNG), including providing the cartel with grenades and engaging in alien smuggling, firearms trafficking, bulk cash smuggling, and narcotics trafficking on its behalf.”), <https://www.justice.gov/opa/pr/mexican-national-and-alleged-alien-smuggler-indicted-first-material-support-terrorism>; *United States v. Allison, et al.*, 2:22-cr-77 (E.D. La. 2022), U.S. Dept. of Justice, Press Release, *Defendant Sentenced for His Role in International Human and Drug Smuggling Conspiracy* (Jan. 22, 2026) (“Villeda pleaded guilty to conspiracy to unlawfully bring aliens to the United States for financial gain and conspiracy to distribute five kilograms or more of cocaine hydrochloride.”), <https://www.justice.gov/opa/pr/defendant-sentenced-his-role-international-human-and-drug-smuggling-conspiracy>; *United States v. Square, et al.*, 8:24-cr-295 (N.D.N.Y. 2024), U.S. Dept. of Justice, Press Release, *Member of Deadly Human Smuggling Organization Extradited from Canada* (Oct. 31, 2025) (“According to court documents, Square allegedly was the U.S.-based leader of an alien smuggling organization (ASO), that regularly smuggled aliens across the U.S.-Canada border via the Akwesasne Mohawk Indian Reservation.”), <https://www.justice.gov/opa/pr/member-deadly-human-smuggling-organization-extradited-canada>; *United States v. Rivera Orijuela, et al.*, 3:24-cr-2471 (W.D. Tex. 2024), U.S. Dept. of Justice, Press Release, *Members of Dangerous Human Smuggling Organization Extradited from Colombia* (Dec. 19, 2025) (“Linero Pinto is alleged to have bribed uniformed service members of the Colombian Navy to acquire real-time intelligence about the position of Navy patrol vessels located between San Andres Island and Nicaragua, enabling the boats carrying migrants to avoid detection. On Oct. 21, 2023, a boat carrying approximately 40 aliens and two boat captains disappeared on its way to Nicaragua after leaving San Andreas Island.”), <https://www.justice.gov/opa/pr/members-dangerous-human-smuggling-organization-extradited-colombia>; *United States v. Zuniga-Garcia*, 2:23cr2451 (W.D. Tex. 2023), U.S. Dept. of Justice, Press Release, *Member of Vast International Alien Smuggling Organization Extradited from Mexico* (Sept. 26, 2025) (“Beginning in November 2020 and continuing through September 2023, the defendant and others were part of a vast international alien smuggling organization (ASO) that illegally brought thousands of aliens from Afghanistan, Yemen, Egypt, India, Pakistan, Columbia, Guatemala, Honduras, and Ecuador into the United States across the border with Mexico.”), <https://www.justice.gov/opa/pr/member-vast-international-alien-smuggling-organization-extradited-mexico>.

¹⁰² See, e.g., *United States v. Ventura et al.*, No. 5:24-cr-1187 (S.D. Tex. 2024); U.S. Dept. of Justice, Press Release, *Three Guatemalan Human Smugglers Charged in U.S. for 2021 Mass Casualty Event in Chiapas, Mexico, Extradited*

crossing points at the southern border, the Department has seen an increase in maritime smuggling events branching into parts of southern California and Florida. These cases often involve small unseaworthy vessels loaded with dozens of people—far more than the rated safe capacity—traveling at night, for long periods of time, on open seas, subject to uncontrollable and rapidly changing weather conditions, again leading to tragic results.¹⁰³ Finally, the Department is seeing increased smuggling along the northern border, in which smugglers move small-to-medium sized groups of people on multiple occasions, leading them into harsh wintery conditions, often at night, sometime culminating in abandonment and exposure deaths.¹⁰⁴

The Department commends the Commission’s efforts in publishing these proposals, which address many of the concerns that we have raised. We view the proposals as working together and support enacting all of them while offering modifications designed to improve their efficacy.

Specifically, the Department supports the proposed changes to §2L1.1(b)(2), which would add more gradations to the table providing offense level enhancements based on the number of aliens smuggled. As to the changes aimed at addressing conduct creating a risk of injury or death, we generally support them but are concerned that they may have limited effect. The changes primarily move portions of the commentary into the guideline to clarify (a) that serious bodily injury includes criminal sexual abuse and (b) that transporting aliens in unsafe conditions constitutes covered risk. Regarding the proposed changes for how the guideline addresses additional injuries or deaths, we are supportive of changes and offer two alternatives, each of which we think would better achieve the Commission’s goals. We also support the proposed cross-

from *Guatemala* (September 4, 2025) (“The Justice Department announced today that three Guatemalan nationals charged in connection with the Dec. 9, 2021 mass casualty event in Chiapas, Mexico, have been extradited from Guatemala to the United States to face prosecution. The crash of a tractor-trailer packed with at least 160 illegal aliens – many of them Guatemalan – killed more than 50 people, including unaccompanied children, and injured over 100 more.”), <https://www.justice.gov/opa/pr/three-guatemalan-human-smugglers-charged-us-2021-mass-casualty-event-chiapas-mexico>; *United States v. Sealed*, No. 5:22-CR-366 (W.D. Tex. 2022); Dept. of Justice, Press Release, *Four Arrested for Tractor-Trailer Smuggling Incident that Resulted in 53 Deaths* (June 27, 2023) (“Four Mexican nationals were arrested yesterday in San Antonio, Houston, and Marshall, Texas, for their alleged roles in a tractor-trailer smuggling incident that resulted in 53 deceased and 11 injured undocumented individuals one year ago today.”), <https://www.justice.gov/archives/opa/pr/four-arrested-tractor-trailer-smuggling-incident-resulted-53-deaths>.

¹⁰³ See *United States v. Montilla*, (D.P.R. 2024); U.S. Dept. of Justice, Press Release; *Dominican National Sentenced for Role in Human Smuggling Even that Resulted in 11 Deaths* (Feb. 10, 2025) (“A Dominican national was sentenced today to nine years in prison for his involvement in a deadly human smuggling venture that resulted in the deaths of 11 smuggled aliens.”), <https://www.justice.gov/opa/pr/dominican-national-sentenced-role-human-smuggling-event-resulted-11-deaths>; *United States v. Smith*, No. 2:23-CR-14047 (S.D. Fla. 2023); *Bahamian National Charged and Arrested for Role in Fatal Human Smuggling Conspiracy* (Mar. 26, 2024) (“An indictment was unsealed in the Southern District of Florida today charging a Bahamian national for his alleged role in a human smuggling conspiracy that resulted in multiple migrant deaths.”) <https://www.justice.gov/usao-sdfl/pr/bahamian-national-charged-and-arrested-role-fatal-human-smuggling-conspiracy>.

¹⁰⁴ See *United States v. Patel*, No. 1:24-CR-95 (N.D. Ill. 2025); U.S. Dept. of Justice, Press Release, *Two Men Sentenced to Prison for Role in International Human Smuggling Conspiracy that Resulted in the Death of a Family of Four* (May 28, 2025) (“Two men were sentenced today in the District of Minnesota after being convicted at a jury trial for their roles in an international human smuggling conspiracy that resulted in the deaths of four Indian nationals, including a three-year-old and 11-year-old child, in January 2022.”), <https://www.justice.gov/opa/pr/two-men-sentenced-prison-role-international-human-smuggling-conspiracy-resulted-death-family>.

reference for cases involving criminal sexual abuse. Finally, we support adding an enhancement for smuggling associated with transnational criminal organizations.

In sum, we greatly appreciate the Commission's efforts to address the Department's long-standing concerns with the alien smuggling guideline. While the Department continues to support some measures beyond those proposed, the amendment would address many of the concerns raised by the Department and provide more adequate, proportional, and calibrated punishment for offenders who smuggle multiple aliens into this country or cause harm to the individuals smuggled, including through sexual assault. Accordingly, we recommend the Commission adopt each of the proposals with our modifications. We address each in turn.

A. The Alien Table at §2L1.1(b)(2)

The Commission has proposed adding additional gradations to the alien table at §2L1.1(b)(2) while leaving intact the starting and ending points for the offense level increases and the number of aliens.¹⁰⁵ The Commission last amended the table in 1997 in response to Congress's directives in Section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which instructed the Commission to "increase the sentencing enhancement [in §2L1.1(b)(2)] by at least 50 percent."¹⁰⁶ Currently, the table at §2L1.1(b)(2) has three tiers that add three additional levels if the offense involved smuggling 6–24 aliens; six additional levels if the offense involved smuggling 25–99 aliens; and nine additional levels if the offense involved smuggling 100 or more aliens. The Commission's proposal would break the existing 6–24 tier into three tiers (adding three additional levels for 6–12 aliens, four additional levels for 13–18 aliens, and five additional levels for 19–24 aliens) and the existing 25–99 tier into two tiers (six additional levels for 25–99 aliens and seven additional levels for 50–99 aliens).

The Department supports these changes, which are in line with relevant data and consistent with congressional intent to increase sentences based on the number of aliens smuggled. Approximately 41% (1,702) of the 4,178 cases sentenced under §2L1.1 in fiscal year 2024 involved smuggling at least six aliens.¹⁰⁷ Roughly 82% (1,391) of those cases fell within the 6–24 range.¹⁰⁸ At the same time, convictions for smuggling incidents involving 6–24 migrants increased from 855 in fiscal year 2013 to 1,399 in fiscal year 2024.¹⁰⁹ These numbers indicate that the current

¹⁰⁵ Proposed Amendments, at 54.

¹⁰⁶ Pub. L. 104–208, 110 Stat. 3009–566 (1996) (Division C of a larger piece of legislation). The legislation directed the Commission to increase the base offense level for alien smuggling by at least three levels; increase the enhancement in §2L1.1 (b)(2) by at least 50 percent; provide an enhancement for an offender with a prior felony conviction for a similar offense; impose an enhancement for death or bodily injury or brandishing a firearm or dangerous weapon; and consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child. U.S.S.G. App. C, amend. 543 (eff. May 1, 1997); U.S.S.G. App. C, amend. 561 (eff. Nov. 1, 1997) (implementing this directive to increase the enhancement in the alien table by at least 50 percent and making other changes).

¹⁰⁷ U.S. Sent'g Comm'n, *Public Data Briefing on 2026 Proposed Amendment Regarding Human Smuggling Offenses*, at Slide 5 ("Human Smuggling Data Briefing"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026_Human-Smuggling.pdf.

¹⁰⁸ *Id.* at Slide 5.

¹⁰⁹ Compare U.S. Sent'g Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2013*, at 51, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal->

gradations do not meaningfully differentiate among offenders and offense conduct. We agree with the Probation Officers Advisory Group that “the volume of individuals smuggled” is a “meaningful proxy” for a smuggling “organization’s scope, profit motivation, and risk.”¹¹⁰ The proposal would fix this flaw and provide additional accountability for the minority of defendants—the Commission estimates that approximately 10% of cases sentenced under §2L1.1 would be affected—who commit this kind of conduct.¹¹¹ In essence, the changes would help courts distinguish among offenders and offenses.

B. Risk of Death or Serious Bodily Injury

The existing risk specific offense characteristic at §2L1.1(b)(6) provides a two-level enhancement for recklessly or intentionally creating a substantial risk of death or serious bodily injury. This enhancement applies once per offense regardless of the number of aliens endangered. The current commentary notes that this risk enhancement applies to a “wide variety of conduct,” including “transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.”¹¹² Similarly, current application note 1(L) in §1B1.1 defines “serious bodily injury” to include “criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.”¹¹³ Current application note 4 in §2L1.1 repeats this definition with respect to “[a]pplication of [s]ubsection (b)(7) to [c]onduct [c]onstituting [c]riminal [s]exual [a]buse.”¹¹⁴

Two problems arise with the current risk enhancement at (b)(6). First, it applies once per offense regardless of the number of aliens endangered. Second, in explaining that serious bodily injury includes criminal sexual abuse under §1B1.1, the current application note references only the injury table at (b)(7) and not the risk enhancement at (b)(6), which can lead to confusion.

In response to these problems, the Commission proposes changes to how the guideline addresses conduct creating a risk of injury or death. The changes would move three portions of the existing commentary into the guideline and separate it into two different risk-based enhancements. First, the amendment would create a new vehicle or vessel based risk enhancement by moving two examples in application note 3 of §2L1.1 relating to “transporting persons in the trunk or engine

[sentencing-statistics/guideline-application-frequencies/2013/Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based Revised.pdf](#); with U.S. Sent’g Comm’n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2024*, at 137, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2024/Ch2_Guideline_FY24.pdf.

¹¹⁰ U.S. Sent’g Comm’n Public Hearing March 9, 2026 (Testimony of Melinda Nusbaum, Vice Chair of the Probation Officers Advisory Group) at 11.

¹¹¹ Human Smuggling Data Briefing at Slide 8; Human Smuggling Data Briefing, transcript at 2.

¹¹² U.S.S.G. §2L1.1(b)(6) cmt. (n.3).

¹¹³ U.S.S.G. §1B1.1 cmt. (n.1(L)).

¹¹⁴ U.S.S.G. §2L1.1(b)(7) cmt. (n.4).

compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel” into a new specific offense characteristic that would become (b)(6) (and existing enhancements after (b)(6) would be renumbered accordingly).¹¹⁵ That new provision would add a two-level enhancement and an offense level floor of 18 for “concealing persons in the trunk or engine compartment” or for “carrying substantially more passengers than the rated capacity” of a vehicle or vessel.¹¹⁶

Second, the amendment would move application note 4’s clarification that “criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law” constitutes “serious bodily injury” from the commentary to the existing enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury at renumbered (b)(7).¹¹⁷ In so doing, it would clarify that criminal sexual abuse under 18 U.S.C. §§ 2241 and 2242 or any similar offense under state law constitute serious bodily injury throughout the Guidelines Manual and that note 4 in §2L1.1 is not limited to only the injury table at renumbered (b)(8) (current (b)(7)).¹¹⁸ It would also make conforming changes to the commentary to add renumbered (b)(7) (current (b)(6)) to application note 4 discussing sexual abuse.

Finally, the amendment would move the existing limitation in application note 3 of §2L1.1 that the dangerous weapon enhancement in (b)(5) and the new risk enhancement at renumbered (b)(7) (current (b)(6)) cannot apply to the same conduct. It would also add the new vehicle or vessel enhancement at new (b)(6) to that limitation.

We support these changes as an effort to reduce confusion and increase consistency in the application of §2L1.1’s enhancements. We are concerned, however, that they may have limited effect because they in essence move portions of the existing commentary into the guideline and clarify that §1B1.1’s inclusion of sexual abuse within the definition of “bodily injury” applies across the Guidelines Manual. Whatever benefit there may be in doing so, we fear that the proposed amendment would not change the substance of §2L1.1 in a meaningful way. The risk enhancements would remain limited to one application per offense regardless of the number of aliens endangered.

To the extent that the Commission or other stakeholders may be concerned that the enhancements are duplicative or would lead to overapplication, we do not share that view. The structure of the proposed amendment guards against overapplication. All three enhancements—the existing dangerous weapon enhancement at (b)(5), the new vehicle or vessel enhancement at new (b)(6), and the existing risk enhancement at renumbered (b)(7)—could all apply to the same offense *only* if premised on *different* conduct. With this limitation, we suspect it would be less common for any two of them to apply, and rarer still for all three to apply in a single offense. Additionally, the risk enhancement at renumbered (b)(7) would remain limited to conduct “intentionally or recklessly” creating a “substantial” risk of death or serious bodily injury—we view the mental state requirement and word “substantial” as limiting principles.

¹¹⁵ Proposed Amendments at 55.

¹¹⁶ *Id.*

¹¹⁷ U.S.S.G. §2L1.1(b)(7) cmt. (n.4); Proposed Amendments at 55.

¹¹⁸ U.S.S.G. §1B1.1 cmt. (note 1(L)).

Nor do we think that the risk enhancements would be duplicative of the injury table changes. We agree with the Probation Officers Advisory Group that the injury table and risk enhancements cover separate harms.¹¹⁹ As the Commission’s data presentation recognized, the risk enhancements and injury table cover different conduct. Although many cases in which an injury occurred also resulted in a risk enhancement under §2L1.1(b)(6), the risk enhancement overwhelmingly applied in cases without injuries, indicating that it is doing important, independent work in holding defendants accountable for dangerous conduct.¹²⁰

Still, the amendments could serve as important complements to the proposals discussed below concerning additional injuries or deaths and the sexual assault cross reference. In light of those limitations, effective deterrence against the most dangerous smuggling operations would require these changes in combination with the other proposed changes to the guideline (with our suggested modifications).

C. Injury Table

The Commission proposes two options to change how the current injury table operates at §2L1.1(b)(7). Currently, the table at §2L1.1(b)(7) provides one enhancement per offense based on the severity of the most severe injury sustained. Additional injuries or deaths do not currently receive an additional increase under that provision or, given the operation of §3D1.2, via the guidelines’ multiple count rules. To address this concern, the Commission has proposed two options to account for additional injuries and deaths. Neither option would treat each additional injury or death the same as the first injury or death, which limits the application of either option. We offer two alternatives, one of which uses Option One’s structure, to more effectively account for mass smuggling events.

Option One would provide one additional level if “one or two additional people” were injured or died and two additional levels if “three or more people” were injured or died. It also brackets options for making the enhancement offense-based or defendant-based with an intentional or knowing *mens rea*. Option Two would only provide an increase for additional deaths or permanent or life-threatening injuries—three offense levels for “one or two additional people” and six offense levels for “three or more additional people” who suffered permanent or life-threatening injuries or death. Additional injuries, even if serious bodily injuries, would not garner an additional enhancement and therefore would continue to not meaningfully factor into guidelines range. Option Two brackets the same offense-based or defendant-based language with an intentional or knowing *mens rea*. Additionally, the Commission has proposed adding “criminal sexual contact” to the bodily injury tier and “including criminal sexual abuse” in the serious bodily injury tier.

We reiterate our preference that each injury and death garner the same additional enhancement as the first injury or death involved in the offense. To effectuate this change, the Commission could replace “any” in existing (b)(7) with “each” so that the table would apply to each injury or death the same way. If the Commission is not inclined to treat each injury or death equally, we think that it should at least provide incremental punishment for each additional injury

¹¹⁹ U.S. Sent’g Comm’n Public Hearing March 9, 2026 (Testimony of Melinda Nusbaum, Vice Chair of the Probation Officers Advisory Group) at 11.

¹²⁰ Human Smuggling Data Briefing, transcript at 3.

or death, and not provide increases only for additional deaths or permanent or life-threatening injuries. Option Two would not provide any increase for additional injuries, serious bodily injuries, or sexual assaults. For that reason, we do not think this option will advance the Commission's goals.

Instead, we offer two alternatives for the Commission's consideration, both of which would provide incremental punishment for additional injuries or deaths but include limitations to avoid unwarranted increases. First, the Commission could add one level for each additional person injured, which would be consistent with how the current grouping rules treat additional victims of crimes against a person under current §3D1.2(d) (second table) and §3D1.4.¹²¹ That is, the Commission could amend Option One to replace clauses (i) and (ii) with "increase by 1 level for each additional person." Because the increase would be limited to one level per additional injury or death, we do not believe that a *mens rea* is appropriate or necessary.

Alternatively, we recommend that the Commission adopt Option One but use Option Two's three- and six-level increases. In other words, the only change we are recommending under this alternative is that increases should be three and six levels instead of the Commission's proposed one and two levels. Under Option One, the table would continue to apply to the most severe injury or death. An additional offense level would apply if "one or two additional people" suffered any injury or died. Two additional levels would apply if "three or more additional people" suffered any injury. Our recommendation is that the offense level increase should be three and six levels, instead of the Commission's proposed one- and two-levels.

We do not think the addition of a *mens rea* is appropriate or necessary to guard against overapplication or unmitigated increases—the structure of the proposal has a built-in cap. Under ours or the Commission's formulations, the table would be applied to the most severe injury, and one enhancement would apply to the offense depending on the number of additional injuries or deaths. The maximum possible increase for four or more total injuries or deaths would be the table plus two levels under the Commission's Option One or six levels under our alternative formulation. The injury table generally applies in a small percentage of cases prosecuted under §2L1.1, but when it does, incremental increases are necessary to provide proportional punishment.¹²²

Take, for example, a case in which the defendant attempted to illegally smuggle 45 people into the United States, leading to the tragic deaths of 11 people.¹²³ He was sentenced to 108 months (nine years), the upper end of the guideline range for his offense level of 29. Under Option One,

¹²¹ As we noted in our February 10 letter, if the Commission does not proceed with these amendments, we recommend that §2L1.1 should at least be included in the list of guidelines that are not grouped as aggregate harm as part of the multiple count amendments. In other words, that provision should move to §3D1.1(b)(1) in the new proposed amendment or the second table of §3D1.2(d) in the current version. This would provide incremental punishment by triggering upward adjustments in cases concerning multiple counts of conviction. Letter from Scott A.C. Meisler, U.S. Dept. of Justice, to Hon. Carlton W. Reeves, Chair, at 51-52 (Feb. 10, 2026), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202602/90FR59660_public-comment_R.pdf#page=299.

¹²² Human Smuggling Data Briefing at Slide 16.

¹²³ See *United States v. Montilla*, 2024 U.S. Dist. LEXIS 168282 (D.P.R. 2024); U.S. Dept. of Justice, Press Release, *Dominican National Sentenced for Role in Human Smuggling Event that Resulted in 11 Deaths* (Feb. 10, 2025), <https://www.justice.gov/opa/pr/dominican-national-sentenced-role-human-smuggling-event-resulted-11-deaths>.

his offense level would have been 31 (+2 for three or more additional injuries or deaths). Under our first alternative (consistent with the grouping rules for additional victims in crimes against a person), his offense level would have been 39 (+1 per additional deaths). Under our second alternative (Option One at Option Two levels), his offense level would have been 35. Either of our proposed options would have produced a far more appropriate and proportional sentence for someone responsible for the deaths of 11 individuals.

The Commission also proposes adding criminal sexual contact and criminal sexual abuse to the injury table. We support doing so because data indicate (as discussed further below) that sexual abuse is a grave problem in smuggling offenses, and the guidelines elsewhere recognize that sexual abuse *is* a form of serious bodily injury.¹²⁴

D. Sexual Assault Cross Reference

The Commission also proposes adding a cross reference to the criminal sexual abuse guidelines. The Department strongly supports the Commission's proposal. In our view, the cross reference is necessary even with the other proposed changes to address the prevalence of such abuse in smuggling operations.¹²⁵ We think sexual assault should be treated like sexual assault. The existing injury table, via application note 4, provides a four-level increase for criminal sexual abuse (as serious bodily injury) but only if the sexual assault is the most serious injury involved in the offense. When there are other more serious injuries or deaths, or more easily established serious bodily injuries, the sexual assault does not meaningfully factor into the guidelines range—even if the guidelines would otherwise treat the sexual abuse as a more serious offense.¹²⁶ That is, if the abuse is reported and investigated.

Those smuggled are isolated from their families in harsh conditions and dependent on their smugglers, which only increases their vulnerability.¹²⁷ As a result, sexual assaults are often

¹²⁴ U.S.S.G. §1B1.1 cmt. (n.1(L)).

¹²⁵ See, e.g., *United States v. Jimenez-Bautista*, 3:22-CR-1550, Dkt. 238, (S.D. Cal.); U.S. Dept. of Justice, Press Release, *Migrant Smuggler Admits to Sexually Assaulting Juvenile During Travel to the United States* (Nov. 2, 2023), (sentencing defendant to 64 months for sexually assaulting a minor while smuggling 25 aliens through the California border region), <https://www.justice.gov/usao-sdca/pr/migrant-smuggler-admits-sexually-assaulting-juvenile-during-travel-united-states>; *United States v. Ballesteros-Moreno*, 4:23-cr-00542 (D. Ariz. 2023); U.S. Dept. of Justice, Press Release, *Smuggler Sentenced to 72 Months* (Feb. 6, 2024), (finding that defendant created a substantial risk of death or serious bodily injury via the method of transporting the young woman in the exterior toolbox, and that he sexually assaulted and involuntarily detained her during the transportation), <https://www.justice.gov/usao-az/pr/smuggler-sentenced-72-months>; *United States v. Sukhtipyaroge*, 17-CR-208 (D. Minn. 2019) (finding that defendant smuggled minor to United States and then compelled him to work and engage in sexual acts for an extended period), *aff'd on diff grounds*, *United States v. Sukhtipyaroge*, 1 F.4th 603 (8th Cir. 2021); *United States v. Hueto-Aleman*, 632 F. App'x 204 (5th Cir. 2015) (unpublished) (detailing sexual assault of a 15-year-old unaccompanied female and noting that multiple female aliens were subject to sexual advances and non-consensual sexual encounters by armed smugglers who kept condoms around and held them involuntarily while demanding further payment from their families).

¹²⁶ See, e.g., *United States v. Julca*, 442 F. App'x 916 (5th Cir. 2011) (unpublished) (upholding application of serious bodily enhancement under §2L1.1(b)(7)(B) and upward variance for beatings of multiple aliens who were also involuntarily detained and sexually assaulted).

¹²⁷ U.S. Sent'g Comm'n Public Hearing March 9, 2026 (Testimony of Melinda Nusbaum, Vice Chair of the Probation Officers Advisory Group) at 12, <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/nusbaum2.pdf>; see, e.g., *United States v. Jimenez-Bautista*, 3:22-CR-1550, Dkt. 238, (S.D.

underreported. While physical injury is not required, individuals victimized do not always have visible injuries that would trigger further investigation by law enforcement. Absent a smuggling or other federal hook, there is no federal jurisdiction to address the sexual assault conduct alone. State authorities are often unable to prosecute these cases because the victim does not know where the assault occurred relative to the state's territory. The very nature of a sexual assault during an already inherently coercive smuggling offense makes state or local jurisdiction hard to prove and even harder for victims to report.

The proposed cross reference mirrors the existing one for homicide. In each case, the cross reference directs the court's attention to the most appropriate and consistent way of accounting for the defendant's egregious conduct. Similar to the homicide cross reference, the proposed cross reference should be an offense-based cross reference. Because the cross reference will apply only when the conduct involved meets the elements of one of the listed offenses, it inherently requires intentional conduct. And the guidelines' relevant-conduct definition at §1B1.3(a)(2) already limits a defendant's responsibility for others' conduct. An offense-based provision would, therefore, not pose any risk of inappropriately holding a defendant accountable for sexual assault committed by another. Indeed, an offense-based cross reference would best deter members of smuggling operations who do not directly engage in sexual abuse but who nonetheless profit from the coercive context that has made such abuse endemic throughout the migration journey.

We think that the cross reference is necessary under any of the above formulations for accounting for additional injuries or deaths. This is especially true for Option Two, which would not meaningfully account for additional sexual abuse in most circumstances. Even under Option One, only the most serious injury or death garners an increase under the injury table and then up to three more injuries or deaths would count towards an enhancement, and the sexual assault may not meaningfully factor into the guidelines range at all. Our preference would be for an offense-based cross reference, which we view as consistent with the case law and the existing homicide cross reference.

E. Transnational Criminal Organizations

Finally, the Commission asks in an Issue for Comment how it should treat alien smuggling offenses perpetrated in support of transnational criminal organizations and asks how to define "transnational criminal organization." We support adding a four-level enhancement.

As the Commission's data recognized, approximately one third of cases in fiscal year 2024 involving a transnational criminal organization (32%) involved smuggling more than 100 aliens,

Cal.); U.S. Dept. of Justice, Press Release, *Migrant Smuggler Admits to Sexually Assaulting Juvenile During Travel to the United States* (Nov. 2, 2023), (sentencing defendant to 64 months for sexually assaulting a minor while smuggling 25 aliens through the California border region) <https://www.justice.gov/usao-sdca/pr/migrant-smuggler-admits-sexually-assaulting-juvenile-during-travel-united-states>; see, also, UN Office on Drugs and Crime, *Abused and Neglected: A Gender Perspective on Aggravated Migrant Smuggling Offenses and Response*, 44 (2021), [https://www.unodc.org/documents/human-trafficking/2021/Aggravated SOM and Gender.pdf](https://www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf); Medecins Sans Frontiers, *Report: Forced to Flee Central America's Northern Triangle* (May 11, 2017) (finding nearly one-third of women surveyed reported sexual abuse), <https://www.doctorswithoutborders.org/latest/report-forced-flee-central-americas-northern-triangle>.

and 10% involved the death of at least one alien.¹²⁸ The proposed amendment is also consistent with Congress's judgment in 8 U.S.C. § 1324 that for-profit smuggling offenses carry a statutory minimum penalty of three years with an increase to a maximum ten-year penalty for ongoing commercial organizations engaged in dangerous smuggling activities.

The Department supports a definition of transnational criminal organization that is not limited to a specific list of existing groups, as these organizations constantly splinter and form new groups. We support using part of the definition contained in part 590 of title 31, Code of Federal Regulations. The guidelines should incorporate the objective elements of this definition, *i.e.*, that the organization is transnational and engages in criminal activity. The more subjective components of the definition that limit the term "significant transnational criminal organization" to those that pose certain risks require policy determinations based on information not typically in evidence in a smuggling case. These elements are therefore not appropriate for inclusion.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working with the Commission on these and other issues before the end of the amendment year.

Sincerely,

Scott Meisler

Scott Meisler, Deputy Chief, Appellate Section,
Criminal Division
U.S. Department of Justice
Ex Officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

¹²⁸ Human Smuggling Data Briefing, at Slides 30, 31.

Appendix A: Additional federal offenses that should be listed as crimes of violence

The Commission's proposed list of offenses are in black.

The Department's proposed additional offenses are in red and underlined.

Murder and Other Threats to Life

- 8 U.S.C. § 1324(a)(1)(B)(iii) or (iv) or 1324(a)(4)(C)(i) (bringing in and harboring certain aliens in a manner endangering human life or causing death or serious bodily injury)
- 18 U.S.C. § 351 (murder, kidnapping, or assault of member of Congress, the Cabinet, or the Supreme Court)
- 18 U.S.C. § 924(j) (causing death through use of a firearm during or in furtherance of a crime of violence or drug trafficking crime) [covered by proposed §4B1.2(a)(1)(A)(ii)]
- 18 U.S.C. § 930(c) (killing in the course of an attack on a federal facility)
- 18 U.S.C. § 1091 (genocide)
- 18 U.S.C. § 1111 (murder)
- 18 U.S.C. § 1112 (voluntary manslaughter only)
- 18 U.S.C. § 1114 (murder of officer or employee of the United States)
- 18 U.S.C. § 1116 (murder of foreign officials, official guests, or internationally protected persons)
- 18 U.S.C. § 1118 (murder by a federal prisoner)
- 18 U.S.C. § 1119 (foreign murder of United States nationals)
- 18 U.S.C. § 1120 (murder by escaped prisoner)
- 18 U.S.C. § 1121 (killing persons aiding Federal investigations or State correctional officers)
- 18 U.S.C. § 1513(a) (murder of a witness, victim, or an informant)
- 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire)

- 21 U.S.C. § 848(e) (intentional killing in furtherance of a continuing criminal enterprise or narcotics trafficking)

Assault and Physical Injury

- 18 U.S.C. § 111 (assault)
- 18 U.S.C. § 112 (interference with specified foreign persons)
- 18 U.S.C. § 113 (assault)
- 18 U.S.C. § 114 (maiming)
- 18 U.S.C. § 115 (influencing, impeding, or retaliating against a federal official by threatening or harming a family member)
- 18 U.S.C. § 116 (female genital mutilation)
- 18 U.S.C. § 117 (domestic assault by a habitual offender)
- 18 U.S.C. § 118 (interference with protective functions)
- 18 U.S.C. § 242 (deprivation of rights under color of law resulting in bodily injury)
- 18 U.S.C. § 245(b) (federally protected activities)
- 18 U.S.C. § 248 (freedom of access to clinic activities)
- 18 U.S.C. § 249 (hate crime acts)
- 18 U.S.C. § 956 (conspiracy to injure persons or property abroad)
- 18 U.S.C. § 1389 (attacks on United States servicemen on account of service)
- 18 U.S.C. § 1512(a) (tampering with a witness, victim, or an informant)
- 18 U.S.C. § 1513(b) (retaliating against a witness, victim, or an informant)
- 18 U.S.C. § 1651 (piracy under law of nations)
- 18 U.S.C. § 1751 (Presidential and Presidential staff assassination, kidnapping, and assault)
- 18 U.S.C. § 1792 (mutiny and riot in a federal prison)

- [18 U.S.C. § 1841 \(protection of unborn children\)](#)
- [18 U.S.C. § 2261 \(interstate domestic violence\)](#)
- [18 U.S.C. § 2340A \(torture\)](#)
- [49 U.S.C. § 46503 \(interference with security screening personnel\)](#)
- [49 U.S.C. § 46504 \(interference with flight crew members and attendants\)](#)

Threats of Violence

- [18 U.S.C. § 241 \(conspiracy against rights\)](#)
- [18 U.S.C. § 247 \(damage to religious property and obstruction of persons in the free exercise of religious beliefs\)](#)
- [18 U.S.C. § 594 \(intimidation of voters\)](#)
- [18 U.S.C. § 875\(b\) and \(c\) \(interstate threats to injure\)](#)
- [18 U.S.C. § 876\(b\) and \(c\) \(threats to injure by mail\)](#)
- [18 U.S.C. § 894 \(collection of extensions of credit by extortionate means\)](#)
- [18 U.S.C. § 2261A \(interstate stalking\) \(except § 2261A\(1\)\(B\) and \(2\)\(B\)\)](#)
- [18 U.S.C. § 2262 \(interstate violation of protection order\)](#)
- [42 U.S.C. § 3631 \(intimidation with respect to fair housing\)](#)

Sexual Offenses and Offenses Against Children

- [18 U.S.C. § 250 \(civil rights offenses involving sexual misconduct\)](#)
- [18 U.S.C. § 1591 \(sex trafficking of children\)](#)
- 18 U.S.C. § 2241 (aggravated sexual abuse)
- 18 U.S.C. § 2242 (sexual abuse)
- [18 U.S.C. § 2243 \(sexual abuse of a minor or ward\)](#)
- 18 U.S.C. § 2244(a)(1) and (a)(2) (abusive sexual contact)

- [18 U.S.C. § 2251\(a\), \(b\), and \(c\) \(sexual exploitation of children\)](#)
- [18 U.S.C. § 2251A \(selling or buying of children\)](#)
- [18 U.S.C. § 2252A\(g\) \(child exploitation enterprises, if the offense involves a felony violation that would itself be a crime of violence under this subsection\)](#)
- [18 U.S.C. § 2260\(a\) \(production of sexually explicit depictions of a minor for importation into the United States\)](#)
- [18 U.S.C. § 2422\(b\) \(coercion and enticement of minors\)](#)
- [18 U.S.C. § 2423\(a\), \(b\), and \(c\) \(transportation of minors\)](#)

Robbery

- 18 U.S.C. § 1951 (interference with commerce by threats or violence)
- 18 U.S.C. § 2111 (robbery)
- [18 U.S.C. § 2112 \(robbery of personal property belonging to the U.S.\)](#)
- 18 U.S.C. § 2113(a) and (d) (bank robbery)
- [18 U.S.C. § 2114\(a\) \(robbery of mail\)](#)
- [18 U.S.C. § 2115 \(post office burglary\)](#)
- [18 U.S.C. § 2116 \(violent entry of post office facilities\)](#)
- 18 U.S.C. § 2118 (robberies and burglaries involving controlled substances)
- 18 U.S.C. § 2119 (carjacking)
- 49 U.S.C. § 46502 (aircraft piracy)

Violent Damage to Property

- [18 U.S.C. § 81 \(arson\)](#)
- 18 U.S.C. § 844([d](#)), ([e](#)), ([f](#)), and ([i](#)) (arson)
- [18 U.S.C. § 1361 \(government property or contracts\)](#)
- [18 U.S.C. § 1362 \(communication lines, stations or systems\)](#)

- [18 U.S.C. § 1364 \(interfering with foreign commerce by violence\)](#)
- [18 U.S.C. § 1365\(a\) and \(d\) \(tampering with consumer products\)](#)
- [18 U.S.C. § 1366 \(destruction of an energy facility\)](#)
- [18 U.S.C. § 1368 \(injuring law enforcement animals\)](#)
- [18 U.S.C. § 1991 \(trespass to train with intent to commit violence\)](#)
- [18 U.S.C. § 1992 \(violence against mass transportation system\)](#)
- [18 U.S.C. § 2117 \(burglary of carrier facilities\)](#)
- [18 U.S.C. § 2155 \(destruction of national-defense materials\)](#)
- [18 U.S.C. § 2280 \(violence against maritime navigation\)](#)
- [18 U.S.C. § 2280a \(violence against maritime navigation and maritime transport involving weapons of mass destruction\)](#)
- [18 U.S.C. § 2281 \(violence against maritime fixed platforms\)](#)
- [18 U.S.C. § 2281a \(violence against maritime fixed platforms\)](#)
- [18 U.S.C. § 2291 \(destruction of vessel or maritime facility\)](#)

Terrorism and Weapons of Mass Destruction

- [18 U.S.C. § 175 \(prohibitions with respect to biological weapons\)](#)
- [18 U.S.C. § 229 \(weapons of mass destruction\)](#)
- [18 U.S.C. § 831 \(prohibited transactions involving nuclear materials\)](#)
- [18 U.S.C. § 2332 \(terrorism, except section \(a\)\(3\) \(involuntary manslaughter\)\)](#)
- [18 U.S.C. § 2332a \(use of weapons of mass destruction\)](#)
- [18 U.S.C. § 2332b \(acts of terrorism transcending national boundaries\)](#)
- [18 U.S.C. § 2332f \(bombings of places of public use, government facilities, public transportation systems and infrastructure facilities\)](#)

- [18 U.S.C. § 2332g \(missile systems designed to destroy aircraft\)](#)
- [18 U.S.C. § 2332h \(radiological dispersal devices\)](#)
- [18 U.S.C. § 2332i \(acts of nuclear terrorism\)](#)
- [18 U.S.C. § 2339A \(providing material support to terrorists\)](#)
- [18 U.S.C. § 2339B \(providing material support or resources to designated foreign terrorist organizations\)](#)
- [18 U.S.C. § 2381 \(treason\)](#)
- [18 U.S.C. § 2383 \(rebellion or insurrection\)](#)
- [18 U.S.C. § 2384 \(seditious conspiracy\)](#)
- [18 U.S.C. § 2441 \(war crimes\)](#)
- [18 U.S.C. § 2442 \(recruitment or use of child soldiers\)](#)

Kidnapping and Human Trafficking

- 18 U.S.C. § 1201 (kidnapping)
- [18 U.S.C. § 1203 \(hostage taking\)](#)
- [18 U.S.C. § 1581 \(peonage\)](#)
- [18 U.S.C. § 1582 \(vessels for slave trade\)](#)
- [18 U.S.C. § 1583 \(enticement into slavery\)](#)
- [18 U.S.C. § 1584 \(involuntary servitude\)](#)
- [18 U.S.C. § 1585 \(seizure, detention, transportation, or sale of slave\)](#)
- [18 U.S.C. § 1586 \(service on vessel for slave trade\)](#)
- [18 U.S.C. § 1587 \(possession of slave aboard vessel\)](#)
- [18 U.S.C. § 1588 \(transportation of slave\)](#)
- [18 U.S.C. § 1589 \(forced labor\)](#)

- 18 U.S.C. § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor)

Umbrella Offenses

- 18 U.S.C. § 373 (solicitation to commit a crime of violence)
- 18 U.S.C. § 924(c) (possession of a firearm in relation to a crime of violence or drug trafficking crime) [covered by proposed §4B1.2(a)(1)(A)(ii)]
- 18 U.S.C. § 1153 (offenses committed within Indian country, except involuntary manslaughter, felony child neglect, or a felony under section 661)
- 18 U.S.C. § 1952(a)(2) and (3)(B) (crimes of violence related to interstate and foreign travel or transportation in aid of racketeering enterprises)
- 18 U.S.C. § 1959 (violent crimes in aid of racketeering activity)
- 18 U.S.C. § 1962 (racketeering, if the offense involves an act of racketeering as defined in section 1961(1) that would itself be a crime of violence under this section, if the act of racketeering had occurred within the special maritime and territorial jurisdiction of the United States, or in interstate or foreign commerce)

Escape

- 18 U.S.C. § 751 (escape of prisoners in custody of institution or officer)
- 18 U.S.C. § 752 (instigating or assisting escape)
- 18 U.S.C. § 753 (rescue to prevent execution)
- 18 U.S.C. § 756 (escape of internee of belligerent nation)
- 18 U.S.C. § 757 (escape of prisoners of war or enemy aliens)

Appendix B: The Department’s proposal for §4B1.2

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) CRIME OF VIOLENCE.—The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
- (1) involves, or has as an element, the use, attempted use, or threatened use of physical force against the person of another;
 - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or 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).
- (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).

...

(f) When determining whether a person has incurred a conviction for a “crime of violence” or a “controlled substance offense,” the court may examine the elements of the offense of conviction. If those elements include, and are no broader than, the conduct described in (a) or (b), the court should conclude that the offense was a “crime of violence” or a “controlled substance offense.” Notwithstanding the elements of the offense of conviction, the court may also consider any reliable evidence, as set forth in §6A1.3(a), in determining by a preponderance of the evidence whether the conduct underlying the prior conviction establishes that the conviction was a “crime of violence” or a “controlled substance offense.”

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

801 I Street, 3rd Floor
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Chair: Heather Williams

Phone: 916.498.5700

March 18, 2026

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

Re: Public Comment on January 2026 Proposed Amendments

Dear Judge Reeves:

Enclosed are the Federal Public and Community Defenders' supplemental comments on the January 2026 proposed amendments. For ease of reference, we have also attached our initial comments on each proposal, which were filed on March 2, 2026 to serve as witness statements for the March 9 hearing:

[Proposal 1: Sentencing Options](#)

[Initial Comment on Sentencing Options](#)

[Proposals 2-3: Career Offender and Circuit Conflicts](#)

[Initial Comment on Career Offender and Circuit Conflicts](#)

[Proposal 4: Human Smuggling](#)

[Initial Comment on Human Smuggling](#)

We appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Heater E. Williams

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex Officio*
Scott A.C. Meisler, Commissioner *Ex Officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Kathleen C. Grilli, General Counsel

**Federal Public and Community Defenders
Supplemental Comment on Sentencing Options
(January Proposal 1)**

March 18, 2026

Defenders supplement our original comment here to briefly respond to matters raised at last week’s hearing on sentencing options.

I. Part A

As we have explained, both social science and statutory scheme support this amendment, which provides important guidance that the current Manual lacks.¹ The Department of Justice (DOJ) and other opponents of Part A claimed at the hearing that this proposed amendment is unnecessary because federal cases are inherently serious, such that probation is rarely appropriate, and because it will create an additional burden on courts. We address these claims below.

A. The Department’s claims about offense seriousness are unsupported.

The DOJ argued that this amendment is unnecessary, claiming probation is rare because 1) DOJ only prosecutes serious cases, and 2) probation has limited statutory availability.²

As for the DOJ’s first claim, their written statement describes their focus on serious matters with a quote from 1940—nearly half a century before the Sentencing Reform Act (SRA)—from then-Attorney General Robert Jackson.³ This in fact disproves the DOJ’s point: despite a longstanding focus of federal prosecutorial resources on “the most serious and consequential crimes,”⁴ before passage of the SRA, probation was a common sentence in federal court.⁵ Further, Defenders and others have laid out data and history debunking any idea that offense seriousness—as opposed to the original

¹ We include our original comment as an attachment here for ease of reference.

² See [DOJ Witness Statement of Nick Linder](#) at 2-3 (Mar. 9, 2026).

³ See *id.* at 3 (quoting Robert H. Jackson, [“The Federal Prosecutor,” address delivered at the Second Annual Conference of United States Attorneys](#) (Apr. 1, 1940)).

⁴ *Id.*

⁵ See [Defenders’ Comment on the USSC’s 2026 Proposed Amendments: Sentencing Options](#) at 5 (Mar. 2, 2026) (“Defenders’ Initial Comment on Sentencing Options”) (“Prior to the SRA, straight probation accounted for 44% of federal sentences, and 63% of federal sentences included some period of probation. Even among those convicted of ‘violent offenses,’ one-third received probationary sentences.” (citing Cecelia Klingele, [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#), 34 Fed. Sent. R. 322, 323 (2022) (discussing data from 1986))).

Commission's prison-presumptive policy choices—explains the disappearance of probation.⁶ And while districts differ, individual defenders around the country have seen a wide variety of low-level federal offenses prosecuted. The DOJ's claim that federal prosecutions “will, and should, mostly yield prison sentences”⁷ not only defies Congressional intent for the SRA to include a variety of sentence options,⁸ but it also evinces an inherent distrust of courts. The proposed amendment does not change the fact that imprisonment is *always* an option across every zone. With the guidance in the proposed amendment, judges will be better positioned to make an informed decision as to the appropriate sentence type.

As for the second claim, DOJ incorrectly stated that probation was unavailable for “approximately half” of the cases sentenced in fiscal year 2024.⁹ This is a miscalculation. The Department incorrectly compared the number of probation-eligible *U.S. citizens* to the total number of sentenced *individuals*, with a denominator including over 21,000 non-citizens.¹⁰ In fact,

⁶ See *id.* at 5-6 (citing, *inter alia*, Melissa Hamilton, [Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration](#), 51 Hous. L. Rev. 1271 (2014); and Hon. Carlton Reeves, [Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership](#), 36 Fed. Sent. R. 130 (2024)).

⁷ [DOJ Witness Statement](#) at 3.

⁸ See [Defenders' Initial Comment on Sentencing Options](#) at 2-4 (discussing how the text and legislative history of the SRA support the Commission both promoting, and giving courts guidance on, alternatives to incarceration).

⁹ [DOJ Witness Statement](#) at 2-3 (“[I]t is worth remembering that probation is not a legally available sentencing option for a large swath of federal offenders—by our estimate, approximately half of the cases sentenced in Fiscal Year 2024.”).

¹⁰ See *id.* at 3 n.7 (incorrectly comparing number of probation-eligible U.S. citizens from Data Briefing to total number of sentenced cases, including both U.S. citizens and non-citizens). Compare USSC, [Public Data Briefing: Proposed Amendment on Sentencing Options](#) at 6 (Feb. 13, 2026) (showing 27,656 individuals being statutorily eligible for probation in Fiscal Year 2024, noting that “Non-U.S. citizens were excluded from analysis”), with USSC, [2024 Sourcebook of Federal Sentencing Statistics](#) at tbl. 9 (showing 40,038 citizens and 21,304 non-citizens sentenced in fiscal year 2024). Thus, for Fiscal Year 2024, of the 40,038 U.S. citizens sentenced, 27,656 were statutorily eligible for probation (69%).

Commission data show that 69% of U.S. citizens sentenced in fiscal year 2024 were statutorily eligible for probation.¹¹

B. Proposed §5A1.1 provides structure for existing requirements for courts.

The CLC and DOJ both argued that §5A1.1 could create new procedural requirements for courts, including potentially requiring courts to go “one-by-one” through all zones listed in proposed §5A1.1(a)(1)-(4).¹² This is unfounded; the new guideline simply solidifies and structures requirements that already exist in the statute and Guidelines. The Guidelines already require courts to determine a person’s guideline range, which automatically includes a determination of their zone. Nothing changes under the proposed §5A1.1(a), which simply summarizes the existing zones (without any one-by-one consideration requirement).

The CLC witness suggested that if the Commission removed the proposed §5A1.1(b), which would give guidance on “determining the appropriate sentencing option(s) from those [recommended] under the guidelines,”¹³ he would be less concerned about the Commission

¹¹ See sources cited *supra* n. 10. The data briefing did not include the filters used to determine statutory eligibility for probation so we were unable to replicate this calculation across all sentenced cases, but we note that some non-citizens can be excellent candidates for probation.

¹² [CLC Comment to USSC on 2026 Proposed Amendments](#) at 5 (Mar. 6, 2026) (“[T]he 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?”); [DOJ Witness Statement](#) at 5 (alleging that proposed §5A1.1 “could be viewed as interjecting another mandatory procedural step between the existing two-step process”); see also USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 17:02-18:30, 28:30-30:22 (Mar. 9, 2026) (discussing procedural concerns and answering questions from Vice Chair Laura Mate related to those concerns).

¹³ [2026 Proposed Amendments: Sentencing Options](#) at 7 (Jan. 30, 2026). Note: Defenders propose using the word “recommended” in lieu of “authorized” as a global edit to §5A1.1 to avoid the suggestion that the Guidelines are mandatory. See [Defenders’ Initial Comment on Sentencing Options](#) at 16 (suggesting removing the word “authorize[d]” as Guidelines are advisory).

inadvertently creating additional procedural requirements for litigants and courts.¹⁴ But under the SRA, courts are *already required* to consider sentence type (*i.e.*, whether to impose a term of imprisonment, probation, or something else); likewise, the Guidelines require this determination in step one of the two-step process for sentencing.¹⁵ These instructions are codified in 18 U.S.C. §§ 3553(a), 3562(a), and 3582(a); likewise §1B1.1(a)(8) now instructs courts to determine the “sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.”¹⁶ We certainly hope judges already understand this requirement, but it makes sense for the Commission to ensure that they do. As the DOJ itself pointed out while arguing for increases to the human smuggling guideline, “we shouldn’t be relying on § 3553 to hope that judges all get to the right place.”¹⁷

Finally, while a sentencing court is required to explain its reasons for the imposed sentence in a manner that allows for meaningful review,¹⁸ it is not generally required to explain why it did not choose a different sentence.¹⁹

¹⁴ See USSC, [Public Hearing](#) at 28:30-30:22 (CLC Witness) (raising concerns that the proposed §5A1.1(b), as opposed to §5A1.1(a), might be viewed as requiring an additional “step-by-step analysis” not already required by law).

¹⁵ See [Defenders' Priority Letter](#) to USSC at 5 (July, 18, 2025) (discussing statutory framework and order of operations); *see also* USSG §1B1.1 (laying out the two-step sentencing process, which includes §1B1.1(a)(8), instructing courts to “determine from . . . Chapter Five the sentencing requirements and options”); USSC, [Public Hearing](#) at 3:38:08-3:38:17 (FPD Witness) (“And [proposed §5A1.1] is not a different step. It’s not a new step. And it is statutorily required. We are all still in step one, right— calculate the guidelines and the range. This is still step one.”).

¹⁶ While §1B1.1(a)(8) currently covers consideration of sentence type, if the proposed amendment is adopted, we do suggest two small conforming changes:

“(8) For the particular guideline range **and zone**, determine from Parts **A B** through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.”

¹⁷ USSC, [Public Hearing](#) at 5:20:13-5:20:18.

¹⁸ See *Gall v. United States*, 552 U.S. 38, 50 (2007) (“After settling on the appropriate sentence, [the court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.”).

¹⁹ See 18 U.S.C. §3553(c) (“The court, at the time of sentencing, shall state in open court the reasons for *its imposition of the particular sentence*” (emphasis added)); *see also* *Gall*, 552 U.S. at 51 (describing bases for appeal including “failing to adequately explain *the chosen sentence*” (emphasis added)); *id* at 54 (explaining

Section 5A1.1 would not convey requirements to sentencing courts beyond those that already exist.

II. Part B

Opponents of Part B of this amendment misused relevant social science literature and conflated supervised-release-violation proceedings with front-end sentencing decisions. We correct these misconceptions below.

A. DOJ and POAG misread the supervision literature.

POAG and DOJ misread certain studies regarding supervision practices to caution against Part B's zone expansion.²⁰ The studies they cited are inapposite to the proposed amendment, which simply expands the recommended front-end sentence options for certain groups of people to include other sentence types, in addition to straight imprisonment.

The POAG witness statement cited studies showing that over-supervising low-risk people can increase the risk of those people recidivating.²¹ But the studies focused on the relationship between supervision intensity and supervision outcomes (arguing in favor of low-intensity methods); they did not compare high-intensity supervision to *imprisonment*.²² And it does not follow that front-end imprisonment leads to

that, at a sentencing hearing, "it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative"). A court, however, will normally explain why it has rejected the government's or defense's nonfrivolous arguments to impose a different sentence, and why it has deviated from the guidelines when imposing a particular sentence. *Rita v. United States*, 551 U.S. 338, 357 (2007); *Gall*, 552 U.S. at 51; § 3553(c)(1).

²⁰ See, e.g., [POAG Witness Statement to USSC on 2026 Proposed Amendments](#) at 2 (Mar. 2, 2026); [DOJ Witness Statement](#) at 7.

²¹ [POAG Witness Statement](#) at 2 (citing, e.g., Thomas H. Cohen, et al., *The Supervision of Low-Risk Federal Offenders: How the Low-Risk Policy Has Changed Federal Supervision Practices without Compromising Community Safety*, 80-JUN Fed. Probation 3 (2016); Haci Duru, et. al, *Does Reducing Supervision for Low-risk Probationers Jeopardize Community Safety?*, 84-JUN Fed. Probation 21 (2020)).

²² See, e.g., [Cohen, et al.](#) at 9 ("Low risk [individuals] should be provided with minimal supervision services, because . . . correctional interventions aimed at reducing recidivism . . . can actually produce higher recidivism rates for this risk group." (citations omitted)); [Duru, et. al.](#) at 21 ("The following study examines the relationship between supervision intensity and supervision outcomes . . . among low-risk [individuals].").

better outcomes, nor do these studies support the POAG's arguments against this amendment, which does not move a single person from low-intensity supervision to high.

The DOJ argues against Part B's expansion because "extensive periods of intensive supervision or community confinement" can "lead to a revolving door of violations."²³ Confusingly, the DOJ grounds its opposition to expanding alternatives to prison by citing with approval a Vera Institute of Justice report opposing mass incarceration.²⁴ The report details how probation, originally seen as a "solution to the problem of mass incarceration[,] can ultimately result in incarceration and thus contribute to jail populations."²⁵ Importantly, that report encouraged *reforms to probation* practices and *greater use of other, less punitive, alternatives* to prison to avoid unnecessary incarceration, not choosing prison over probation in the first instance.²⁶

Defenders agree that courts should avoid imposing over-long terms of probation and supervised release, along with unnecessary and onerous conditions.²⁷ We also agree that in some cases even a sentence to straight probation is more punitive than necessary, when perhaps a fine would

²³ [DOJ Witness Statement](#) at 7.

²⁴ Compare [DOJ Witness Statement](#) at 7 & n. 24 (contending that lengthy community confinement "lead[s] to a revolving door of violations" (citing Alex Roth et al., Vera Inst. Just., [The Perils of Probation: How Supervision Contributes to Jail Populations](#) 5 & n.17 (2021))), with [Roth et. al.](#) at 31 (calling for further study of "the problem of probation's impact on jail populations" so that jurisdictions may take "more targeted steps to reduce the use of jail for probation violations," which is "essential not only to reduce the number of people in jail, but also to reverse the trend of probation being used as an . . . auxiliary of mass incarceration").

²⁵ [Roth et. al.](#) at 1.

²⁶ *Id.* at 29-31.

²⁷ See, e.g., [Defenders' Comment on the USSC's 2025 Supervised Release Proposed Amendment](#) at 10-16 (Mar. 3, 2025) (encouraging the Commission to remove the former minimum supervised release term lengths and prune the list of standard conditions of supervised release); [Defenders' Reply Comment on the USSC's 2025 Supervised Release Proposed Amendments](#) at 5-6 (Mar. 18, 2025) (discussing testimony and studies regarding negative consequences of unnecessary supervision conditions).

suffice.²⁸ But that does not undercut the wisdom of this amendment, which provides for the individualized consideration of additional front-end sentence options.

B. Individual choices at supervised release revocation proceedings do not counsel against expanding zones B and C.

As further grounds to reject Part B of the amendment, the DOJ argued that some individuals facing supervised-release-revocation proceedings prefer imprisonment to continued supervision.²⁹ The implied suggestion was that people being sentenced *for the instant federal offense* would prefer a sentence of straight imprisonment—which very often includes a period of supervised release to follow³⁰—rather than a probationary or alternative sentence. This comparison to the supervised release context is irrelevant for two primary reasons. First, individual choices made in the context of supervised-release violations speak to the difficult nature of supervision following life-altering terms of imprisonment.³¹ Back-end revocation proceedings are very different

²⁸ 18 U.S.C. § 3551(b) (“An individual found guilty of an offense shall be sentenced . . . to— (1) a term of probation . . . ; (2) a fine . . . ; or (3) a term of imprisonment . . .”).

²⁹ [DOJ Witness Statement](#) at 7 (“Indeed, in our experience, defendants at supervised release violation hearings who are given the choice between a period of incarceration with no supervision to follow or a longer period of supervision with additional constraints will choose the incarceration option.”); *see also* USSC, [Public Hearing](#) at 3:18:35-3:21:10 (DOJ Witness) (responding to a question from Chair Reeves about whether a lengthier term of supervision could reasonably be viewed as “counterproductive” when the only alternative is imprisonment, by focusing on individual preferences at back-end supervised-release-revocation hearings rather than front-end sentencing hearings).

³⁰ While data on the impact of last year’s supervised release amendment remain to be seen, data from before that amendment indicate the imposition of supervised release has been almost routine. USSC, [Quick Facts: Supervised Release](#) (FY 2024) (90% of sentences including a term of imprisonment also included a term of supervised release).

³¹ *See* [Defenders’ Initial Comment on Sentencing Options](#) at 11 n.36 (citing 2025 witness statements discussing difficult nature of supervision after prison). *Cf.* DOJ, [Report on Resources and Demographic Data for Individuals on Federal Probation and Supervised Release](#) 15-16 (2023) (noting that, among the cases revoked in fiscal years 2021 and 2022, technical violations—which did not include conduct constituting crimes—made up approximately two-thirds of federal revocations of supervised release and probation combined).

from front-end sentencings, and individual back-end decisions are no reason to take additional front-end sentencing options off the table for everyone.³²

Second, at the front end, it is hard for us to imagine many clients who would choose prison over probation.³³ Our clients seeking probation or alternative sentences typically have jobs, bills to pay, children to feed, and parents to care for; being removed from their community, even for a short while, can have a devastating impact on them and their families.³⁴ And while broader data are scarce given the low percentage of probation terms imposed generally, data from the Administrative Office of the U.S. Courts indicate that individuals sentenced to probation have relatively low revocation rates.³⁵

III. The fiscal and human costs of imprisonment support both parts of this amendment.

Finally, at last week's hearing (as at the February hearing), Commissioners asked the DOJ and CLC witnesses whether their amendment

³² The DOJ also overgeneralizes. Individuals being sentenced—whether for the instant federal offense or for a violation of probation or supervised release—are not a monolith. While some individuals facing revocation might prefer a short prison sentence with no supervision to follow over continued or additional supervision, that is certainly not true of everyone—especially people who would risk losing housing, employment, or even custody of their children if their community supervision was interrupted by a prison stay. The DOJ simply cannot speak for our clients on this issue. The group best situated to speak on behalf of sentenced individuals is the SIAG, which supports expanding zones B and C. See [SIAG Witness Statement of Dr. Shaneva D. McReynolds](#) at 3 (Mar. 2, 2026).

³³ Each of our clients is a unique individual, of course, and the Supreme Court has made clear that each person's sentence must be individualized. See *Gall*, 552 U.S. at 50 (discussing how the sentencing judge “must make an individualized assessment based on the facts presented”).

³⁴ See [Defenders' Initial Comment on Sentencing Options](#) at 8 (“Even short terms of imprisonment can be incredibly disruptive . . . by interfering with employment, family stability, and community ties that are themselves protective against future criminal conduct.” (collecting sources)); see also [SIAG Witness Statement](#) at 2 (discussing how “[e]ven a short custodial sentence would have been destabilizing” for 21-year-old suffering from mental health issues).

³⁵ See U.S. Courts, [Data Table E-7A: Federal Probation System – Post-Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2025](#) (showing that among cases terminated during the reporting period, 11% of probation cases ended in revocation, as opposed to 37% of supervised release cases ending in revocation).

positions account for the costs of incarceration. Defenders appreciate the question: beyond the human costs, imprisonment is extremely costly compared to alternative sanctions.³⁶ This supports the inclusion of other less expensive (yet effective) sentence options in the Manual. At the February hearing, the DOJ methamphetamine witness's answer revealed that prosecutors are not factoring these costs into their charging decisions.³⁷ In March, the CLC witness indicated that there are judges who consider costs and others who doubt that costs are pertinent to their sentencing decisions.³⁸ Yet, POAG, DOJ, and CLC consistently urge the Commission to account for probation's resources (or lack thereof) and the courts' time and resource constraints in discussing potential amendments and retroactivity. Sentencing policymakers should not ignore the dramatic costs of incarceration—both in dollars and in human lives.³⁹ Thus, we urge the Commission to factor this consideration into its decision to adopt this amendment.

³⁶ US Courts, [The Public Costs of Supervision Versus Detention](#) (June 5, 2025) (showing that in fiscal year 2024, the annual cost to imprison a person after sentencing was \$51,711 versus only \$4,742 to supervise them in the community after sentencing).

³⁷ See USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 1:35:36-1:38:49 (Feb. 17, 2026) (DOJ Witness) (responding to Chair Reeves' question regarding cost of incarceration stating that DOJ does not consider costs of incarceration in pursuing drug mandatory minimums).

³⁸ USSC, [Public Hearing](#) at 25:56-26:30.

³⁹ See also [Defenders' Initial Comment on Sentencing Options](#) at 6 (discussing § 994(g) and unsafe conditions within BOP).

**Federal Public and Community Defenders
Comment on Sentencing Options
(January Proposal 1)**

March 2, 2026

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Defenders enthusiastically support the proposed amendment on Sentencing Options. Part A would add new introductory commentary to Chapter Five of the Guidelines Manual, underscoring the importance of the initial determination of sentence type and the role of non-imprisonment sentences. It would also create a new guideline, §5A1.1. This new provision would, for the first time, explicitly direct courts to decide the appropriate sentence type before deciding on sentence length and conditions, and it would guide them in this decision. Part B would increase the number of people who qualify for a non-prison sentence under the Guidelines by expanding Zones B and C of the Sentencing Table.

Below we recommend ways this proposal could go further to encourage alternatives to prison in appropriate cases. But at a minimum, the Commission should adopt this amendment. The proposed changes (as well as our suggested improvements) are empirically justified. And they better align Chapter Five with the Sentencing Reform Act (SRA), which requires the Commission to provide guidance to courts not only on the appropriate length of a prison sentence, but also on whether to impose a prison sentence in the first place,¹ and contemplates that courts will consider the kinds of sentences available before turning to the question of sentence length or amount.

And both parts of this amendment recognize what Defenders and our clients have long understood: Probation *is* punishment—it involves significant restrictions on liberty and onerous conditions—but it also provides a transformative chance at rehabilitation, which in turn reduces recidivism and makes communities safer. As laid out below, both statute and social science support the proposed amendment, which we hope will result in fewer prison-only sentences, while promoting the important statutory purposes of sentencing.

Our Comment proceeds in three parts. Part I explains how this amendment is consistent with SRA text and legislative history. Part II discusses how developments in social science reinforce the need for this amendment. And Part III affirms Defenders’ support for the proposal and suggests small modifications. Specifically, we offer additional or alternate text to ensure the new §5A1.1 best achieves the Commission’s goals. We also offer support for the proposed expansion of zones in Part B, and we suggest

¹ See Section I, *infra* (discussing 28 U.S.C. § 994(a)(1)(A) & (B); 18 U.S.C. § 3553(a)(3), (4)).

an additional expansion of Zones B and C further for people in Criminal History Categories (CHCs) II and III.

I. The statutory scheme for federal sentencing supports the proposed amendment, which would ameliorate the Guidelines’ current default sentence of imprisonment.

As we explain below, the Commission’s organic statute is unequivocal: The Guidelines must instruct courts not only on how to select the length of any sentence, but also on how to determine what type of sentence to impose. Despite this, the original Commission made a series of decisions that were at odds with this mandate and created a default outcome of imprisonment, with grave consequences.² The current proposal is an important step toward bringing Chapter Five in line with the SRA and expanding the universe of available punishments under the Guidelines.

A. The SRA supports giving courts guidance on, and promoting the use of, a variety of sentence types.

The SRA’s text instructs sentencing courts to consider the § 3553(a) factors “in determining *whether* to impose a term of” probation or imprisonment, distinct from its consideration of those same factors in determining the length of any sentence.³ And it further instructs the Commission to guide courts not just as to the length of sentence, but also on “whether to impose a sentence to probation, a fine, or a term of imprisonment,” so that the sentence best achieves the purposes of sentencing in each individual case.⁴

In drafting the SRA, Congress did not provide for a single default sentence type and showed no preference or presumption for one sentence over

² See Section I.B. *infra* (discussing original Commission choice to disregard SRA mandate and subsequent decrease in federal noncustodial sentences).

³ 18 U.S.C. § 3582(a); 18 U.S.C. § 3562(a).

⁴ § 994(a)(1)(A); *see also* § 994(f) (requiring the Commission, in designing guidelines, to “promote the purposes set forth in section 991(b)(1),” which in turn discusses the § 3553(a) factors, disparity, individualization, and advancement in knowledge of human behavior, among other things).

another.⁵ Legislators explicitly chose not to include a presumption for, or against, sentences of probation.⁶ The SRA framers desired, “in all cases . . . to encourage the intelligent balancing of often competing considerations,” through individualized consideration of the § 3553(a) factors.⁷

Probation, of course, is one of three available punishments under the SRA—not just for misdemeanors but also for most C, D, and E felony offenses.⁸ Outside of a handful of prescriptions, the SRA leaves to the Commission the task of designing guidelines that align with each of the

⁵ When Congress intended a certain type of sentence to prevail in a certain type of case, it said so explicitly. *See, e.g.*, 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” involving a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”); § 994(h) (mandating “that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized” for certain “categories of defendants”). Even when commanding the Commission to create guidelines reflecting that “in many cases, [pre-SRA] sentences do not accurately reflect the seriousness of the offense,” the text does not state that prison is the only appropriately serious sanction. *See* 28 U.S.C. § 994(m). The absence of a presumptive sentence type in the mine-run case is notable considering that at the time of the SRA, most people received some period of probation. *See* Cecelia Klingele, [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#), 34 Fed. Sent. R. 322, 323 (2022) (“In 1986, for example, straight probation accounted for 44.4% of federal sentences, and 62.5% of federal sentences included some period of probation.”).

⁶ [S. Rep. No. 225](#), 98th Cong., 2d Sess. at 91 (Sept. 14, 1983) (“[T]he Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission ... and the courts, the full exercise of full discretion in tailoring sentences to the circumstances of individual cases.”).

⁷ *Id.* at 91-92 (discussing 18 U.S.C. § 3562, which directs courts to “consider the factors set forth in section 3553(a)”).

⁸ 18 U.S.C. § 3551(b) (authorizing sentences to a term of probation, a fine, or a term of imprisonment); 18 U.S.C. § 3561(a) (describing the categories of offenses for which probation is not available); *see also* *Esteras v. United States*, 606 U.S. 185, 196 (2025) (“Fines, probation, and imprisonment are a court’s primary tools for ensuring that a criminal defendant receives just deserts.”). While the bulk of this Comment focuses on probation, we note that fine-only sentences are also often permitted under the statutory scheme, which also allows for a wide variety of creative intermediate sanctions via supervision conditions.

purposes of § 3553(a)(2),⁹ which can be achieved by multiple forms of punishment.¹⁰

Moreover, several provisions of that Enabling Statute seem to counsel in favor of far more probationary and alternative sentences than courts impose today. For example, § 994(j) focuses on the appropriate nature of noncustodial sentences for many individuals without criminal history. Section 994(g) requires the Commission to consider correctional resources and minimize the risk of exceeding federal prison capacity. And § 994(k) directs the Commission to avoid recommending imprisonment as a means of rehabilitation.

B. The inaugural Commission's choice of imprisonment as default punishment failed to give courts important guidance, with grave consequences.

Despite clear statutory text and Congressional intent, the inaugural Commission created a Guidelines structure that did not comply with the SRA and under-promoted non-prison sentences. The original Commission failed to give guidance on sentence type, and instead explicitly and implicitly positioned imprisonment as the default sentencing option.¹¹ Since the dawn

⁹ See 28 U.S.C. § 991(b)(1)(A) (requiring that the Commission “establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18”).

¹⁰ See Hon. Lynn Adelman & Jon Deitrich, [How Federal Judges Contribute to Mass Incarceration and What they Can Do About It](#), 99 *Judicature* 72, 77 (2015) (“Judges also need to overcome the notion that probationary sentences are necessarily lenient The conditions of probation may serve to punish . . . , to incapacitate . . . , and to deter Finally, probation can ensure that a defendant receives needed correctional treatment”); Ellen C. Brotman, [Make Probation a Real Option at Sentencing](#), 23 *Fed. Sent. Rep.* 257, 258 (2011) (“Given how high the statutory eligibility for probation reaches, it is patently unreasonable—and contrary to the statutory structure of federal sentencing as a whole—to focus on a guideline chart that treats probation as only possibly appropriate in the most trivial or extremely mitigated cases.”).

¹¹ See Defenders’ [Priority Letter to USSC](#) at 4 (July, 18, 2025) (discussing failure of Guidelines to effectuate SRA mandate); Tina M. Woehr, [Federal Alternative Sentences: A Critically Endangered Species](#), *Sentencing Matters Substack* (Jan. 5, 2026) (“[T]he Guidelines Manual has, from the start, treated imprisonment as the default outcome, both explicitly and implicitly.”).

of the Guidelines regime, commenters have bemoaned this choice as a misapprehension of the statutory mandate.¹²

Prior to the SRA, straight probation accounted for 44% of federal sentences, and 63% of federal sentences included some period of probation.¹³ Even among those convicted of “violent offenses,” one-third received probationary sentences.¹⁴ By contrast, in fiscal year 2024, only 12% of statutorily eligible U.S. citizens—already a much reduced population after passage of the SRA—receive a straight probation sentence, with another 8% receiving something other than a prison-only sentence.¹⁵ While multiple factors have contributed to the disappearance of non-prison sentences, the Guidelines’ prison-presumptive approach has been a leading factor.¹⁶

¹² See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1955 (1988) (criticizing the original Commission’s failure to address the statutory mandate to reduce probability of prison overcrowding even though “[a] number of obvious options were available” to do so including “propos[ing] alternatives to incarceration as [a] means of reducing the incarceration rate.”); Steven Lindemann, [Opening the Federal Sentencing Guidelines to Alternatives](#), 15 William Mitchell L. R. 555, 600 (1989) (“This article makes a prima facie case that the Commission did not adequately consider nonimprisonment sanctions, the purposes of sentencing, and the impact of the guidelines on prison overcrowding.”); Daniel Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1706 (1992) (“Congress said nothing in the statute about abolishing or even drastically curtailing probation. . . . The Commission, however, drafted guidelines containing a presumptive sentence of imprisonment for every felony. . . .”).

¹³ See [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#) at 323 (discussing data from 1986).

¹⁴ *Id.*

¹⁵ USSC, [Public Data Briefing: Proposed Amendment on Sentencing Options](#) at 6 (Feb. 13, 2026). While the data briefing focused on U.S. citizens, we note that many non-citizens are eligible for, and can be good candidates for, probation, depending on the offense and circumstances.

¹⁶ Melissa Hamilton, [Prison-by-Default: Challenging the Federal Sentencing Policy’s Presumption of Incarceration](#), 51 Houston L. Rev. 1271, 1299-309 (2014) (using sentencing data to establish that “the Commission is largely, perhaps primarily, responsible for a trend toward reliance on incarceration in the vast majority of cases”); see also USSC, [Supplementary Report on the Initial Sentencing Guidelines and Policy Statements](#) at 60 (1987) (“The projections of our basic model indicate that the guidelines will reduce the number of straight probation

The original Commission's choice caused tremendous harm, including contributing to the exploding federal prison population¹⁷ and compounding racial disparities.¹⁸ And despite the Commission's statutory requirement to minimize the likelihood of prison overcrowding, these choices also contributed to the crisis facing the Bureau of Prisons (BOP) system.¹⁹ BOP facilities are unsafe, with insufficient staffing, crumbling facilities, and insufficient medical, psychological, or rehabilitative options available to address the needs of those incarcerated.²⁰ The Commission has acknowledged the

terms. . . . Second, the guidelines will, for a number of crimes, increase somewhat the average length of time served.”).

¹⁷ Hon. Carlton Reeves, [*Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership*](#), 36 Fed. Sent. R. 130, 132 (Feb. 1, 2024) (highlighting that original Commission chose “to write guidelines that made incarceration the default sanction in nearly every case” and “there is no doubt that the policy choice made forty years ago is a major reason why alternatives to incarceration today are all but nonexistent in the federal system”); *see also* Rachel Barkow, [*Sentencing Guidelines at the Crossroads of Politics and Expertise*](#), 160 UPALR 1599, 1605 (2012) (“between 1995 and 2004, the federal prison population increased at an annual average rate of 7.8%, compared to an average annual increase of 2.7% in the states.”); Defenders’ 2025 [Priority Letter](#) at 3 n.6 (discussing impact of Guidelines’ structural failure to incorporate probation sentences).

¹⁸ *See Alternatives To Incarceration and the Sentencing Commission: A Call For Progress Through Partnership at 130-132* (discussing racial disparities in criminal legal system over past century); Jelani Jefferson Exum, [*Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*](#), 58 Am. Crim. L. Rev. 1685, 1686 (2021) (highlighting importance of Reconstruction period in the “criminal sentencing context where law and policy have been used to perpetuate racialized oppression”).

¹⁹ *See* Congressman Jamie Raskin et al., [Letter to BOP Director re: Staffing Shortages](#) at 1-2 (Feb. 20, 2026) (“We are concerned that staffing issues have reached a crisis point.”); *see also* [Defenders’ Comment on the USSC’s 2025 Drug Offense Proposed Amendments](#) at 8-13 (Mar. 3, 2025) (discussing BOP crisis); Max S. Wolson et al., [From Sickness to Cure: Obeying 28 U.S.C. § 994\(g\)’s Mandates as a Remedy to Bureau of Prisons Overcrowding](#), 38 Fed. Sent. Rep. 98 (publication forthcoming May 2026) (same).

²⁰ *See, e.g.,* Keri Blankinger, [*We’re Broken: As Federal Prisons Run Low on Food and Toilet Paper, Corrections Officers are Leaving in Drove for ICE*](#), ProPublica (Nov. 21, 2025); Sen. Richard J. Durbin, [Priority Letter to USSC re: BOP practices](#) at 5 (July 18, 2025) (urging Commission to consider amendments that account for the limited nature and capacity of facilities and services available within BOP); Nicole B. Godfrey, [*Decades of Indifference and Failures in Accountability in the Provision of Medical Care in Federal Prisons*](#), 25 Nev. L. J. 755, 755 (Spring 2025) (describing “BOP’s well-known institutional failures in its provision of medical care

difficulty of incentivizing sentences other than straight imprisonment, yet an effective solution has proved elusive, perhaps until now.²¹

II. Advancements in knowledge of human behavior show the proposed amendment would advance public safety.

Moving on from the inaugural Commission’s past oversights, advancements in our knowledge of human behavior since passage of the SRA support the proposed amendment’s recalibration of the Guidelines’ prison-first structure, in terms of promoting the purposes of sentencing.²²

Specifically, research has called into question overreliance on incarceration as a means of promoting public safety. We now know that the value of imprisonment in promoting general deterrence is questionable at best: research shows that certainty of apprehension, as opposed to severity of sanction, carries more deterrent value.²³ Thus, expanding the availability of non-prison sentences will not diminish the general deterrent purpose of sentencing.²⁴

to incarcerated people”); OIG, DOJ, [Top Management and Performance Challenges Facing the DOJ 2025](#) at 2 (“The Federal Bureau of Prisons (BOP) continues to face persistent challenges, most critically those presented by staffing shortages, deteriorating infrastructure, and the introduction of contraband.”).

²¹ Defenders’ 2025 [Priority Letter](#) at 10 (discussing past Commission attempts to promote alternative sentences); *see also* USSC, [Alternative Sentencing in the Federal Criminal Justice System](#) at 1 (2015) (noting “continued decreasing trend in the imposition of alternative sentences” despite previous expansion of zones); USSC, [Alternatives to Imprisonment Project Report](#) at 4 (1990) (noting a “clear need exists for the U.S. Sentencing Commission to consider alternatives to imprisonment . . .”).

²² The Commission has an ongoing duty to ensure that the Guidelines “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. § 991(b)(1)(C).

²³ Nat’l Inst. of Justice, DOJ, [Five Things About Deterrence](#) at 5 (May 2016); *see also* Roger Pryzbylski et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship*, 36 Fed. Sent. Rep. 81, 82 (2023) (“The certainty and swiftness of consequences function as a more effective crime deterrent than their severity.”); Daniel Nagin, [Incarceration & Public Safety](#), Arnold Ventures (July 2022) (explaining how certainty principle “calls into question the effectiveness of over four decades of U.S. crime-control policy predicated on the premise that lengthy prison sentences . . . are an effective deterrent to crime”).

²⁴ § 3553(a)(2)(B).

With respect to recidivism, noncustodial sentences can be just as, if not more, effective than incarceration.²⁵ Defenders have witnessed the social harms inflicted by removing vast numbers of people from their communities.²⁶ Even short terms of imprisonment can be incredibly disruptive—especially to people who have made steps toward post-offense rehabilitation—by interfering with employment, family stability, and community ties that are themselves protective against future criminal conduct.²⁷ By directing courts to actively engage with the initial sentence type decision, along with broadening the availability of alternative sanctions

²⁵ Kevin Wolff & Michael T. Baglivio, [Priority Letter to USSC](#) at 1 (July 2025) (“A broad literature base demonstrates that incarceration, especially short-term custodial sentences, is less effective at reducing reoffending compared to structured community sanctions.”); Nat’l Rsch. Council, [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) 156 (2014) (“[T]he body of credible evidence on the effect of the experience of imprisonment on recidivism is small, that evidence consistently points either to no effect or to an increase rather than a decrease in recidivism. Thus, there is no credible evidence of a specific deterrent effect of the experience of incarceration.”); FWD.us, [Priority Letter to USSC](#) at 2 (July 18, 2025) (discussing “meta-analysis of 116 studies that compared people who were sentenced to jail or prison with people who received noncustodial sanctions like probation found that incarceration either has no impact on a person’s likelihood of committing a crime in the future or increases it.”).

²⁶ See, e.g., [Defenders’ 2025 Comment re: Drug Offenses](#) at 7 (Mar. 3, 2025) (noting how mass incarceration has “destabiliz[ed] families and communities—factors that are linked to *increased* crime and *increased* demand for drugs” (emphasis in original); [Defenders’ Letter to the USSC](#) at 26 (July 23, 2012) (encouraging alternatives to incarceration based upon criminogenic nature of imprisonment).

²⁷ See [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) at 152 (2014); see also Scottish Government, Justice Analytical Servs., [What Works to Reduce Reoffending: An Update of the Evidence on Imprisonment and Community Disposals](#) at 16 (June 2025) (A “review by the Sentencing Council for England and Wales found little evidence for effective or beneficial outcomes in respect of short term prison sentences . . . whilst studies . . . also highlight concerns about short sentences in particular.”) (citations omitted); Melissa Hamilton, [Priority Letter to USSC](#) at 5 (July 2025) (discussing failure of short imprisonment terms to rehabilitate and their exacerbation of reoffending); Youness Nafid et al., [The Role of Criminal Alternatives as a Future in Achieving Security](#), 19 Int’l J. Crim. Just. Sci. 552, 563 (2024) (describing criticisms of short-term incarceration as neglecting “rehabilitative and reintegrative aspects of punishment,” and contending it fails “allow for meaningful correction in [individuals] but tends to perpetuate criminal behavior.”).

under the Guidelines, the proposed amendment can promote recidivism reduction.²⁸

As we explained last month in the context of the proposed post-offense rehabilitation adjustment, since the adoption of the Guidelines, scientific developments have shed light on the dynamic nature of a person’s risk to re-offend.²⁹ In short, people change. Dynamic risk factors fluctuate over time and are receptive to intervention.³⁰ And a growing body of literature recognizes the importance of protective factors, which can decrease the likelihood of reoffending.³¹ A modern-day understanding supports interventions available via probationary sentences as recidivism prevention, such as the Risk-Need-Responsivity model of tailoring sentencing interventions to individual need.³² The proposed amendment provides an important opportunity to incorporate these developments into the Guidelines, as directed by § 991(b)(1)(C).

And despite outdated misconceptions, probation is not simply rehabilitative; it is also highly punitive.³³ The Supreme Court has

²⁸ § 3553(a)(2)(C).

²⁹ [Defenders’ Comment on the USSC’s 2026 Post-Offense Rehabilitation Proposed Amendments](#) at 2-4 (Feb. 10, 2026); *see also* [Hamilton 2025 Priority Letter](#) at 11 (“Incorporating dynamic factors into sentencing promotes proportionality (by aligning the severity of punishment with actual risk), fairness (by recognizing human capacity for change), and public safety (by targeting interventions to address criminogenic needs).”).

³⁰ [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 2-3.

³¹ *Id.*

³² [Wolff & Baglivio 2025 Priority Letter](#) at 1 (discussing risk-need-responsivity framework); *see also* Devon L. L. Polaschek, *Desistance and Dynamic Risk Factors Belong Together*, 22 Psychol., Crime & L. 171, 179 (2016) (discussing the Risk-Need-Responsivity model); James Bonta & Donald A. Andrews, *The Psychology of Criminal Conduct* at 19 (6th ed. 2017) (noting that “Risk-Need-Responsivity (RNR) model of [individual] assessment and rehabilitation . . . has become the premier model to guide applications in corrections and criminal justice.”).

³³ § 3553(a)(2)(B); *see also, e.g.*, Fiona Doherty, [Obey All Laws and Be Good: Probation and the Meaning of Recidivism](#), 104 Geo. L. J. 291, 294, 354 (2016) (examining probation systems across the country, which “wield an almost farcical level of control over people’s lives” and concluding that “although probation is often invoked as a solution to the problem of overincarceration, it should instead be analyzed as part of the continuum of excessive penal control.”); Cecelia Klingele,

acknowledged that federal supervised probation is punishment, and that its many conditions “substantially restrict” one’s liberty.³⁴ Especially with taxing conditions such as intensive supervision or electronic monitoring, probation operates as a form of intrusive and punitive control over almost every aspect of an individual’s life.³⁵ And the lived experience of those being supervised confirms that even the forms of supervision not intended to be punitive, such as supervised release and home confinement, can prove to be onerous and a

[*Rethinking the Use of Community Supervision*](#), 103 J. Crim. L. & Criminology 1015, 1065 (2013) (discussing the connection between the rise in probationers and the rise in incarceration and arguing that by “limiting the use, duration, and conditions of probation and post-release supervision, lawmakers can succeed in reducing unnecessary revocation while also ensuring the continued legitimacy of community sanctions.”); *see also* Vera Inst. Just., [*The Perils of Probation: How Supervision Contributes to Jail Populations*](#) at 1 (Oct. 2021) (contending “[p]robation has been considered an alternative to incarceration, but it has become more common and more punitive over time.”).

³⁴ *Gall v. United States*, 552 U.S. 38, 48 (2007) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)) (People “on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.”). The statute on probation conditions lists nine mandatory conditions and 23 discretionary conditions. 18 U.S.C. § 3563(a), (b).

³⁵ Michelle S. Phelps et al., [*Beyond “Pains” and “Gains”: Untangling the Health Consequences of Probation*](#), 10 Heath & Just. 29, 16 (Oct. 2022) (finding “probation provides both pains and gains, connecting people to services and providing a form of coercive motivation, while also burdening precarious adults with significant demands and new legal risks”); U.S. Courts, [*Post-Conviction Supervision*](#) (describing common supervision strategies of federal probation officers of regular monitoring; restrictions such as curfews or abstinence; interventions and required treatments; and contact with family, friends, and employers); Marina Richter et al., [*Punitiveness of electronic monitoring: Perception and experience of an alternative sanction*](#), 13 European J. of Probation 262, 275 (2021) (exploring literature and concluding the punitiveness of electronic monitoring may depend on how it is used and noting how electronic monitoring “as a means of controlling people on parole turns it into an additional punishment because it substantially restricts freedom of movement and deprives people of the dynamics of family, work and life in general.”); *see also* Carmen L. Diaz et. al, [*A retrospective study of the role of probation revocation in future criminal justice involvement*](#) 93 J. Crim. Just. 102225 (Jul.-Aug. 2024) (“Revocation broadly does not appear to influence future criminal justice contact. Instead, revocation seems to indicate that an individual is already following a trajectory of misconduct. Among low-risk probation clients however, technical violations are particularly harmful.”).

potential trapdoor into prison.³⁶ Further, unlike with supervised release, probation violations are potentially subject to a full resentencing, meaning that probation violations carry the risk of even greater punishment through incarceration.³⁷ In the federal system, probation gives individuals an opportunity at rehabilitation that they would not receive in prison, but that does not take away from the fact that it is also deeply punitive.

III. The Commission should adopt the proposed amendments, with modifications.

Defenders support the Commission’s proposal, which directs courts to contemplate sentence type before sentence length and increases sentencing options for more individuals by expanding Zones B and C. As discussed above, noncustodial and alternative sentences are far too rare despite being statutorily available. And Congress did not mandate this result; the inaugural Commission chose it. The proposed amendment helps this Commission correct course. We urge the adoption of both Parts of this amendment, and below we suggest modest modifications that could help the proposal better promote the statutory purposes of sentencing.

A. Part A

Defenders urge the Commission to adopt, with slight modifications, both Part A’s proposed introductory commentary and the new proposed guideline, §5A1.1.³⁸ For years, stakeholders have asked the Commission to provide more guidance on the threshold question of sentence type.³⁹ For the

³⁶ See [Statement of Rita Gray](#) to USSC on Supervised Release at 1 (March 13, 2025) (discussing supervision restrictions that led to missing child’s graduation, losing professional opportunities, and missing housing opportunities); [Statement of Eric Hicks](#) to USSC on Supervised Release at 4 (March 3, 2025) (discussing loss of travel ability, agency, and privacy rights); [Statement of Daniel Varley](#) to USSC on Supervised Release at 4 (March 3, 2025) (“Being on supervised release added another layer of challenge to an already difficult time.”).

³⁷ See 18 U.S.C. § 3565; see also U.S.S.G. §7B1.3 (advising revocation for Grade A and B violations of probation).

³⁸ See [Issue for Comment 1](#) (Part A).

³⁹ See Section I.B., *supra* (summarizing early critiques); Defenders’ 2025 [Priority Letter](#) at 3, 8 n.28 (suggesting that the Commission “remodel the first three parts of Chapter Five and incorporate a new guideline that gives judges guidance on the “in/out” decision and on *all* sentencing options available by statute” and collecting

first time in four decades, Part A of this amendment creates such guidance. We appreciate that this Commission has heeded the call to recalibrate the current sentencing process, which overwhelmingly favors incarceration and obscures other available sentencing options. The Commission should adopt both the new introductory commentary and the new guideline.

Below, we further suggest that, in adopting Part A, the Commission should also:

- modify the Chapter Five Introductory Commentary to highlight the importance of the sentence-option choice;
- add language to the Chapter Five, Part A Introductory Commentary to remind courts that imprisonment is not an appropriate means of rehabilitation;
- change language throughout §5A1.1(a) referring to “authoriz[ed]” sentences within certain zones to “recommend[ed]” sentences;
- consider the inclusion of factors in §5A1.1(b) to provide courts with guidance on selecting a sentencing option; and
- keep the bracketed language in §5A1.1(d) reminding courts that they may determine that a sentencing option authorized by statute, but not by the Guidelines, is appropriate.

sources); *see also* [*Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*](#), 51 Hous. L. Rev. at 1324 (“The Commission should jettison its prison-by-default ideology and start anew with the philosophy that giving direction on the full range of types of sentences is at least as important as guidance on the length of imprisonment.”).

1. Chapter Five Introductory Commentary

Defenders support adding the proposed introductory commentary to Chapter Five, and Part A with one suggested change. In keeping with the spirit of this amendment, Defenders believe that the introductory commentary to Chapter Five should read as follows:⁴⁰

Introductory Commentary

Chapter Five sets forth the steps used to determine the applicable sentencing **range options** and sentencing **range options** based upon the guideline calculations made in Chapters Two

This reversal of words accurately reflects the order of operations contemplated in the SRA and the Commission’s organic statute,⁴¹ while also reinforcing the principles in §5A1.1—namely that the court, in the first step of the sentencing process, should consider the *kinds* of sentences available before turning to sentence length.⁴²

2. Chapter Five, Part A Introductory Commentary

Defenders welcome the new introductory commentary to Chapter Five, Part A, titled “Determination of Type of Sentence and Sentencing Range.” This commentary rightfully emphasizes the Commission’s responsibility to provide guidance for courts when making their threshold sentence-type decision by citing the SRA’s legislative history. It also stresses that Congress did not intend to establish a presumption of any sentence, and the need for individualized consideration in each case.

⁴⁰ The text of the introductory commentary, including proposed language, reads: “Chapter Five sets forth the steps used to determine the applicable sentencing **range** and sentencing **options** . . .” [2026 Proposed Amendment: Sentencing Options](#) at 5 (emphasis added). Our changes are in red.

⁴¹ See § 3553(a)(3) and (a)(4); 18 U.S.C. § 3582(a); § 994(a)(1)(A) and § (a)(1)(B).

⁴² Thomas W. Hillier, II, *Linking Judicial Sentences to Congressional Purposes*, 8 Fed. Sent. Rep. 24, 24 (1995) (discussing that judges, lawyers and commentators “have criticized the guidelines since inception for ignoring the Congressional directive that judges fully consider the crime, [individual], possible punishments and purposes of sentencing *before* applying the guidelines.”).

We also support including the bracketed text at the end of the introductory commentary, with modification.⁴³ The language could go further by reminding courts that an individual’s access to programming and resources can vary dramatically,⁴⁴ and no one should be incarcerated simply because programming in the community is unavailable or may prove challenging to implement.⁴⁵ To ensure that lack of access to resources and other structural disadvantages are not used against individuals at sentencing, we propose adding the text in red:

⁴³ The bracketed text reads: “[As 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.]” [2026 Proposed Amendment: Sentencing Options](#) at 6.

⁴⁴ See [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 1, 12-13 (requesting modifications to proposed amendment to “ensure that those who lack access to resources or formal programming either in detention facilities or in the community can still qualify for the reduction;”); [CLC Comment on the USSC’s 2026 Post Offense Rehabilitation Amendment](#) at 9 (Feb. 10, 2026) (noting that rehabilitation opportunities “could vary widely depending on . . . what resources might be available in their institutions (for those detained) and in their communities (for those released)”).

⁴⁵ See [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 17 (describing access barriers); *see also* § 3582(a) (recognizing that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

As 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. **However, the court may not choose imprisonment over probation or intermediate forms of punishment because an individual lacks access to such resources. See 18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319 (2011) (holding that a sentence of imprisonment is not an appropriate means of promoting rehabilitation, and rehabilitation therefore cannot justify lengthening a sentence).** The Commission intends for §5A1.1 (Determination of Type of Sentence) 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).

3. Section 5A1.1

Overall, Defenders support §5A1.1 and its structure, which directs courts to consider available sentence type options and select the appropriate sentence type prior to making the determination of sentence length.⁴⁶ We also appreciate that Part A moves the Sentencing Table from its prominent placement at the beginning of Chapter Five to §5A1.2.⁴⁷ And we appreciate that §5A1.1(a) clearly sets out the descriptions of the zones with cross-references. The zones are currently scattered throughout Chapter Five; recapping them in §5A1.1(a) will make it easier for judges and practitioners to view them together in one place. That said, we have three suggestions to

⁴⁶ See [2026 Proposed Amendment: Sentencing Options](#) at 6-8. See Section I.A., *supra* (discussing statutory scheme); see also Defenders' 2025 [Priority Letter](#) at 5 (discussing the two distinct decisions of sentence type and amount contemplated by statutory scheme).

⁴⁷ [Federal Alternative Sentences: A Critically Endangered Species](#) (recommending that Commission create a new sentencing options guideline that "could come at the start of Chapter Five and prompt sentencers to contemplate sentence type before sentence amount"); Defender's 2025 [Priority Letter](#) at 4, n. 10 ("The choice to begin Chapter Five with the Table as Part A, coming before the Parts discussing terms of probation and imprisonment, also solidifies this default [of imprisonment].").

help the new guideline better accomplish the Commission’s goal of providing courts with effective guidance on this “critical decision.”⁴⁸

First, our global suggestion for §5A1.1 is that the guideline should not use the word “authorize[d]” when discussing what sentence types are included within specific zones.⁴⁹ Given the post-*Booker* advisory guidelines system, only the statutory scheme authorizes sentences. Thus, the Commission should use the word “recommend” throughout instead (such as “Zone A **recommends** a sentence of probation”) to avoid suggesting that the Zones are mandatory.

Second, we appreciate §5A1.1(b), which requires courts to determine the appropriate sentencing option(s) before considering the length of any such sentence.⁵⁰ Defenders would support subsection (b) as written, but we suggest expressly reminding courts of the specific relationship between § 3553(a) and the determination of the appropriate sentence type.⁵¹ As for

⁴⁸ [2026 Proposed Amendment: Sentencing Options](#) at 4. We do have concerns regarding §5A1.1(a)’s reliance on guideline ranges (still measured in months of imprisonment) because of the cognitive anchoring effect of the range, which could inadvertently continue to promote imprisonment as the norm. *See* Defender’s 2025 [Priority Letter](#) at 4. But such concerns are tied to the persistence of the table’s use of months of imprisonment as its unit of measurement and Chapter Five’s continued characterization of guideline ranges as being measured in months of prison as well. In the future, the Commission might explore adding a table providing ranges for alternative sentences. *See* [Federal Alternative Sentences: A Critically Endangered Species](#) (discussing alternatives tables).

⁴⁹ *See* [Defenders’ Comment on the USSC’s 2025 Simplification Amendment](#) at Appx. 11 (Feb. 3, 2025) (“Defenders identified additional language in tension with the post-*Booker* advisory guidelines system—that is, language suggesting certain Commission guidance is mandatory.”).

⁵⁰ As explicit consideration of the punishment type decision is likely new to many courts and practitioners, it makes sense to break this process into distinct steps to ensure courts fully contemplate this decision at the beginning of the sentencing process.

⁵¹ If the Commission adopts the list of factors in Issue for Comment 2, we do not believe it is necessary to explicitly include particular § 3553(a) factors in the list, given that courts must already consider them. *See* § 3582(a) (courts should “consider the factors set forth in § 3553(a) to the extent that they are applicable”). *See also* *Pepper v. United States*, 562 U.S. 476, 488 (2011) (finding that courts can consider the “widest possible breadth of information,” ensuring the court is in

including certain additional factors, as suggested in Issue for Comment 2, these could assist courts in determining the appropriate sentence option.⁵² If the Commission adopts these additional factors, Defenders suggest that the Commission specify that any factors that are drawn from § 994(k) can be taken into consideration only for non-custodial or intermediate sentences.⁵³ Sentencing courts are statutorily prohibited from using these factors to impose or lengthen a term of imprisonment.⁵⁴

Finally, we support the proposed §5A1.1(d), including the proposed bracketed language.⁵⁵ This subsection, including the bracketed language, is outcome-neutral and does not suggest a policy choice by the Commission. It simply reflects the two-step process for sentencing,⁵⁶ along with the law under *Booker* and its progeny that allows a sentencing court to impose any sentence within statutory limits based on appropriate consideration of all the factors listed in § 3553(a). By setting forth the relevant legal framework of §3553(a), the bracketed language in §5A1.1(d) serves to remind sentencing courts of their ability to consider the “widest possible breadth of information”

“possession of the fullest information possible concerning the defendant’s life and characteristics”) (citation omitted)).

⁵² Defenders have asked the Commission for this sort of guidance in the past. See [Joint Statement of Thomas W. Hillier II and Davina Chen on behalf of Defenders to USSC in Stanford, CA on “The Sentencing Reform Act of 1984: 25 Years Later”](#) at 4, 11 (May 27, 2009) (asking the Commission to provide evidence-based guidance for courts making the threshold sentencing options decision); *Linking Judicial Sentences to Congressional Purposes* at 24 (discussing lack of guidance on punishment type).

⁵³ See [Issue for Comment 2](#) (including as a factor for §5A1.1(b): “[w]hether the defendant is in need of educational or vocational training, medical care, or other rehabilitative or correctional treatment, and the setting in which any such treatment would be most effectively provided.”); see *Tapia v. United States*, 564 U.S. 319 (2011) (holding that a sentence of imprisonment is never an appropriate means of rehabilitation, and rehabilitation therefore cannot justify lengthening a sentence).

⁵⁴ See *Tapia*, 564 U.S. at 332.

⁵⁵ The bracketed language reads: “[The court may determine that a sentencing option that is authorized by statute, but not by the guidelines, is appropriate based on the consideration of these sentencing factors.]” [2026 Proposed Amendment: Sentencing Options](#) at 7.

⁵⁶ See USSG §1A1.1 cmt. (citing *Gall*, 552 U.S. at 49-51) (internal quotations omitted); see also USSG §1B1.1, Application Instructions (laying out the two-step sentencing process).

about an individual,⁵⁷ and that courts' sentencing discretion is constrained only by statutory limits.⁵⁸

B. Part B

Defenders support the proposed expansion of Zones B and C. We believe these changes, along with the proposals in Part A, will remind courts of the additional sentencing options available to them and encourage them to utilize those options. We note below that if the Commission wanted to take additional action, it would make sense to broaden the expansions for individuals in CHC I to include individuals in CHCs II and III.

Coupled with the guidance in Part A, the proposed expansion of Zones B and C in Part B is a step toward meaningful change. Defenders have criticized zones in the past as overlooked and confusing. Under the current Manual, the vast majority of individuals fall within Zone D, and even when individuals fall within the lower zones, they frequently receive imprisonment sentences.⁵⁹ But the addition of the new guidance in §5A1.1 addresses some of these concerns by cementing the importance of the sentence-type decision. Defenders support any expansion of Zones B and C, which will promote alternative sentences for our clients.⁶⁰

⁵⁷ See *Pepper*, 562 U.S. at 488.

⁵⁸ See *Concepcion v. United States*, 597 U.S. 481, 494 (2022) (“The only limitations on a court’s discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.”). Including the bracketed language would also track the Commission’s policy statement on whether to impose a term of supervised release following a term of imprisonment. See USSG §5D1.1. This recently amended policy statement instructs courts to impose terms when required by statute, but “[w]hen a term of supervised release is not required by statute,” it guides courts to “order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision.” See *Id.* (including commentary reminding courts of the statutory factors supporting the individualized assessment determination); see also USSC App. C, [Amendment 835](#) (Nov. 1, 2025).

⁵⁹ Defenders’ 2025 [Priority Letter](#) at 13.

⁶⁰ We have supported expansion of Zones B and C in the past. See [Defenders’ Comment on the USSC’s 2017 Proposed Zone Expansion Amendment](#) at 14 (Feb. 20, 2017).

In particular, the proposed expansion of Zones B and C for individuals in CHC I makes sense as it ameliorates the table's prison-default for many individuals with negligible criminal history, which runs afoul of the statutory directive in § 994(j).⁶¹ By including more individuals with the lowest criminal history category into the expanded zones, the Commission is making progress toward effectuating that mandate.⁶²

We note that the proposed amendment (with or without the additional expansion we suggest) is not one of leniency; it simply expands the punitive *options* available under the Guidelines for certain people. As before, imprisonment is still an option in every cell of the table, which continues to carry the unit of measurement of “months of imprisonment.” While Defenders lament that the proposed amendment does not expand Zone A (the only zone that does not recommend some minimum term of confinement), the expansion of Zones B and C will move the Manual in the right direction, and sentencers will retain judicial discretion to tailor the sanction type to the case at hand.

Finally, while Defenders applaud the Commission's expansion of Zones B and C for certain individuals in CHC I, it could go even further. Additional support for the expansion of Part B to include more individuals in CHC II and CHC III comes from racial disparities baked into criminal history scoring,⁶³ particularly with respect to low-level offenses.⁶⁴ Broadening the

⁶¹ § 994(j) (Guidelines should “reflect the general appropriateness of imposing a sentence other than imprisonment in cases” involving a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”).

⁶² This proposal also builds on the Commission's previous work toward effectuating the § 994(j) mandate. See [Statement of Jami Johnson](#) at 18 (comparing breadth of § 994(j)'s mandate to 2023 proposal).

⁶³ See, e.g., Defenders' [Priority Letter to USSC](#) at 12 (May 15, 2024) (urging Commission to “criminal history rules that perpetuate harmful racial disparities”); Defenders' [Priority Letter to USSC](#), at 14 & n.64 (Oct. 17, 2022) (discussing scholarly and legal consensus that Black people are more often the targets of law enforcement stops, searches, arrests, and prosecutions than white people).

⁶⁴ [Statement of Jami Johnson](#) at 11-16 (March 8, 2023) (discussing racial disparities in municipal and juvenile systems); see also R. R. Dunlea & Pauline K. Brennan, [Evidence of Cumulative Disadvantage and the Liberation Hypothesis in Court Cases Involving Resisting Arrest](#), 101 J. Crim. Just. 102513 (2025) (summarizing findings that sociodemographic disparities result from cumulative disadvantage that are observed more often in less serious cases where discretion is

availability of alternative sentencing options could therefore be a step toward alleviating documented racial disparities in who receives alternative sentences.⁶⁵

We recognize that the Commission's data briefing indicated that rearrest rates are higher for many U.S. citizens who received a term of probation at higher criminal-history scores.⁶⁶ But the data briefing leaves many questions unanswered about those findings,⁶⁷ and rearrest is an especially expansive outcome measure.⁶⁸ And as we have stressed before, the

greater); C. Clare Strange et al., [Rewriting the Record: A Qualitative Analysis of Race, Criminal History, and Sentencing Policy Reform in Pennsylvania](#), 16 Race & Just. 191, 193 (2026) (contending that differential policing patterns in minority neighborhoods result in more arrest for low-level crimes).

⁶⁵ See [Alternative Sentencing in the Federal Criminal Justice System](#) at 16 (noting that “Black and Hispanic [individuals] consistently were sentenced to alternatives less often than White [individuals]” and pointing to “differences in criminal history and offense severity,” noting that “Black [individuals] had more serious criminal history scores compared to the other groups.”). And among all U.S. citizens sentenced in fiscal year 2024, Black individuals made up 25% of those within CHC I, but made up 39% of CHC II, and 47% of CHC III. The data for these analyses were extracted from the USSC [“Individual Datafiles”](#) spanning fiscal years 2020 to 2024. The dataset is publicly available for download on its [website](#).

⁶⁶ USSC, [Public Data Briefing on Sentencing Options](#) at 9.

⁶⁷ More granular information would be valuable and was not included. In particular, separating arrests for supervision or probation violations from arrests for new offenses, clarifying whether individuals received terms of straight probation or probation in combination with confinement, distinguishing minor from serious new conduct, identifying supervision status and intensity of supervision at the time of rearrest, providing demographic information with rearrest rates, and reporting reconviction and resentencing outcomes would substantially clarify the practical meaning of the reported rearrest rates. Recidivism statistics for those who ineligible for probation but received a non-prison sentence nonetheless would also be helpful.

⁶⁸ While the briefing did not provide exact parameters, rearrest may include supervision violations, low-level conduct, or even arrests for behavior predating the sentencing event unless specifically excluded. See e.g., USSC, [Older Offenders in the Federal System](#) at 44 (2022) (reporting recidivism counted events such as DUI, probation/supervision violations, and public order offenses); [Urban Institute, “Whys” and “Hows” of Measuring Jail Recidivism](#) 4-5 (2006), (noting recidivism rates can be overstated if counting criminal history events that occurred prior to the commencement of the follow-up period). Further, while higher criminal history categories are often assumed to correspond with incrementally higher recidivism, the Commission's cell-level table does not exhibit a consistently monotonic pattern; certain higher criminal history cells reflect lower rearrest rates than lower adjacent

Commission should recognize the importance of exploring other, less outdated risk proxies, beyond the static criminal history score.⁶⁹

Finally, to the extent one supports the concept of incremental punishment,⁷⁰ it is consistent with a larger expansion of Zones B and C to incorporate more individuals in CHCs II and III. Data indicate that a substantial portion of people in CHCs II and III have had little, if any, previous extended incarceration, rendering prison-only sentences a potentially dramatic increase in severity.⁷¹ An additional expansion to include more people in CHC II and III would offer sentencers a greater range of recommended sentencing options, which would encourage more individualized sentencing for these individuals.

IV. Conclusion

Defenders welcome the Commission's proposal to mend a glaring gap in the Guidelines, which persists despite clear statutory mandates. We encourage the Commission to adopt both Parts A and B, with the modifications identified above. While more remains to be done to address the Guidelines' overreliance on incarceration, the proposed amendment is an important first step.

categories. These features suggest that the statistics are descriptive and should not be overgeneralized. See USSC, [Public Data Briefing on Sentencing Options](#) at 9.

⁶⁹ See [Defenders' 2026 Comment re: Post-Offense Rehabilitation](#) at I.A. (discussing dynamic risk and protective factors).

⁷⁰ It is unclear if increases based on previous criminal history serve the statutory purposes of punishment. See Rhys Hester et al., [Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences](#), 47 Crime & Just. 209, 242 (2018) ("The high cost and adverse effects of prior record sentence enhancements might be tolerable if they served important punishment purposes, but all of the potential justifications for these enhancements are weak."); see also Christopher Lewis, *The Paradox of Recidivism*, 70 Emory L.J. 1209, 1271 (2021) ("Rather than responding more severely to repeated wrongdoing than we do to first-time misconduct, they should do the exactly the opposite.").

⁷¹ Many people in CHCs II and III get there without a single, counted, three-point conviction (i.e. solely based on sentences of 13 months or less due either to sentence length or age of conviction). Nearly two thirds (63.2%) of people in CHC II had no three-point offenses, as did nearly half (47.5%) of people in CHC III. [Individual Datafiles](#), FY 2020 to FY 2025.

**Federal Public and Community Defenders
Supplemental Comment on Career Offender and
Circuit Conflicts
(January Proposals 2 and 3)**

March 18, 2026

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Federal Public and Community Defenders filed our initial comment March 2 so it could serve as a witness statement for last week's hearing but, at the time, we were able to provide only partial feedback on the Commission's proposed "crime of violence" definition. We were still working through problems we'd identified in that definition, so we did not get into specifics.

In this supplemental comment, we get into specifics. To summarize our more significant suggestions, if the Commission is moving away from the categorical approach as it has suggested, we urge it to:

- Reframe the proposed §4B1.2(a) prefatory language as something more like "step one" and "step two," rather than instructing judges that "crime of violence" "means" any listed offense and then instructing judges that "crime of violence" does *not* include some instances of the listed offenses. The current framing is confusing.
- For federal offenses, move forward with the listed-statutory-offenses approach but delete at least: involuntary manslaughter; bank burglary, larceny, and receipt; controlled-substance-related burglary; and possession of NFA firearms and explosive materials.
- For state offenses, adopt a version of Option 2 that defines a short list of heartland violent offenses (as proposed with unbracketed offenses), with definitions serving as minimum elements.
- Adopt a much higher minimum-prior-sentence exclusion, in line with some of last year's options: 5 years imposed and at least 3 years served (with defendants bearing the burden of proving sentence *served*). If the Commission adopts a minimum-sentence threshold this high, the other limitations become less troublesome; but the Commission should still require the government to prove that those limitations (which we'll call *exclusions*) do not apply, using Shepard documents.¹

We also respond to a few matters raised at the hearing, some of which relate to the "controlled substance offense" and circuit-conflict proposals.

¹ These are our big-picture suggestions. Throughout this comment, we also provide the Commission with other suggestions intended to clarify guideline language, and we further discuss the many bracketed options.

I. The crime of violence proposal could be workable with substantial modifications—including, most importantly, a *much higher* minimum-prior-sentence exclusion.

This year’s “crime of violence” proposal has two steps: inclusions and exclusions. The idea is that at the first step, inclusions grab entire statutory offenses that cover certain conduct (*e.g.*, murder, robbery), regardless of whether those offenses are overbroad—that is, regardless of whether they cover both violent and nonviolent conduct. Then at the second step, exclusions (styled in the proposal as one exclusion and three limitations) remove individual convictions that aren’t appropriate for the “crime of violence” label in the context of a three-strikes provision designed to trigger stat-max or near-stat-max sentences.

This two-step process, as a concept, is not necessarily objectionable; but the second step has to do real work. The first step is deliberately overbroad; we know that it will grab offenses encompassing conduct that isn’t properly labeled “crime of violence” simply because a particular statutory offense encompasses both violent and nonviolent conduct—although similar statutory offenses, in other jurisdictions, encompass only violent conduct. And as our witness said at last week’s hearing, with some of these offenses, in some states, *most* covered conduct could be overbroad; we would expect this to often be true with “aggravated assault” offenses (many of which encompass reckless, negligent, and even accidental conduct), and also with sexual-assault-related offenses (where there is tremendous variation among the states). But overbreadth exists with every offense: in some states, “robbery” encompasses shoplifting followed by even accidental assault²; in others, it encompasses pickpocketing.³ In many (but not all) states, “murder” or “manslaughter” encompasses controlled-substance-related deaths.⁴

² See, *e.g.*, *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (discussing how, under Cal. Pen. Code. § 211, someone could commit California robbery by “accidentally using force”).

³ See, *e.g.*, D.C. Code § 22-2801 (robbery statute prohibiting theft by “sudden or stealthy seizure or snatching”).

⁴ See, *e.g.*, Ala. Code § 13A-6-3(a)(3) (Manslaughter, which encompasses controlled-substance-related death); Alaska Stat. § 11.41.110(a)(6) (Second-degree murder, which encompasses controlled-substance-related death); Tenn. Code § 39-13-210(a)(3) (same).

Defenders understand that this self-conscious overbreadth is essential to the Commission's proposal, to avoid the categorical approach's complexity and anomalous results. And Defenders could be open to the idea—but only if the exclusions at Step Two are broad enough, and clear and simple enough, to actually capture and exclude all the overbreadth we'd expect to see and prevent career-offender numbers from increasing dramatically. Unfortunately, as written, the exclusions are not broad or clear or simple.

Indeed, the Commission's second and third limitations (regarding injury/harm and mens rea) appear impossible to prove. Regarding the second limitation, on bodily injury, how could a defendant prove that he did not *intend* injury or harm—much less that none of his confederates intended injury or harm? Defenders feel certain that in most districts, simply signing an affidavit saying as much would not suffice. A judge would be more inclined to trust a Shepard document or police report; but such documents are written as accusations against our clients, and they'd rarely—if ever—mention circumstances suggesting our clients were less culpable. We could subpoena witnesses and victims, perhaps, but in many cases that will be impossible.⁵ And where it is possible, it would result in mini-trials that no one wants—but which defense counsel would be obligated to trigger, to avoid draconian sentencing ranges.

On the third limitation, regarding mental state, how could a defendant prove he acted only recklessly or negligently? If the offense of conviction encompasses *only* reckless conduct, perhaps we could simply cite the statute of conviction. Even this situation is unclear, however, because the limitation is based on *conduct*. Might a prosecutor persuade a judge that even though the individual was convicted of some sort of reckless-endangerment offense (classified as “aggravated assault”), his conduct was *really* knowing? How might this be impacted by an earlier charge that would have required proof of intent (but was dismissed)? Moreover, with the much more common offenses encompassing *both* intentional *and* unintentional conduct, charging documents often do not specify the mental state, and whether conduct was knowing or reckless or negligent is largely a subjective call. The difficult,

⁵ The TIAG witness last week explained that this would be particularly true on Indian reservations, where a large proportion of federal crimes of violence are charged. See [TIAG Comment on the USSC's 2026 Proposed Amendments](#) at 5-7 (Mar. 2, 2026).

subjective nature of this call doubtless explains why legislators write statutes so that prosecutors—and jurors—do not have to choose between mental states. But it would be deeply problematic for a federal judge to decide in the first instance whether an individual’s conduct was intentional or reckless, years after the conduct at issue and after the person was fully punished for that conduct.

In short, Defenders fear both that these limitations will lead to mini-trials and that we will invariably lose those mini-trials—even when we should win them. And this situation gets more worrisome when we consider that the CLC has argued that the way to reduce litigation here is to ensure that the defense bears the burden, because defendants will choose to not pursue a limitation to avoid getting a higher sentence and even losing the acceptance-of-responsibility reduction or getting an obstruction enhancement.⁶ The notion that a defendant should be afraid to argue for a limitation related to a prior conviction (that he would know more about than anyone), to reduce litigation, should be sufficient to convince Commissioners that the current proposal is not workable as written.

After much discussion, debate, and analysis, involving defenders from around the country, Federal Public and Community Defenders have concluded that the key to making the Commission’s two-step scheme workable is the minimum-prior-sentence exclusion. Determining the length of a prior sentence is simple and easily understood; as discussed below, this is true even of sentence *served* (contrary to what some other stakeholders have suggested). And beyond simplicity, excluding offenses with shorter prior sentences is capable of teasing out minor offenses—including minor *federal* offenses, frequently committed on Indian reservations, which could create new disparities—and it’s also capable of excluding the most overbroad conduct that would otherwise have to be litigated via mini-trials (pickpocketing, reckless assaults, sex between teenagers).

⁶ See [CLC Comment to USSC on 2026 Proposed Amendments](#) at 9 (March 6, 2026). We disagree that a court is permitted to deny the “acceptance of responsibility” reduction in a case where the defendant accepts responsibility for his federal offense but disputes facts related to the legal classification of a prior offense. See §3E1.1. But we cannot assume that the caselaw would break our way on this, particularly since an organization of judges raised this possibility.

However, this is true only if the minimum-sentence exclusion is set at a sufficiently high threshold. And the current options on the table aren't even close; they would exclude almost (or if probation is chosen, literally) nothing. Indeed, even the threshold that Defenders suggested in our initial comment two weeks ago is not nearly high enough. After further consideration, Defenders urge the Commission to set the threshold at 5 years—with no less than 3 years served. This was presented as an option in last year's "crime of violence" proposal.⁷ It is consistent with our position last year.⁸ And Defenders are hopeful that it would be high enough to address the substantial overbreadth that we expect to see at Step One, which otherwise would likely result in a significant increase in the number of career offenders.

Below, we go through the Commission's proposal one subsection at a time. We engage with all parts of the proposal, addressing many more issues than just minimum prior sentence. But this comment is written with the understanding that a 5-year minimum-prior-sentence exclusion is the key.

A. 4B1.2(a)(1)—Step One prefatory language

Framing matters. As written, the proposed §4B1.2(a)(1) affirmatively states that "crime of violence" "means" certain listed offenses.⁹ Then, later the proposal offers an "exclusion" and "limitations," which can theoretically take something that was just defined as a "crime of violence" out of that category. This framing is confusing and, further, it conveys that the exclusion and limitations should be treated as rare exceptions although some offenses that are included at Step One may be profoundly overbroad—perhaps only including a sliver of qualifying conduct.

In discussing the Commission's overall concept, this document has referred to "step one" and "step two," as we think this best conveys what the Commission is trying to do here. We recommend that the Commission use this sort of framing in the guideline text itself, so judges understand that

⁷ USSC, [2025 Proposed Amendments: Career Offender](#) at 8-10 (Dec. 19, 2024).

⁸ [Defenders' Comment on the USSC's 2025 Proposed Amendment: Career Offender](#) at 29-32 (Feb. 3, 2025).

⁹ USSC, [2026 Proposed Amendments: Career Offender](#) at 22 (Jan. 30, 2026).

whether something is a “crime of violence” depends on both parts of the proposal—inclusions and exclusions.

Here is how this might look:

(1)STEP ONE—INCLUSIONS.— The term “crime of violence” means any of the following offenses, if punishable by imprisonment for a term exceeding one year,¹⁰ unless an exclusion at step two (subsection (a)(3)) applies.

This sort of language could both mirror and contrast with prefatory language later used in subsection (a)(3), which might look like this:

(3)STEP TWO—EXCLUSIONS.— The term “crime of violence” does not include any offense where any one of the following exclusions applies.¹¹

B. 4B1.2(a)(1)(A)—Listed federal offenses

Defenders agree with the Commission and most other stakeholders that the best way to identify federal crimes of violence is simply to list statutory offenses. With a list, everyone knows the score. And instant offenses will always be federal, so a clear list of federal crimes permits all parties to know at a glance whether a case might implicate—or definitively does not implicate—the career-offender guideline.

As for the proposed list of offenses, the DOJ has reasonably argued that, to some extent, the list is underinclusive: it does not include all federal murder offenses.¹² And a couple of offenses that are listed as bracketed

¹⁰ Defenders include the “punishable by” limitation in this initial prefatory language so that it clearly applies to both the federal and state subsections. The Commission’s proposal includes this limitation only in the state subsection, which inaccurately suggests that the limitation does not apply in the federal context. *See* [2026 Proposed Amendments: Career Offender](#) at 22-23. This limitation is just as important in the federal context, as some of the proposed listed federal statutes include misdemeanors. *See, e.g.*, 18 U.S.C. §§ 113(a)(4) & (a)(5), 2113(b) & (c).

¹¹ Because Defenders urge the Commission not to place the burden of proving limitations on the defense (other than sentence served), in this mock-up, we assume that the Commission would collapse (a)(3) and (a)(4) into a single section.

¹² *See, e.g.*, 18 U.S.C. §§ 351 (murder, kidnapping, or assault of member of Congress, the Cabinet, or the Supreme Court); 930(c) (killing in the course of an attack on a federal facility); 1114 (murder of officer or employee).

potential offenses in the proposal's state-offense section would seem far more appropriate for the federal section.¹³ The DOJ has said it will provide the Commission with a longer list of federal offenses; Defenders would appreciate an opportunity to provide feedback on any such list, to ensure that the Commission does not over-correct.

But the list of federal offenses is not only under-inclusive; it is also over-inclusive. We do not focus here on misdemeanor offenses that can be omitted via prefatory language. Nor do we focus on offenses that are internally overbroad, since this can theoretically be addressed via exclusions (so long as the exclusions are up to the task, as discussed).¹⁴ Rather, the Commission's proposed subsection (a)(1)(A) includes some distinct offenses that should not make the list in the first place. We object to the following:

Involuntary manslaughter. The career-offender guideline has long covered voluntary manslaughter but not involuntary manslaughter.¹⁵ And Defenders agree with the DOJ that the Commission should not change its policy here.¹⁶ Under § 1112, voluntary and involuntary manslaughter are distinct criminal offenses.¹⁷ So, the Commission's citation to § 1112 should expressly exclude involuntary manslaughter.

Bank burglary, larceny, and receipt. The career-offender guideline currently covers bank robbery under 18 U.S.C. § 2113(a) and at least potentially covers bank assault under § 2113(d); but, as far as we know, it's never covered bank burglary under the second paragraph of sub. (a), bank

¹³ See 18 U.S.C. §§ 924(c) and 2332a ("using weapons of mass destruction"). As noted below, these offenses are not appropriate for the state-offense subsection, since most states have no analogs for them.

¹⁴ Although the proposal's exclusions and limitations are presented as part of "Option 2 for Definition Applicable to State Offenses," we read the proposal's exclusions as clearly applying to both federal and state offenses. See [2026 Proposed Amendments: Career Offender](#) at 24-25. And this understanding is essential to our position objecting to only five federal offenses, since many of the listed federal offenses are overbroad, including, notably, aggravated assault, which is a common offense in Indian Country and frequently committed by reckless conduct.

¹⁵ See §4B1.2(a)(2).

¹⁶ [DOJ Witness Statement of Robert Zauzmer](#) at 2 (Mar. 9, 2026).

¹⁷ See 18 U.S.C. § 1112 (providing a 15-year penalty for voluntary manslaughter and an 8-year penalty for involuntary manslaughter).

larceny under sub. (b), or receipt of stolen bank property under sub. (c).¹⁸ As with manslaughter, these are distinct offenses.¹⁹ Thus, the list of federal crimes should refer more specifically to “§ 2113(a) excluding bank burglary” and “§ 2113(d).”

Controlled-substance-related burglary. The situation with 18 U.S.C. § 2118 is similar to bank burglary. Section 2118(a), robbery related to controlled substances, is reasonably identified as a crime of violence; but § 2118(b), burglary related to controlled substances, is not. The Commission’s list should thus refer more specifically to § 2118(a).

Possession of NFA firearms and explosive material. These are objections to offenses that *currently* count: possession of a firearm described in 26 U.S.C. § 5845(a) (“NFA firearms”); and possession of “explosive material.” Both NFA firearms and explosive material are legal to possess, with a permit and a \$200 payment.²⁰ In 2004, the Commission added NFA firearms to §4B1.2, saying that Congress had identified these as “inherently dangerous and when possessed unlawfully, serve only violent purposes.”²¹ But that was based only on the fact that Congress had made them subject to registration and a special tax.²² In 2016, during the special session dealing with *Johnson*, the Commission removed “use of explosives” and added

¹⁸ Until 2016, §4B1.2 covered only burglary “of a dwelling”; and since 2016, it has not covered even that variety of burglary. See USSG App’x C, [Amend. 798](#) (2016).

¹⁹ See 18 U.S.C. § 2113(a), (b), (c), (d); see also, e.g., *United States v. Jordan*, 96 F.4th 584, 590 (3d Cir. 2024) (“Section 2113(a)’s first and second paragraphs are also divisible. . . . So not only is § 2113(a) divisible from § 2113(b), but § 2113(a) is also internally divisible.”).

²⁰ See ATF, [National Firearms Act](#); see also 18 U.S.C. § 843 (regarding “user permits” for explosive material).

²¹ USSG App’x C, [Amend. 674](#) (Reason for Amendment) (2004); see also USSG App’x C, [Amend. 798](#) (Reason for Amendment) (2016) (explaining the decision to maintain this as a crime of violence post-*Johnson*, using the same explanation).

²² *Id.* All guns are deadly. But most guns—including many military-style ones—are not subject to the NFA’s registration requirements. Instead, the NFA covers a hodgepodge of especially dangerous weapons as well as collectible and obscure weapons and accessories, some of which cannot expel a projectile on their own (e.g., firearm silencer or muffler). See ATF, [National Firearms Act Handbook: What are “Firearms” Under the NFA](#) 15 (Rev. Apr. 2009).

“possession . . . of explosive material”—without explanation.²³ Notably, the question originally presented in *Johnson* was whether possession of an NFA firearm fit within ACCA’s residual clause, and justices found it so impossible to decide whether this offense was especially risky that it gave up on the endeavor and struck down ACCA’s residual clause.²⁴

Beyond these substantive concerns, deleting these two offenses would promote simplification: they do not describe specific offenses—rather, they describe a class of offenses, which would have to be identified either categorically or based on conduct. And also, they are rare as instant offenses in career-offender cases.²⁵ Defenders do not know why the Commission didn’t delete reference to NFA firearms post-*Johnson*, nor why the Commission added possession of explosive materials then. But it should delete both offenses now.

C. 4B1.2(a)(1)(B)—Specified state offenses

For state offenses, the proposal offers two options: the first is based on labels, the second on definitions borrowed from federal offenses. The viable concept here is Option 2—what we understand as the “definitions” approach. The idea of using labels is facially appealing but, if it is intended (as the Commission has said) to ultimately cover all listed offenses “by whatever name they are known under state law,”²⁶ it presents the worst possible

²³ [Amend. 798](#) (Reason for Amendment) (noting this change in the same sentence as it noted the continued inclusion of NFA firearms but then explaining only the NFA firearms, not the possession of explosive materials).

²⁴ *Johnson v. United States*, 576 U.S. 591, 600, 606 (2015); *see also id.* at 607 (Kennedy, J., concurring) (disagreeing with the Court’s void-for-vagueness holding but finding that possession of a sawed-off shotgun did not inherently “present[] a serious potential risk of physical injury to another”); *id.* at 607-609 (Thomas, J., concurring) (same).

²⁵ Over the past five fiscal years, we count 14 career-offender cases in which the instant offense included possession of NFA firearms (citing 26 U.S.C. §§ 5845 and 5861(d)). This datum was extracted from the Commission’s publicly available “Individual Datafiles” datafiles spanning fiscal years 2020 to 2024. USSC, [Commission Datafiles](#). We aren’t sure how to identify relevant data regarding possession of explosive material, but in our experience, such cases are exceedingly rare (if they exist).

²⁶ [2026 Proposed Amendments: Career Offender](#) at 38.

overbreadth scenario.²⁷ The only way a labels-based scheme could cover every state offense of a particular type, without covering myriad dissimilar offenses that happen to have the same name, would be for the Commission to *define* the offense type—which gets us back to definitions.

Option 2, the definitions approach, focuses on statutory offenses, rather than conduct (like last year). But it is simpler than the traditional “categorical approach” because it is self-consciously overbroad: the statute of conviction must include the elements of the defined conduct, but its elements need not be as narrow as the definition. So, a state robbery offense proscribing taking property by use or threat of force is “robbery,” even if it also captures additional conduct. The statutory analysis is over. But while Option 2 accepts overbreadth, it is not a free-for-all; there *is* a minimum statutory definition. So we aren’t worried that a freestanding pickpocketing statute would get labeled as “robbery.”

At least, we aren’t worried about that freestanding pickpocketing offense so long as sub. (a)(1)(B)’s prefatory language makes clear that the provided definitions represent a minimum set of elements. To that end, Defenders prefer the first bracketed option, but replacing “*meets* each of the elements” with “*includes* each of the elements,” since the verb “meets” does not agree with “statute of conviction,” which creates ambiguity. We also suggest that the Commission delete the word “such” before “elements” in the parenthetical, as this also creates ambiguity.²⁸

²⁷ POAG has said that it prefers a labels-based approach, even if the list of qualifying labels gets very long. [POAG Witness Statement to USSC on 2026 Proposed Amendments](#) at 4. But POAG seems not to appreciate that a label like “sexual assault” can attach to entirely different offenses across jurisdictions or even within the same jurisdiction. *Compare, e.g.*, Wis. Stat. §940.225(1) (“first degree sexual assault,” a 60-year-max felony covering forcible rape), *with id.* at sub. (3m) (“fourth degree sexual assault,” a misdemeanor covering unwanted sexual contact that can occur over clothing).

²⁸ [2026 Proposed Amendments: Career Offender](#) at 23 (“ . . . regardless of whether the statute of conviction includes additional elements (or means of committing any *such* elements) that are broader than those of the offense” (emphasis added)).

The DOJ has suggested altering this prefatory language to go the other way—clarifying that the listed definitions are *not* a minimum.²⁹ The Commission should reject this suggested revision. Perhaps the DOJ is making this suggestion due to concerns about how some of the definitions will work in practice, as some of the federal offenses that serve as definitions have internally complicated elements. The first offense, murder, is an example: The Commission proposes to define murder with reference to 18 U.S.C. § 1111, which centers on “malice aforethought,” a concept that is no longer used in many states and thus could get confusing.³⁰

But this is not a reason to throw out the idea of minimum elements. The Commission could clarify confusing terminology by simply enumerating definitions within guideline text—based on the cross-referenced statutes but using plain language. Sticking with the “murder” example, the Commission might restate § 1111 as follows: “Killing another human being intentionally, knowingly, or with extreme recklessness; or causing the death of another human being with intent to inflict grievous bodily harm or with intent to commit another dangerous felony.”³¹ This definition tracks § 1111 but with clearer, more administrable language. An additional benefit of using plain-

²⁹ See [DOJ Witness Statement](#) at 4-5. The DOJ would have the Commission instruct judges that a state offense need only “proscribe[] at least some conduct that could establish . . .” the definitional elements. *Id.*

³⁰ See Wayne R. LaFave, 2 Subst. Crim. L. § 14.1 (3d ed. Oct. 2025) (noting that “‘malice aforethought,’ in modern times . . . does not even approximate its literal meaning” so “it is preferable not to rely upon that misleading expression for an understanding of murder but rather to consider the various types of murder (typed according to the mental element) which the common law came to recognize and which exist today in most jurisdictions”); see also [Hon. Andrew S. Hanen Comment on the USSCs 2015 Proposed Amendments](#) at 3 (suggesting that the Commission rethink its “use of the term ‘malice aforethought’ in the definition of murder,” because in many states “‘malice aforethought’ is not a concept currently in use”).

³¹ See § 1111; see also *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010) (in the context of discussing § 1111, noting that “in modern criminal law, malice aforethought covers four different kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless indifference); and (4) intent to commit a felony.”); *Malice aforethought*, Black’s Law Dictionary (12th ed. 2024) (“The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called ‘abandoned and malignant heart’), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).”).

language definitions is that the Commission can omit (and improve) discrete provisions in statutory definitions; and here we'd recommend omitting extreme recklessness and felony murder.³² But the point is that most, or even all, of the listed offenses could be simplified in this way, as needed—without compromising on minimum elements.

Turning to the specific offenses that get listed and defined, most importantly, the Commission should list only the unbracketed offenses and not include any of Option 2's bracketed offenses (or any others). One of the great benefits of the Commission's proposal this year is its focus on a relatively short, closed list of enumerated offenses that attempt to represent, as one Commissioner put it last week, *heartland* violent offenses—so long as the Commission does not go beyond the unbracketed offenses.

It is important to keep in mind that this list of defined state offenses relates only to prior offenses—past conduct, which has already been punished. Federal judges will be punishing instant *federal* offenses.³³ And when judges rail against anomalies related to the categorical approach, they are generally talking about heartland violent offenses—*e.g.*, murder, robbery. They are not talking about the sorts of offenses that are bracketed in the Commission proposal—*e.g.*, coercion, production of child pornography. Also, judges criticizing the categorical approach are criticizing complexity; and a longer list of offenses increases complexity. Courts can—and do—account for violent conduct in their § 3553(a) analyses, regardless of the statutory offense of conviction. So if the Commission tried to exhaustively catalog all the offenses that in one state (but not another) might sometimes signify violence, it would only make things more complicated, with no corresponding benefit.

Beyond these general concerns, there are also specific problems with some of the bracketed options. The defined, bracketed terms “child abuse,” “coercion,” “domestic violence,” and “human trafficking” simply do not work

³² Extreme recklessness is being actively litigated right now in the courts (as to whether it's a “crime of violence”), and states' approaches to felony murder vary wildly—some treat it as a distinct crime, others abolished it entirely, and those that retain it differ on which felonies qualify (ranging from *any* felony to only dangerous or enumerated felonies). See *United States v. Vederoff*, 914 F.3d 1238, 1247 (9th Cir. 2019) (discussing variations among states' treatment of felony murder).

³³ [Defenders Initial 2026 Comment on Career Offender](#) at 7 (discussing judicial criticism of crimes of violence that trigger career-offender status and related data).

under the proposed approach because their definitions either (i) do not read like statutes, creating a confusing minimum-elements baseline that could encompass many distinct offenses with unknown elements and applications; or (ii) refer to idiosyncratic laws that exist in some states but not many others. At best, including these offenses would create disparities; likely, it would be a litigation nightmare.

There are three bracketed offenses that might be acceptable on the federal list but do not belong on the state list: aircraft piracy (49 U.S.C. § 46502), firearms possession and use (18 U.S.C. § 924(c)), and using weapons of mass destruction (18 U.S.C. § 2332(a)). These are distinct federal crimes without uniform state analogs.

Finally, while arson (18 U.S.C. § 844(i)) and extortion (18 U.S.C. § 1951(b)(2)) have long been enumerated as crimes of violence, we commend the Commission for bracketing them. These offenses are typically non-violent, particularly in state prosecutions, and do not belong on the list of offenses that are presumptively treated as crimes of violence.³⁴

D. 4B1.2(a)(2)—Inchoate offenses

As Defenders have said before, the definition of “crime of violence” (as with “controlled substance offense”) should not include inchoate offenses.³⁵ Inchoate offenses—especially conspiracy offenses—are not equivalent in

³⁴ See [Defenders’ Comment on the USSC’s 2015 Proposed Career Offender Amendment](#) at 11-12 (discussing circumstances under which clients had received enhancements for offenses deemed “arson” although they “could not reasonably be considered to have posed a threat to another”); see also [Witness Statement of Molly Roth on behalf of Defenders to USSC on 2015 Proposed Career Offender Amendment](#) at 16 (explaining that extortion “is commonly classified as an offense against property” and discussing statutes). If the Commission nonetheless decides to include these offenses, we would recommend the following definitions: (1) Arson – maliciously damaging or destroying any building by means of fire or an explosive (drawn from 18 U.S.C. § 844(i) but, consistent with the Commission’s proposal, limited to buildings); (2) Extortion – obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury (taken from the current definition found in §4B1.2(e)(2)).

³⁵ See, e.g., [Witness Statement of Juval O. Scott on behalf of Defenders on USSC’s 2023 Career Offender Amendment](#), at 28-30.

seriousness to completed offenses.³⁶ We addressed this issue in detail in 2023 and won't rehash our arguments here. But we continue to object to provisions that expressly include inchoate offenses—(a)(2) and (b)(2).

That said, Defenders are pleased that the Commission has situated the inchoate-offenses provision higher, at (a)(2), so that inchoate offenses (like completed offenses) are subject to exclusions. To further clarify this, assuming that the Commission retains this provision, Defenders recommend using language that echoes the prefatory language we recommended for (a)(1), related to the new two-step process:

(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, unless an exclusion at step two (section (a)(3)) applies.

E. 4B1.2(a)(3) and (a)(4)—Exclusion and limitations

As discussed at the outset of this supplemental comment, the second step of the Commission's new approach for assessing potential crimes of violence—exclusions—is critically important. Step One, inclusions, is deliberately overbroad; and some of these offenses will be *profoundly* overbroad. This overbreadth could only be workable if Step Two is up to the task of excluding offenses that are not serious and/or violent enough to be labeled “crime of violence” (in the context of a three-strikes provision calling for maximum or near-maximum sentences). We are not confident that the limitations relating to mens rea or bodily injury could ever be up to the task—even if perfectly written, and especially not as currently written. So again, the minimum-prior-sentence exclusion is the key.

1. Prior sentence

The minimum-prior-sentence exclusion is (by far) the most administrable way to deal with overbreadth. So long as the Commission sets the minimum high enough, it will exclude the great majority of cases involving non-violent conduct, making the more fact-intensive exclusions less impactful (and thereby reducing litigation). Defenders recommend a

³⁶ *Id.* at 28-29.

threshold of five years (and at least three years served, with the burden on the defense to show sentence served). This might look like this:

(3) STEP TWO—EXCLUSIONS.— The term “crime of violence” does not include any offense where any one of the following exclusions applies.

(A) SENTENCE LENGTH.—Where the offense resulted in a prior conviction,³⁷ the sentence imposed was either non-incarcerative (e.g., probation, fine, community service) or was a term of imprisonment less than 5 years; or the defendant establishes that he or she served less than 3 years in prison.

There are other ways the Commission could accomplish this, including by amending §4B1.2(c) in line with last year’s proposal.³⁸

This is a much higher minimum-sentence exclusion than the Commission’s current proposal contemplates and it’s even higher than we suggested in our initial comment just two weeks ago. It is essentially our position from last year, which selected from among the Commission’s options for a minimum-sentence proposal.³⁹ This year, the Commission’s options are much lower, and Defenders initially tried to stake out a position that was closer to the Commission’s newer proposal. But we have reverted to last year’s position after additional analysis and consideration based primarily on two factors: (1) likely impact on career-offender numbers and (2) likely impact on Native American clients.

Career-offender numbers. At first glance, one might think that because the proposed list of offenses largely mirrors already-enumerated offenses, the career-offender population could remain roughly constant. But that does not account for the significant impact the categorical approach

³⁷ The Commission’s proposed subsection (a)(3) does not clarify that the exclusion applies only to prior convictions. Our version clarifies this.

³⁸ [2025 Proposed Amendments: Career Offender](#) at 3, 8-10.

³⁹ Compare *id.*, with [Defenders’ Comment on the USSC’s 2025 Proposed Amendment: Career Offender](#) at 29-32.

(including generic definitions) has on career-offender application⁴⁰; nor does it account for the quantity of overbreadth the Commission’s proposal tolerates at Step One.

Our biggest concern is aggravated assault—a particularly common state offense and also a common federal offense in Indian Country—which can reach both very serious and not-serious conduct.⁴¹ With aggravated-assault offenses based on heightened bodily injury, a large proportion of states’ statutes do not currently satisfy the force clause or generic definition, including the federal offense.⁴² With aggravated assault based on a deadly weapon (ADW), many state statutes are presently excluded.⁴³ And beyond

⁴⁰ Generic definitions do not capture *every* enumerated state crime across jurisdictions, as the Commission seems to intend to do here; rather, they are designed only to capture the *majority* of jurisdictions. *See Taylor v. United States*, 495 U.S. 575, 589, 598 (1990) (A crime’s generic definition is what the term means as it is used “in the criminal codes of most States” and “roughly correspond[s] to the definitions of [the crime] in a majority of the States’ criminal codes.”); *Redacted v. Redacted*, 2022 WL 4546737, at *15-*16 (D.D.C. Aug. 29, 2022) (relying upon a consensus of 25 to 30 states to establish the generic definition of robbery).

⁴¹ See [Defenders’ Comment on the USSC’s 2025 Proposed Amendment: Career Offender](#) at 23 (discussing data showing that aggravated assault is the most common prior offense that the Commission enumerates as a crime of violence).

⁴² Many state aggravated-assault statutes are likely excluded from qualifying under the force clause and generic definition because they tolerate reckless conduct. *See, e.g., United States v. Schneider*, 905 F.3d 1088, 1094-95 (8th Cir. 2018) (surveying state laws and finding 18 aggravated-assault statutes “allow for convictions based on ordinary recklessness,” which means they cannot serve as §4B1.2 predicates); *United States v. Devereaux*, 91 F.4th 1361, 1363 (10th Cir. 2024) (holding that a federal conviction for assault resulting in serious bodily injury under 18 U.S.C. § 113(a)(6) was not a “crime of violence” under the guidelines because it tolerates reckless conduct). Some aggravated-assault statutes are excluded for other reasons, like criminalizing mental injuries. *See, e.g., United States v. Burris*, 912 F.3d 386, 396-400 (6th Cir. 2019) (finding part of Ohio’s aggravated-assault statute is not a §4B1.2 predicate because it criminalizes serious mental harms).

⁴³ *See, e.g., United States v. Gomez*, 165 F.4th 1199, 1210 (9th Cir. 2026) (California’s ADW statute, Cal. Penal Code § 245, is not a §4B1.2 predicate because it can be committed recklessly); *United States v. Barnes*, 855 Fed. Appx. 893, 894 (4th Cir. 2021) (D.C.’s ADW statute can be committed recklessly); *United States v. Frazier*, 48 F.4th 884, 887 (8th Cir. 2022) (Iowa’s intimidation with a dangerous weapon is not a §4B1.2 predicate because it requires only general intent); *United States v. Simmons*, 917 F.3d 312, 320-21 (4th Cir. 2019) (North Carolina ADW is not a §4B1.2 predicate because it can be committed with culpable negligence); *United*

these, many additional state ADW statutes (likely a majority) presumably don't qualify based on the statute's explicit mens rea,⁴⁴ or based on state case law.⁴⁵ And many excluded offenses are in populous states.

If the Commission's new approach at Step One includes all these offenses, and Step Two excludes only a small fraction of them, then based only on this one offense type, Defenders anticipate that career-offender numbers could explode. And of course, the Commission's proposal isn't just about aggravated assault.

Native American clients. TIAG presented compelling testimony last week that eliminating the categorical approach will have a disproportionate and negative impact on Native American clients.⁴⁶ And Commission data bears this out: the three districts with the highest percentage of cases

States v. Young, 809 F. App'x 203, 209 (5th Cir. 2020) (Louisiana aggravated assault with a firearm is not a violent felony because it can be committed with negligent conduct); *see also* Gov't Answer Br. in *United States v. Gonzalez*, No. 21-2022, 2021 WL 3236540 at *3-4 (10th Cir. July 21, 2021) (conceding that N.M. aggravated assault with a deadly weapon is not an ACCA predicate because it is a general intent crime).

⁴⁴ *See, e.g.*, Ala. Code § 13A-6-21(a)(3); Alaska Stat. Ann. § 11.41.200(a)(1); Colo. Rev. Stat. Ann. § 18-3-203(1)(d); Conn. Gen. Stat. Ann. § 53a-60(a)(3); Del. Code Ann. tit. 11, § 612(a)(2); Ky. Rev. Stat. Ann. § 508.025(1)(a); Me. Rev. Stat. tit. 17-A, § 208(1)(B); Neb. Rev. Stat. Ann. § 28-309(1)(b); N.H. Rev. Stat. Ann. § 631:2(I)(b); N.J. Stat. Ann. § 2C:12-1(b)(3); Or. Rev. Stat. Ann. § 163.165(1)(a); R.I. Gen. Laws Ann. §§ 11-5-2(a), 11-5-2.2; Tenn. Code Ann. § 39-13-102(a)(1)(B)(iii); Wash. Rev. Code Ann. § 9A.36.031(1)(d); *cf.*, *e.g.*, Ariz. Rev. Stat. Ann. § 13-1204(A)(2) (close analog of ADW, aggravated assault that occurs if person uses a deadly weapon when committing an assault as prescribed under § 13-1203, which tolerates reckless causation of injury); N.D. Cent. Code Ann. § 12.1-17-03 (close analog of ADW, reckless endangerment with firearm).

⁴⁵ *See, e.g.*, *Kelly v. State*, 552 So. 2d 206, 208 (Fla. Dist. Ct. App. 1989) (affirming a Florida ADW conviction under Fla. Stat. Ann. § 784.021(1)(a) by explaining that intent may be established “by proof of conduct equivalent to culpable negligence”); *Commonwealth v. Welch*, 450 N.E.2d 1100, 1102 (Mass. App. Ct. 1983) (explaining that Massachusetts ADW law, Mass. Gen. Laws Ann. ch. 265, § 15A(b), can be proven through “proof of a wilful, wanton and reckless act”); *State in Interest of McElhaney*, 579 P.2d 328 (Utah 1978) (stating that under Utah's aggravated ADW statute, “no culpable mental state is specified and thus . . . intent, knowledge, or recklessness shall suffice to establish criminal responsibility” (internal quotation marks omitted)).

⁴⁶ *See* [TIAG Comment](#) at 2-5.

sentenced under Chapter Two, Part A (crimes against a person) are Oklahoma East, South Dakota, and Oklahoma North—far from the urban centers that people might associate with violent crimes.⁴⁷

This is a direct consequence of federal jurisdiction over Indian Country: conduct that would ordinarily be handled in state court—bar fights, domestic altercations, and mine-run assaults—is instead prosecuted federally.⁴⁸ And the resulting sentences are much higher on average than state sentences.⁴⁹ Thus, Defenders have come to realize that a 13-month minimum-prior-sentence exclusion (the threshold we suggested in our initial comment) will not tease out relatively minor offenses—the “barroom brawls” that have never made sense as career-offender predicates⁵⁰—for a distinct racial group. The Commission should not attempt to ameliorate (to some extent) a racial disparity that mostly impacts Black men by exacerbating a different racial disparity impacting Native Americans—and certainly not when there is a better option.

Our data-based concerns about career-offender numbers and Native clients counsel for caution, and thus in favor of a high minimum-sentence exclusion. And these aren’t our only concerns; as we noted in our initial comment, in California, our nation’s most populous state, the lowest

⁴⁷ These data were extracted from the Commission’s publicly available “Individual Datafiles” datafiles spanning fiscal years 2020-2024. USSC, [Commission Datafiles](#). The Districts of North Dakota, Wyoming, and Montana, and the Eastern District of Washington, also make the top ten. *Id.*

⁴⁸ *United States v. Lasley*, 832 F.3d 910, 916-19 (8th Cir. 2016) (Bright, J., dissenting) (discussing this and the significant sentencing disparities it engenders).

⁴⁹ *Id.*; see also Desiree L. Fox, et al., [Over Incarceration of Native Americans: Roots, Inequities, and Solutions](#), MacArthur Foundation at 7 (Jan. 10, 2023) (“2008 sentencing data showed that AI/AN in South Dakota who were prosecuted for aggravated assault in federal court received sentences that were 62% longer than those prosecuted in state court for the same offense.”).

⁵⁰ USSC, [Criminal History Working Group Report](#) at 17 (Oct. 17, 1991) (noting that the “crime of violence” definition sometimes captured statutory offenses where the conduct involved was “less serious in nature than the conduct that one generally envisions as constituting a crime of violence[.]” like a “barroom brawl” or a “heated verbal dispute”); see also *id.* at 33 (suggesting that one option for the Commission was excluding the use of *two* lesser prior offenses as the two qualifying career-offender predicates—“e.g., two barroom brawls”).

incarcerative sentence possible for the lowest-level felony is 16 months.⁵¹ When shifting to a new system, we know there will be unforeseen—and unforeseeable—errors. The cost of errors in this context, though, are not symmetrical. If the threshold is set too high, little-to-no harm is done: people will be sentenced under otherwise-applicable guidelines, which account for aggravated conduct and criminal history. But if the threshold is too low, consequences could be catastrophic: the career-offender population could increase dramatically; sentences for a distinct, vulnerable ethnic group could explode; and the gulf between clients’ experiences in guideline-centric districts versus other districts could further widen. In the face of uncertainty with stakes this high, the Commission should err on the side of fewer career offenders. Once the Commission starts getting real-world data under the new scheme, it can consider further refinements.

At last week’s hearing, the DOJ witness suggested that prior sentence length is not a good proxy for offense seriousness.⁵² Defenders would not claim that sentence length is a perfect proxy; but it is the best option available and it’s certainly the best that is easy to apply. That’s why it serves as the foundation for Chapter Four’s scoring system: “Criminal history points”—based on sentence length—“represent the purest form in which the guidelines measure recidivism risk.”⁵³ Indeed, the Commission has suggested that the career-offender guideline—the part of Chapter Four that does not distinguish between offenses based on length of prior sentence—makes Chapter Four less predictive of recidivism risk than otherwise.⁵⁴

When the Commission decided to largely eliminate the categorical approach for §2L1.2 in 2016, it transitioned to a minimum-sentence system for gauging prior offense seriousness—distinguishing between sentences of at least 5 years, 2 years, 13 months, and others—after “conclud[ing] that the length of sentence imposed by a sentencing court is a strong indicator of the court’s assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in

⁵¹ See Cal. Penal Code § 1170(h)(1).

⁵² [DOJ Witness Statement](#) at 6.

⁵³ USSC, [Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines](#) at 7 (May 2004).

⁵⁴ *Id.* at 9, 37.

the Chapter Four of the *Guidelines Manual*.⁵⁵ Incidentally, the Commission also noted that using prior sentence length as a proxy for seriousness “would greatly simplify application of the guideline.”⁵⁶ And post-amendment study has proven that the Commission was right about that.⁵⁷

Finally, several stakeholders last week argued that the Commission should not amend §4B1.2 to turn on sentence *served* rather than sentence *imposed*. This opposition explains why Defenders are first asking for five years imposed, rather than going straight to sentence served, and also why—on this one issue (sentence served)—we accept the burden of proof.

But Defenders are truly baffled by the opposition.⁵⁸ Congress’s most recent recidivist enhancements rely on sentence served⁵⁹; and as noted in our initial comment, prosecutors continue to charge, and prove, those enhancements. Also, probation officers frequently have to determine when a person was released from prison to apply the look-back rule at §4A1.2(e)(1). These records *do* exist: In Defenders’ experience across myriad jurisdictions, state and local agencies that imprison our clients are required to keep records of that imprisonment.⁶⁰ To be sure, it is often harder to get records from jailors than from clerks of court; but defendants have the strongest possible incentive to persist in efforts to obtain these records. And defendants can begin the process of obtaining these records early in a case. Moreover, in the rare case in which a state agency is utterly unreachable, our clients are in a unique position to nevertheless prove their release date—with, *e.g.*, a bus ticket from prison, a lease agreement, work or school records, or even dated

⁵⁵ USSC App’x C, [Amend. 802](#) (2016) (Reason for Amendment).

⁵⁶ *Id.*

⁵⁷ USSG, [Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment](#) at 17-18 (2022).

⁵⁸ We find concerns about administrability to be particularly baffling given that the stakeholders who raised concerns about a defendant’s ability to prove sentence served did not raise concerns about defendants’ ability to prove that they did not intend bodily harm or acted recklessly (relating to prior offenses).

⁵⁹ *See* 21 U.S.C. § 802(58), (59).

⁶⁰ In ACCA cases, where predicates never time out, problems do arise, as it can be difficult or impossible to obtain old records from the pre-computer decades; this is true with court records (regarding sentence *imposed*) as well. But given timing rules, we almost never see career-offender predicates from the 1970s, 80s, or 90s.

photographs or emails. In contemporary life, anyone who is not incarcerated leaves a digital footprint of their daily activities.

To the extent that the concern is about concurrent sentences, there is an easy solution. At the hearing last week, the POAG witness said there could be confusion when a person served multiple sentences concurrently: Would §4B1.2’s assessment rely on the ultimate release date? Or an earlier date where the potential predicate was a shorter sentence?⁶¹ This is a legitimate question, but one that the Commission can simply answer, however it sees fit (either in guideline text or in commentary).

Beyond administrability, a substantive concern was raised—that relying on sentence served might create disparities, since people get released due to prison overcrowding or other circumstances unrelated to offense seriousness. But the primary reason to rely on sentence served is to *reduce* disparities. Because while federal prosecutors may not understand idiosyncratic state mechanisms for early release, state judges (and state practitioners who negotiate plea agreements) have to understand them. And idiosyncratic early-release systems (that are hard for federal practitioners to understand) fundamentally change the nature of imposed sentences. A judge who imposes a 3-year sentence without good time or parole is making a very different judgment than a judge who imposes a 3-year sentence where everyone expects release at 25% (9 months). Defendants should be permitted to prove hard-record-based facts that would cure this disparity.

2. Other limitations

As long as Step Two’s minimum-prior-sentence exclusion is set high enough—at five years; and at least three years *served*—Defenders’ otherwise serious anxieties about the more fact-intensive limitations dissipate. We would expect a sufficient minimum-sentence exclusion to exclude most cases where there was no serious bodily injury (and no attempt or threat of such injury), and also most cases involving a mens rea less than knowledge.

These limitations could still be important, though, in a small number of cases. As the Commission’s working group recognized back in 1991, it is “highly unlikely that Congress envisioned” reckless offenses like “involuntary

⁶¹ USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 2:15:00-2:15:20 (Mar. 9, 2026).

manslaughter or vehicular manslaughter (typically in connection with driving under the influence of alcohol or controlled substances)” when it “referred to crimes of violence.”⁶²

Our primary concern with these more fact-intensive limitations is that the burden of proving relevant facts remains on the government. That is, “[a]ny difficulty in proving the facts underlying a past conviction” should inure to the benefit of the defendant, such that a defendant’s “career-offender status” could never be based a failure of “record-keeping.”⁶³ We understand the CLC’s concern that conduct-based inquiries could result in increased litigation, but that problem should be addressed by adopting a much higher threshold for the minimum-prior-sentence exclusion, which would limit the role of fact-based limitations—not by making defendants afraid to argue for limitations. And in meeting its burden, the government should be restricted to Shepard documents, as the Commission proposed last year.⁶⁴

Turning to the specifics of the Commission’s second limitation, the injury/harm limitation, Defenders’ positions are as follows:

- The injury-focused option (as opposed to harm-focused) is the viable option. The harm-focused option could resurrect the uncertainty of the residual clause and could also nullify this limitation (regardless of burden) since nearly every criminal offense can be said to at least create a *risk* of injury to another.
- Within the injury-focused option, “serious bodily injury” is preferable; mere “bodily injury” sets the threshold too low. Courts have found the bodily-injury standard satisfied based on minimal injuries, involving conduct that is not meaningfully violent.⁶⁵ Also,

⁶² [1991 Working Group Report](#) at 32-33.

⁶³ *United States v. Burris*, 912 F.3d 386, 409 (6th Cir. 2019) (Thapar, J., concurring).

⁶⁴ [2025 Proposed Amendments: Career Offender](#) at 6-7; *see also* [Defenders’ Reply Comment on the USSC’s 2025 Proposed Amendments: Career Offender](#) at 2-3 (Feb. 18, 2025) (replying to a government argument for using additional evidence).

⁶⁵ *See, e.g., United States v. Blanco*, 27 F.4th 375, 383 (5th Cir. 2022) (“We have indicated that the bodily injury enhancement may apply even if the injury is not both painful and obvious and that the absence of bruising, swelling, or bleeding is not dispositive.” (cleaned up)); *United States v. Greene*, 964 F.2d 911, 911-12 (9th

“serious bodily injury” incorporates aggravated sexual abuse under § 2241, which the Commission intends to cover.⁶⁶

- The Commission should not exclude extortion and arson offenses from the limitation—if it includes them in the first place. Really, the fact that the Commission is contemplating a special rule here proves the point we made earlier: extortion and arson are usually nonviolent offenses. If the Commission chooses to include these offenses at Step One, it should at least focus on violent cases—by permitting the limitations to work in the ordinary way.
- Finally, Defenders recommend a non-substantive revision for clarity: replacing “acts for which the defendant is criminally liable” with “conduct comprising the offense of conviction.” We think the Commission intended its “criminally liable” language to capture a defendant who was convicted as an aider-abettor (or otherwise held accountable as a principal).⁶⁷ But some people thought it might refer to more complicated legal concepts or require comparing state law against some generic notion of liability.

Turning to the final limitation, related to mens rea, Defenders’ positions on the specifics are as follows:

- The limitation should refer not only to recklessness and negligence, but also to accidental conduct.
- The limitation should clarify that the relevant mens rea attaches to the violent conduct (or threatened violent conduct). As proposed, the reference to “defendant’s conduct during the commission of the

Cir. 1992) (slap in the face, causing pain, swelling, and redness); *United States v. Isaacs*, 947 F.2d 112, 114-15 (4th Cir. 1991) (slap in the face, causing red and puffy mark); *United States v. Fitzwater*, 896 F.2d 1009, 1012 (6th Cir. 1990) (pain caused where “a bank teller hit her head and hip on her teller’s drawer in the course of lying down on the floor during the robbery”). Even if it would make sense to call slapping a “crime of violence,” it certainly does not make sense to deem an *intent* or a *threat* to slap someone to be a “crime of violence.”

⁶⁶ USSG §1B1.1, cmt. note 1(L).

⁶⁷ See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (explaining that all states and the federal government have “expressly abrogated the distinction” among principals and aiders and abettors (citation omitted)).

offense” could be misinterpreted to mean that any intentional act—no matter how attenuated from the harm—defeats the limitation. The government has suggested clarifying this matter in the opposite direction, to indicate that essentially any knowing or intentional act relevant to an offense can defeat the limitation.⁶⁸ But that would nullify the limitation: “Every crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome.”⁶⁹ The Commission should reject the government’s suggestion and clarify that the relevant mental state is the one that accompanies the conduct related to the injury.⁷⁰

- Alternatively, for simplicity, the limitation could clarify that this limitation is based on the offense of conviction, rather than conduct, as POAG has suggested.⁷¹
- Finally, we urge the Commission to reject the bracketed language excepting “extreme recklessness” from the limitation. If the Commission excludes reckless conduct, but not extreme recklessness, there will be litigation over how to distinguish between gradations of recklessness—as applied to *conduct*. At bottom, extreme recklessness is still recklessness requiring a risk “far less than . . . substantial certainty.”⁷² And like ordinary recklessness, extreme recklessness operates on a continuum: the more unjustified the risk, the lower the risk needs to be. But there is no line marking where recklessness ends and extreme recklessness begins. That indeterminacy would create problems. If the Commission nevertheless decides to create an exception for

⁶⁸ [DOJ Witness Statement](#) at 8.

⁶⁹ *United States v. Woods*, 576 F.3d 400, 411 (7th Cir. 2009).

⁷⁰ Clarifying this nuance will better comport with *Borden* as well, which requires a purposeful or knowing “*application of force*,” not merely that the person engaged in volitional conduct that happened to produce the result. *See Redacted v. Redacted*, 2022 WL 4546737, at *4 (D.D.C. Aug. 29, 2022) (interpreting *Borden*); *United States v. Gomez*, 165 F.4th 1199, 1209 (9th Cir. 2026) (en banc) (finding California ADW is not a crime of violence under USSG §4B1.2(a)(1) because it “does not require the intentional application of force against another”).

⁷¹ [POAG Witness Statement](#) at 5.

⁷² Wayne R. Lafave, 2 Subst. Crim. L. § 14.4(a) (3d ed. Oct. 2025).

extreme recklessness, we strongly urge the Commission to base that exception solely on the statute of conviction (*not* conduct), to avoid protracted and uncertain litigation.

II. The Commission should proceed with substantially limiting “controlled substance offense”—most simply, by narrowing that definition to only the offenses in the directive.

This supplemental comment focuses on “crime of violence.” But three points were raised at last week’s hearing related to “controlled substance offense” that necessitate a brief response.

1. *Sentence served as applied to CSO*: Last week, CLC and POAG argued that the Commission should adopt a sentence-imposed cutoff with the CSO definition, because gathering records to establish sentence served would be too challenging. Defenders refer back to our discussion of sentence served in relation to “crime of violence,” above. In short, this does not present a serious challenge, and it’s certainly not an insurmountable one.

2. *Congressional intent*: No one has argued (yet) that removing state-drug priors from the CSO definition would violate 28 U.S.C. § 994(h). However, DOJ asserted that doing so could create “tension” with inferred Congressional intent because it would result in such a small number of drug-based career offenders.⁷³ First of all, statutory interpretation begins—and ends—with the text, “not by psychoanalyzing those who enacted it.”⁷⁴ And § 994(h)’s text unambiguously permits CSO Option 1: just comparing § 994(h)(2)(B) with (h)(1)(B) and (i) makes this clear (and there is additional textual support).⁷⁵ But also, there is no reason to think that Congress’s intent differed from text. As part of the new mandatory guideline system, § 994(h) called for what was likely the harshest mandatory minimum then in federal law.⁷⁶ So if one is going to engage in atextual psychoanalysis, the most

⁷³ [DOJ Witness Statement](#) at 8-9.

⁷⁴ *Carter v. United States*, 530 U.S. 255, 271 (2000); *see also Babb v. Wilkie*, 589 U.S. 399, 413 (2020) (“Where, as here, the words of a statute are unambiguous, the judicial inquiry is complete” (internal brackets and citations omitted)).

⁷⁵ *See* [Defenders’ Comment on the USSC’s 2023 Proposed Amendments: Career Offender](#) at 22-25 (Mar. 14, 2023).

⁷⁶ In 1984, the Controlled Substances Act’s recidivist provision elevated only the maximum sentence, not the minimum; and the various changes that Congress

natural inference is that Congress was focusing on serious federal drug-trafficking crimes—not on whatever trafficking conduct states might choose to prosecute.⁷⁷

3. *Circuit splits*: At the hearing, Vice Chair Wong asked if adopting the time-of-conviction approach follows from the Supreme Court’s decision in *Brown* and “why a disconnect . . . would not be problematic.”⁷⁸ As Defenders’ witness alluded, the Supreme Court in *Brown* distinguished the Guidelines from ACCA.⁷⁹ And both courts of appeals that have addressed the issue post-*Brown* recognized that *Brown* did not answer the Guidelines question (ultimately splitting on their answer to that question).⁸⁰ Moreover, in briefing in *Brown*, the government suggested that ACCA and the Guidelines should be interpreted differently on this question.⁸¹

made to the CSA in 1984 did not change that. See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502, 98 Stat. 1837, 2068 (1984) (Chapter V of Comprehensive Crime Control Act of 1984).

⁷⁷ See [2023 Defender Comment on Proposed Amendments: Career Offender](#) at 25. At the time, Congress thought that federal prosecutors would focus on “major” drug-trafficking. See [S. Rep. 98-225](#) at 20 (1983) (report accompanying the Comprehensive Crime Control Act of 1984) (in discussing the Bail Reform Act, portraying drug traffickers charged in federal court as major traffickers—explaining that they were involved in an “extremely lucrative” trade and had “substantial ties outside the United States” and thus “both the resources and foreign contacts to escape to other countries with relative ease”); *id.* at 23-24 (same).

⁷⁸ USSC, [Public Hearing](#) at 1:45:53-1:46:30.

⁷⁹ *Brown v. United States*, 602 U.S. 101, 120 n.7 (2024) (“[T]here is reason to doubt that the Guidelines practice [the time-of-sentencing approach] is relevant here . . . because Congress has expressly directed courts to apply the Guidelines ‘in effect on the date the defendant is sentenced’” and “ACCA contains no similar instruction.”).

⁸⁰ Compare *United States v. Minor*, 121 F.4th 1085, 1092 (5th Cir. 2024) (“Because ACCA and the Guidelines differ in key ways, as both the Supreme Court and government acknowledge, we understand that *Brown* does not dictate the outcome in the case before us.”), with *United States v. Nelson*, 151 F.4th 577, 583 (4th Cir. 2025) (“We do not read the *Brown* footnote to mandate the time-of-sentencing approach in the Guidelines context, leaving us free to decide between that approach and the time-of-conviction approach”; but ultimately finding that the time-of-prior-conviction approach was required by prior circuit precedent).

⁸¹ Brief for United States in *Brown*, 2023 WL 5411948, at *43 (Aug. 21, 2023) (“*Brown* is wrong to suggest that the ‘time-of-sentencing rule’ that provides ‘the background sentencing principle’ in the Guidelines context’ should equally apply

III. A concluding note on the directive

Defenders have long viewed the categorical approach as the best of bad options for (inherently problematic) recidivist enhancements. In addition to the fact that the categorical approach is the best way to define a “conviction,” it also has the salutary effect of keeping career offender numbers down. And this should be a shared goal: the career-offender guideline produces unduly harsh sentencing ranges in most cases, which exacerbate and compound racial disparities, and which judges reject *en masse*.

If the Commission decides to eliminate the categorical approach, it must take care not to make a bad guideline worse. With “controlled substance offense,” directive text provides the best path: With a pen stroke, the Commission could remove state-drug priors from the analysis entirely, making the guideline fairer and less racially skewed and eliminating two circuit splits. If the Commission instead opts for a minimum sentence-length requirement, this could still be an improvement, but only if the threshold is high enough. For instance, if the Commission selected one of the lower cutoff options, and also resolved the circuit splits against defendants, we could easily see a *net increase* in the number of drug-only-pathway career offenders: Highly populated districts in the First, Second, Fifth, and Ninth Circuits currently exclude many state drug priors, so the number of newly captured individuals could easily exceed whatever a lower cutoff filters out.⁸²

With “crime of violence,” the directive is less prescriptive. But in the context of a provision calling for the harshest sentencing ranges in the Guidelines Manual—ranges that were conceived as mandatory—“crime of

here. . . . Congress has provided by statute for application of the Guidelines in effect at the time of a defendant’s federal sentencing. *See* 18 U.S.C. § 3553(a)(4)(A)(ii) . . . No similar textual mandate exists for the ACCA.”).

⁸² *See, e.g., United States v. Chaires*, 88 F.4th 172, 178 (2d Cir. 2023) (holding that prior New York drug convictions cannot serve as §4B1.2 predicates); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (finding that an Arizona marijuana offense did not qualify as a §4B1.2 predicate); *United States v. Steele*, No. 22-cr-195, 2024 WL 1877072 (E.D. La. Apr. 23, 2024) (finding that a Louisiana cocaine offense did not qualify as §4B1.2 predicate); *cf.* USSC, [Data Handout on 2026 Proposed Circuit Conflicts Amendment](#) (Feb. 2026) (highlighting how circuits siding with the government on the circuit splits generally see more people qualifying as career offenders and also qualifying for enhanced BOLs under §2K2.1).

violence” connotes a high level of violence.⁸³ In other crime-of-violence contexts with high stakes (ACCA, § 924(c))—arguably lower stakes than § 994(h) as conceived—the Supreme Court has adopted an analytical framework that is “under-inclusive by design,” which “*expects* that some violent acts . . . will not trigger enhanced sentences.”⁸⁴ In this context, the goal has never been to capture every offense that might involve some modicum of violence. Rather, the term “crime of violence” is meant to “mark out a narrow ‘category of violent, active crimes’”⁸⁵—the worst of the worst.⁸⁶

The simplest way to focus on the convictions the directive was designed to reach, while avoiding state-based anomalies, is a high minimum-prior-sentence threshold—5 years, with at least 3 years served. As discussed in this supplemental comment, a lower threshold (even the 13 months Defenders previously tried to make work) is not enough to prevent career-offender numbers from increasing and it’s not enough to avoid creating a new racial disparity. Other limitations could still matter in edge cases, but the high prior-sentence cutoff is the key to a fair and administrable guideline.

In closing, Defenders again commend the Commission for its sustained attention to this most problematic of guidelines. Since hosting a roundtable in 2024, the Commission has contemplated amendments that would not only eliminate the categorical approach to address anomalous cases where the current §4B1.2 is seen as underinclusive (as some other stakeholders have asked for) but would also address bigger problems related to over-inclusiveness, which are starkly revealed by sentencing data. Defenders appreciate opportunities to participate in this process and we sincerely hope that the Commission is able to promulgate an amendment this year that finally, and effectively, addresses the big problems.

⁸³ *Borden v. United States*, 593 U.S. 420, 438 (2021) (“Ultimately, context determines meaning” (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010))); see also *id.* (“Were there any doubts about the elements clause’s meaning, context and purpose would remove it.”).

⁸⁴ *Id.* at 442 (emphasis in original).

⁸⁵ *Id.* at 438 (quoting *Johnson*, 559 U.S. at 139).

⁸⁶ See [128 Cong. Rec. 26517-18](#) (Sept. 30, 1982) (Senator Kennedy, explaining that the provision that would become § 994(h) targeted the “relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets”—that is, those “who stab, shoot, mug, and rob”).

**Federal Public and Community Defenders
Comment on Career Offender and Circuit Conflicts
(January Proposals 2 and 3)**

March 2, 2026

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Federal Public and Community Defenders appreciate the Commission's sustained attention to the career-offender guideline and efforts to improve it. From the start, the congressional directive requiring this guideline has interfered with the Sentencing Commission's ability to create guidelines that are rational and fair; and the career-offender guideline has called for overly harsh sentences and exacerbated racial disparities.

This comment has five parts. First, we set the stage by explaining that the existence of the career-offender guideline is itself a problem. Only Congress can fully solve that problem, since the career-offender guideline is based on a directive. But the Commission can make the guideline function much less badly by clarifying and substantially narrowing the definitions under USSG §4B1.2.

Second, we address the Commission's proposed new "crime of violence" definition. At this point, Defenders are able to share only general thoughts, as we are still carefully testing and analyzing application of the many interconnected parts of the proposal's various options. We will provide more specific feedback in a supplemental comment by the March 18 comment deadline. One issue, however, is already clear: every option proposed for the minimum-prior-sentence exclusion at §4B1.2(a)(3) is inadequate.

Third, we again urge the Commission to delete state drug priors from §4B1.2's "controlled substance offense" definition. The Commission's alternative proposal for a prior-sentence rule could work too, but only if the minimum sentence is long enough. We recommend five years, served.

Fourth, turning to §2K2.1, we explain why the Commission should cross-reference ACCA,¹ rather than a current set of definitions that no one likes. But the Commission will have to expressly exclude the defunct "residual clause," and we also suggest an additional clarification.

Finally, we briefly address Proposal 3, regarding controlled-substance-offense-related circuit splits. If the Commission eliminates state drug priors, that would resolve the splits without further action. Otherwise, the Commission should clarify that the Guidelines' references to "controlled substances" are to *federally* controlled substances, and that courts should apply the schedules that are in effect at the time of sentencing.

¹ "Armed Career Criminal Act," 18 U.S.C. § 924(e).

I. There can be no “good” career-offender guideline; but the Commission can use the authority it has to make the scheme better.

If a person started paying attention to federal criminal practice only recently, they would quickly discern that the career-offender guideline is a problem, but they might think the source of the problem is the so-called “categorical approach.” Since the Supreme Court began significantly narrowing the categorical approach around ten years ago, federal reporters have filled with jurists’ complaints about the approach.²

But the categorical approach is not the career-offender guideline’s big problem. The guideline, a three-strikes provision required by the Sentencing Reform Act,³ has *inherent* problems. Back before the Supreme Court had ever uttered “categorical approach” in a criminal case, practitioners struggled to apply the career-offender guideline to real-world convictions arising out of dozens of jurisdictions.⁴ And judges and other stakeholders were deriding the career-offender guideline as “unjust,” “excessive,” and overly dependent on distinctions between types of convictions that do not reflect meaningful sentencing considerations.⁵

One inherent problem is that the career-offender guideline “makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their prior convictions.”⁶ Courts

² See USSC, [2026 Proposed Amendments: Career Offender](#) at 1 (“Synopsis of Proposed Amendment,” referencing some opinions making these complaints).

³ 28 U.S.C. § 994(h) (also referenced herein as the “career-offender directive”).

⁴ See USSC, [Mem. from Gary J. Peters to All Commissioners, et al., re Career Offender Guidelines](#) at 2 (Mar. 25, 1988) (“1988 Peters Memo”) (“Since the Career Offender guidelines have begun to be applied to actual cases . . . problems have arisen.”).

⁵ USSC, *Sent’g Guidelines for U.S. Courts*, 54 Fed. Reg. 9122-01, 9161 (Mar. 3, 1989) (1989 WL 296205) (describing seven distinct criticisms lodged against the career-offender guideline); see also [Tr. of Public Hearing on Proposed Amendments to the Sentencing Guidelines](#) at 127 (Apr. 7, 1989) (then-Commissioner Stephen G. Breyer, describing complaints from judges and others).

⁶ [1988 Peters Memo](#) at 13-14 (explaining that two people convicted of the same federal drug felony would be subject to the same career offender sanction, even if one was a “drug kingpin” and the other a “low-level street dealer” who received probationary sentences for their prior drug offenses); see also USSC, [Criminal](#)

have raised concerns about this problem in their opinions for *decades*.⁷ From the start, Commission data showed “extensive use of [downward] departures” in career-offender cases.⁸ And judges felt quite strongly: “Such departures were often accompanied by disparaging comments about the career offender provisions or about the Commission itself.”⁹

Post-*Booker*, judges have no need for vitriol. Now, they can impose a well-below-guideline sentence. And that is precisely what judges have done,

[*History Working Group Report*](#) at 48-49 (Oct. 17, 1991) (“1991 Working Group Report”) (describing the results of the guideline to be “draconian” and “inherently unjust” because it can be triggered by drug priors involving small quantities for which a person received short sentences, or a minor assault that the state classifies as a felony).

⁷ See, e.g., *Bridges v. United States*, 991 F.3d 793, 810 (7th Cir. 2021) (noting that district judges frequently recognize the career-offender guideline’s cutoffs are “arbitrary,” and that the “[t]he categorical approach grafts another arbitrary cutoff onto this *already problematic guideline*”) (emphasis added)); *United States v. Vasquez*, 796 F. Supp.2d 1370, 1371 (M.D. Fla. 2011) (criticizing the career-offender guideline “as a failed attempt to come up with a rule that applie[s] to all defendants in all circumstances, regardless of the actual offenses, their nature, or their timing”); *United States v. Whigham*, 754 F. Supp. 2d 239, 242 (D. Mass. 2010) (noting that the career-offender guideline is “frequently over broad, giving the same ‘score’ to individuals who are not remotely similar and ignoring critical differences between them (their role in the offense, their mens rea) that should bear on punishment.”); *United States v. Britzman*, 750 F. Supp. 388, 390 (E.D. Ark. 1990) (explaining that because of a prior conviction for purse-snatching, the defendant was “in no different position than he would have been had that ‘crime of violence’ been murder”); *United States v. Dixon*, 2016 WL 4492843, at *3 (M.D. Ala. Aug. 5, 2016) (criticizing the career-offender guideline in a drug-trafficking case involving one prior trafficking offense and one prior “crime of violence,” for “treat[ing] a wide range of offenses of varying severity as controlled-substance offenses and violent offenses, warranting” identical enhancement); *United States v. Qualls*, 373 F. Supp. 2d 873, 877 (E.D. Wis. 2005) (criticizing the career-offender enhancement, quoting, “The precipitous effect of a habitual offender statute with mandated additional penalties will seldom coincide with the more flexible scheme of presumptive sentences, and will introduce gross disparities into sentencing patterns and distortions into the policy objectives the sentencing agency is seeking to implement.” (quoting ABA Standards for Criminal Justice—Sentencing § 18-3.5 at 59-60 (3d ed. 1994))).

⁸ Michael S. Gelacak, et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (1996).

⁹ *Id.* at 356.

in increasing numbers, for 20+ years.¹⁰ But *Booker* does not nullify the career-offender guideline’s pernicious influence: the career-offender sentencing range still has a powerful anchoring effect.¹¹ And in some districts, even today, judges mostly impose career-offender-range sentences, causing disparities and resulting in life-shatteringly-long prison sentences for unfortunate individuals—mostly, Black men—in those districts.¹²

The existence of a career-offender guideline is Congress’s fault: the guideline was created to comply with the congressional directive at § 994(h).¹³ But from the start, the career-offender guideline’s definitions have covered more offenses than § 994(h) requires.¹⁴ And since then, the Commission has

¹⁰ USSC, [Report to the Congress: Career Offender Sentencing Enhancements](#) at 22 (Aug. 2016) (“2016 Report to Congress”) (“During the past ten years, the proportion of career offenders sentenced within the applicable guideline range has decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014.”); see also USSC, [Proposed Amendment on Individuals Sentenced under §4B1.1 Career Offender: Public Data Briefing](#) at 8 (2026) (“2026 Data Briefing”) (noting that the percentage of within-career-offender-range sentences in 2024 was just 18 percent). Although judges have the authority to vary dramatically from the career-offender guideline range, they are nevertheless required to first correctly calculate that range under the complicated categorical approach. This would explain why judges these days spill more ink on the categorical approach (which they cannot get out of) than the fundamental unfairness of the career-offender guideline (which they can get out of, by imposing a below-guideline sentence). See *Bridges v. United States*, 991 F.3d 793, 810 (7th Cir. 2021) (“A district court finding that a [career offender] guideline definition is abstract, arbitrary, or arduous should ask itself, with the § 3553(a) factors in mind, why anyone should care how the answer comes out.”).

¹¹ See *Peugh v. United States*, 569 U.S. 530, 541 (2013) (“The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines. . . .”).

¹² The five districts that impose within-guideline sentences at the highest rates are: Northern District of Texas (57.1%), Southern District of Mississippi (55.3%), Southern District of Illinois (54.5%), Western District of Louisiana (54.3%), and Southern District of Georgia (54.7%). Compare these with the recent data briefing’s reported national within-range average: 18%. See [2026 Data Briefing](#) at 8. The district-specific data in this footnote were extracted from the Commission’s publicly available “Criminal History of Sentenced Individuals” datafiles spanning fiscal years 2020 to 2024. U.S. Sent’g Comm, [Commission Datafiles](#). See also [2026 Data Briefing](#) at 7 (demographic data).

¹³ USSG §4B1.1 (Background).

¹⁴ See *id.* (acknowledging that the Commission had modified § 994(h)’s definitions “to focus more precisely on the class of recidivist offenders for whom a

repeatedly expanded §4B1.2's definitions.¹⁵ This expansion continued even after the Commission in 2004 identified the career-offender guideline's application to drug-trafficking cases as one of two guideline applications associated with unwarranted racial disparities.¹⁶ And it continued post-*Booker*, although well-below-guideline-range sentences became the norm.¹⁷ The Commission did make positive changes in 2016 (deleting the residual clause and "burglary of a dwelling"), in response to the paradigm-breaking *Johnson v. United States*.¹⁸ Then it expanded definitions again in 2023.¹⁹ In recent years, it has been categorical approach caselaw (not the Commission) that has meaningfully limited the reach of §4B1.2's definitions.

As the Commission considers §4B1.2, Commissioners should be realistic: there can be no perfectly rational career-offender guideline. For all their flaws, the ordinary guidelines are designed to account for distinctions among offense conduct and prior convictions. The career-offender guideline, in contrast, is a blunt tool that's triggered by the mere fact of certain convictions. All the Commission can do is limit the reach of the career-offender guideline—by substantially contracting the definitions that trigger

lengthy term of imprisonment is appropriate" and avoid disparities). This background was added after some courts struck down §4B1.2's inclusion of drug conspiracies for going beyond § 994(h)'s terms without justification. USSC, App. C, [Amend. 528](#) (1995) (Reason for Amendment). In adding this background, the Commission did not suggest *how* or *why* it had determined that certain individuals beyond the terms of § 994(h) were "appropriate" for career-offender-level sentences.

¹⁵ See, e.g., USSC, App. C, [Amend. 433](#) (1991); USSC, App. C, [Amend. 461](#) (1992); USSC, App. C, [Amend. 568](#) (1997); USSC, App. C, [Amend. 642](#) (2002); USSC, App. C, [Amend. 674](#) (2004); USSC, App. C, [Amend. 795](#) (2015). In addition to these amendments, which added offenses to §4B1.2 or amended counting rules so that more offenses could be predicates, in 2003, the Commission also limited departures in career-offender cases. USSC, App. C, [Amend. 651](#) (2003).

¹⁶ USSC, *Fifteen Years of Guidelines Sentencing* at 131, 133-34 (2004) ("Fifteen Years Report"). The other most-racially-disparate guideline was the 100-to-1 powder-cocaine-to-crack ratio, see *id.* at 131-33, which has since been eliminated and is now understood to have been an unjust product of a less enlightened time.

¹⁷ [2016 Report to Congress](#) at 22.

¹⁸ 576 U.S. 591 (2015); see also USSG, App. C, [Amend. 798](#) (2016).

¹⁹ USSG, App. C, [Amend. 822](#) (2023) (resolving a circuit split regarding inchoate offenses by moving the reference to inchoate offenses from commentary to guideline text, to ensure that such offenses would count, and expanding the definition of "robbery").

it, as much as possible under the directive. Some stakeholders might complain about certain people avoiding the career-offender guideline. But let's be clear: no one is getting a slap on the wrist. The regular guidelines call for significant prison sentences in essentially all cases relating to drug trafficking or violence.²⁰ And for someone with a serious criminal history—regardless of whether their priors fit within specified categories—sentencing ranges go up from there.

II. 4B1.2(a): The Commission should aim not just to clarify and simplify the “crime of violence” definition, but also to limit that definition.

Everyone agrees that the “crime of violence” definition presents an application problem. But it also presents a policy problem, often capturing offenses that do not warrant the label “crime of violence” and shouldn’t trigger draconian sentencing ranges. A working group back in 1988 advised the Commission that it could distinguish between minor and more serious offenses by changing §4B1.2’s definitions so that a prior conviction could count only if it had garnered an over-13-month sentence—not just for “controlled substance offense” but also for “crime of violence.”²¹ A working group in 1991 presented multiple additional ways of restricting §4B1.2’s definitions to serious offenses, again related to both definitions.²² But in the ensuing years, the Commission has never attempted to restrict §4B1.2’s definitions to the sorts of serious crimes that Congress intended the career-offender guideline to cover.²³

²⁰ See [Defenders’ Comment on the USSC’s 2015 Proposed Amendment: Career Offender](#) at 16 (Nov. 25, 2015) (describing sentencing ranges for violent crimes); see also USSG §2D1.1.

²¹ [1988 Peters Memo](#) at 15-16.

²² [1991 Working Group Report](#) at 32-36 (describing potential avenues for narrowing definitions); see also *id.* at 48-49 (noting that under the existing §4B1.2, a “prior conviction for a minor assault may trigger the career offender provision due to the state’s classification of such a crime as a felony,” although the same conduct would be a misdemeanor elsewhere).

²³ 128 Cong. Rec. 26517-18 (Sept. 30, 1982) (Senator Kennedy, explaining that the provision that would become § 994(h) targeted the “relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets”—that is, those “who stab, shoot, mug, and rob”).

In picturing cases where injustices arise, Commissioners should keep in mind that, in the career-offender context, “crime of violence” issues arise most frequently *not* in cases where the person recently committed a violent offense, but in drug-trafficking cases where violence appears only in the form of a prior conviction.²⁴ And judges understand that there’s a profound difference between a person who recently committed a violent act, and a person who recently committed only a nonviolent drug offense but has a prior conviction that’s labeled “crime of violence.”²⁵

What’s more, even in cases presenting an instant “crime of violence,” judges still overwhelmingly impose sentences below the career-offender range—in over 70% of cases.²⁶

²⁴ See [2016 Report to Congress](#) at 28 (noting that the vast majority (80.9%) of individuals in the mixed-pathway category had drug trafficking as their instant offense, with “crime of violence” relating only to one or more prior convictions). The recidivism rate for defendants in these cases is effectively identical to the recidivism rate for defendants in “drug trafficking only” cases. [2026 Data Briefing](#) at 11.

²⁵ See, e.g., *United States v. Baker*, 961 F.2d 1390, 1393 (8th Cir. 1992) (Bright, S.J., concurring) (complaining that the 236-month sentence for a cocaine offense was a “harsh result” for the 38-year-old defendant, dependent as it was on two robberies he committed when he was 19); *United States v. Bowser*, 941 F.2d 1019, 1025-26 (10th Cir. 1991) (affirming a downward departure in a drug-trafficking case where the career-offender guideline applied based on the defendant’s only two criminal convictions (both for robbery)); *United States v. Shoupe*, 929 F.2d 116, 121 (3d Cir. 1991) (Rosenn, J., dissenting) (criticizing the majority for requiring the district court to impose a 14-year sentence in a drug case, which the judge considered “fundamentally impractical, unsound, and unjust,” in part because the defendant “over fifteen years ago at the age of eighteen, was convicted of burglary and armed robbery”); *United States v. Leavitt*, 925 F.2d 516, 518 (1st Cir. 1991) (Coffin, S.J., concurring) (in a drug-trafficking case, explaining that the defendant’s “criminal history does not reveal the kind of ‘career offender’ that I believe should warrant an elevation of sentencing range from 27–33 months to 168–210 months,” where both COV predicates were from when the defendant was 21 years old); *United States v. Woody*, 2010 WL 2884918, at *1, *9-10 (D. Neb. July 20, 2010) (declining to apply the “excessively harsh” career-offender guideline where a drug-trafficking defendant suffering from addiction had one prior CSO and one prior COV, both related to addiction); *United States v. Patzer*, 548 F. Supp. 2d 612, 616-17 (N.D. Ill. 2008) (declining to apply the career-offender guideline based on one CSO and one COV, observing that “[a]lmost one-third of his life has passed since those crimes occurred and the court is struck by Patzer’s young age when he committed those offenses”).

²⁶ When career-offender cases are isolated to those with an instant offense that is *not* labeled as a drug-trafficking offense, sentences fall below the career-offender

The career-offender guideline calls for unduly harsh sentences in *all* cases; so the goal for amending the “crime of violence” definition should not be limited to simplification (which the Commission is seeking to accomplish by eliminating the categorical approach). The Commission should also aim to limit the “crime of violence” definition, to more substantially reduce the number of career offenders. The Commission could choose to limit the “controlled substance offense” definition more dramatically, since it presents an even starker policy problem. But limiting the CSO definition would not justify expanding the COV definition, as that would just redistribute the unwarranted and excessive punishment elsewhere.

This year’s “crime of violence” proposal offers a new framework for the career-offender definitions. Defenders read the proposal as striving to:

- eliminate the categorical approach as we know it, by eliminating complicated assessments of elements and means;
- provide clear, finite lists of offenses that count as predicates;
- require that a prior conviction meet a minimum threshold of seriousness via a prior-sentence rule; and
- offer defendants an escape hatch, where conduct was not sufficiently serious or violent to be deemed a “crime of violence.”

As we understand it, the idea is to expressly identify a closed list of violent offenses, accepting that many of those offenses are overbroad (meaning they cover both violent and nonviolent conduct) on the front end; but then to narrow that overbreadth via exclusions and limitations on the back end.

Again, Defenders approach this part of the Commission’s proposal with caution. As we have long said, the categorical approach should not be viewed as a “problem”; rather, “it is the Supreme Court’s *solution* to problems that arise when applying recidivist-based sentence enhancements that look to convictions arising out of 50+ distinct criminal jurisdictions.”²⁷ Moreover,

range at a rate of 70.4% (as compared to 82.1% in instant drug-trafficking cases). [Individual Datafiles](#), FY20-24.

²⁷ [Defenders’ Comment on the USSC’s 2025 Proposed Amendment: Career Offender](#) at 2 (Feb. 3, 2025).

because the categorical approach is “under-inclusive by design,”²⁸ it has the salutatory effect of limiting the number of offenses categorized as “crime of violence”—a feature, not a bug, given that the guideline calls for sentencing ranges that are too high in nearly all cases.²⁹

The current proposal gives us pause for at least two reasons. First, it tolerates overbreadth on the front end, with narrowing mechanisms at the back end. And we are uncertain how the limitations would work in practice; we are continuing to think through this problem. Second, we have little information on potential impact. The Commission’s public data briefing provides some information on the prior convictions of individuals convicted of an instant federal “crime of violence”; but as discussed, “crime of violence” questions usually arise in drug-trafficking cases, and the report contains no information on prior convictions in those cases.³⁰ And we lack data on the big question: How many people would have two qualifying priors under any potential definition? We have pulled some data suggesting that the Commission’s proposal (even if limited only to unbracketed offenses) could result in significantly higher numbers of career offenders, but we lack confidence in it.³¹ We will continue to explore data through at least March 18, but it may be that there is no reliable way of measuring impact.

All that said, Defenders intend to engage more fully with the Commission’s proposal. We had hoped to do that by the witness-statement

²⁸ *Borden v. United States*, 593 U.S. 420, 442 (2021).

²⁹ *See supra* note 26.

³⁰ [2026 Data Briefing](#) at 15.

³¹ Defenders reviewed Commission data (including the main sentencing files and criminal history files) from the last five fiscal years to explore how many individuals might meet the proposed criteria based on observable offense and criminal history information. Our preliminary review suggested that the amendments could materially expand the number of individuals qualifying as career offenders—potentially by a substantial margin—but the structure of the available data does not permit a reliable numerical estimate. The public datasets do not identify which specific offense within a multi-count sentencing event triggered the criminal history points associated with career offender status, and the criminal history files do not contain a full account of past sentencing events to justify the total criminal history points assigned. As a result, any estimate would necessarily rely on proxy measures and methodological assumptions rather than directly observable designations. The Commission’s data briefing on this amendment likewise did not identify the number of individuals who could be affected.

deadline (that is, in this document) but, unfortunately, we cannot yet speak to specifics. The “crime of violence” proposal has numerous moving parts, and we think many of those parts will not function as intended—at least not without significant litigation to sort out their meaning. Each part of the proposal has ripple effects; and each time we contemplate proposing alternative language for one part, we have to analyze all the ripple effects of that language. Also, at the upcoming hearing, we hope to learn more about Commissioners’ and other stakeholders’ concerns, which should help us finalize our analysis in a way that is actually helpful. Again, that analysis will be provided by the March 18 comment deadline.

Already, though, at least one thing is crystal clear: the minimum-prior-sentence exclusion at subsection (a)(3) is woefully inadequate as written (under all proposed options). This would be true irrespective of whether the Commission makes the list of federal offenses at (a)(1) longer or shorter, or chooses Option 1 or Option 2 (or any sub-option) for state offenses. Indeed, if the Commission decides not to move forward with a new analytical approach for “crime of violence” this year, the exclusion proposed at subsection (a)(3) would be a great addition to the current definition; and even then, the proposed options would be inadequate.

A minimum-prior-sentence exclusion is the simplest way to limit the “crime of violence” definition to more serious offenses. But that works only if the exclusion sets the threshold at *at least* 13 months (that is, excludes any offense that does not garner three points under §4A1.1(a)). An exclusion with a threshold that’s at least this high would ensure that a prior offense not only *was capable* of garnering a felony-level sentence but also *received* a felony-level sentence. This would be meaningful (albeit imperfect) evidence that the offense may have been serious enough to warrant the label “crime of violence.”³² And it would finally prevent individuals who have never before served a prison sentence from receiving a career-offender sentence.

But the Commission must actually exclude probationary sentences and short jail sentences. And unfortunately, the proposal as written does not accomplish this; indeed, it suggests that a probation sentence without even

³² Even 13 months is lower than ideal. In at least one state, California—our nation’s most populous state—the lowest incarcerative sentence possible for a low-level (unclassified) felony is 16 months. *See* Cal. Penal Code § 1170(h)(1).

conditional jail time might be enough to make this exclusion inapplicable. This would make (a)(3) toothless. In Defenders’ experience, state judges impose (supervised and unsupervised) probationary sentences in even the most minor cases. Further, the length of a probationary term is largely related to the state of conviction, with a report showing that probationary terms average just 9.3 months in Kansas but 52.4 months in New Jersey.³³ And these averages include misdemeanor probation (which in most states can last *years*).³⁴ Further, it is easy for judges to impose lengthy probation sentences since, in many jurisdictions, they can reduce them later.³⁵ In sum, whether a probationary term lasts one, three, or five years, or is supervised or not, reflects local sentencing practices more than the seriousness of the underlying offense. A probation-only sentence—of any length—is a clear indication that the offense is not really a “crime of violence.”

Further, a sentence of just 30 or 60 days is too short to reflect offense seriousness or recidivism risk. Most likely, it will reflect nothing more than time served in pretrial detention before the person was offered a plea deal for release, which means that the length of sentence often has more to do with a person’s financial ability to make bail than with the seriousness of their offense.³⁶ Again, this sort of sentence is an indication that the offense is not fairly labeled a “crime of violence.”

Back in 1988, a working group advised the Commission that it could focus on more serious offenses by limiting §4B1.2’s definitions to prior convictions that meet the threshold of §4A1.1(a)—*i.e.*, require an imprisonment sentence exceeding 13 months.³⁷ This was meant to

³³ The Pew Charitable Trusts, [States Can Shorten Probation and Protect Public Safety](#) 4, Fig. 1 (Dec. 2020).

³⁴ *Id.* at 17 (explaining that statutory maxima for *misdemeanor* probation in most states range from two to ten years).

³⁵ *Id.* at 15-16 (showing that in most states, the court has authority to terminate probation early, and in many there is a mandated review for early discharge).

³⁶ *Cf.* Kimberly Kessler Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. Rev. 2001 (2023) (arguing that “time served” sentences reflect only the inability to get released pretrial and not actual case-specific factors, and that they present a serious problem in our nation’s justice systems).

³⁷ [1988 Peters Memo](#) at 15-16.

“distinguish[] between career offenders who have committed serious prior offenses and those whose prior offenses were relatively minor[.]”³⁸ Also, a 13-month threshold would help “ameliorate the prison impact potential of this guideline” and would promote more rational scaling of punishment: a person “who received only probationary sentences may well need a prison sentence to deter him from future criminal conduct, but not a sentence of 210 months[.]”³⁹ It’s never too late to take good advice.

III. 4B1.2(b): It is essential that the Commission (without further delay) substantially narrow the definition of “controlled substance offense”—ideally via Option 1.

Defenders urge the Commission to adopt the narrowest possible definition of “controlled substance offense” (CSO) consistent with its statutory obligations in § 994(h). Here, that means adopting Option 1, without the bracketed language. If the Commission goes with Option 2, it should choose the longest possible prior-sentence limitation.

A. The career-offender guideline has failed in drug cases.

It is beyond debate that the career-offender guideline as applied in drug cases is a failed experiment. The guideline’s flaws are especially pronounced with drug-trafficking offenses “because of the higher statutory maximum penalties for those offenders[.]”⁴⁰ For decades, federal judges have complained about the career-offender guideline treating drug-trafficking offenses (instant and prior) the same as violent offenses.⁴¹

³⁸ *Id.*

³⁹ *Id.* at 16.

⁴⁰ See [2016 Report to Congress](#) at 3.

⁴¹ See, e.g., *United States v. Henshaw*, 2018 WL 3240982, at 7 (S.D. Ill. July 3, 2018) (finding “that the Career Offender Guidelines’ categorical treatment of drug trafficking only offenders as severely as those who have a history of violence is unjust” and that it “fails to promote the goals of sentencing”); *United States v. Valdez*, 77 F. Supp. 3d 1115, 1145 (D.N.M. 2014) (finding the career-offender range excessive in a drug-trafficking-only case, where one predicate was “at most a few years from being stale,” and where the defendant was “nonviolent” and “appear[ed] to deal drugs to support his own habit” rather than as part of “a sophisticated or violent criminal organization”); *United States v. Newhouse*, 919 F. Supp. 2d 955, 980 (N.D. Iowa 2013) (complaining about the “many low-level, non-violent drug addicts

But we need look no further than data, which conclusively establish that courts overwhelmingly reject career-offender ranges in drug-trafficking cases.⁴² Data also establish that inclusion of drug-trafficking offenses in the career-offender guideline exacerbates unwarranted racial disparities.⁴³ And indeed, the Commission has itself questioned whether including these offenses in the career-offender enhancement promotes any purposes of sentencing, making the racial disparities associated with it especially pernicious.⁴⁴

serving sentences grossly disproportionate to their role and culpability”); *United States v. Moreland*, 568 F. Supp. 2d 674, 688 (S.D. W. Va. 2008) (declining to apply the career offender guideline where “[t]wo relatively minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison, vaulted this [individual] into the same category as major drug traffickers engaged in gun crimes or acts of extreme violence”).

⁴² When career-offender cases are isolated to those with instant drug-trafficking offenses, the within-guideline-range rate is just 17.5%, with 82.1% of cases getting a below-range sentence. As noted above, all *other* career-offender cases have a still very low (but higher) within-range rate of 27.2% and a below-range rate of 70.4%. [Individual Datafiles](#), FY20-24.

⁴³ See [Fifteen Years Report](#) at 133-34 (discussing the disproportionately high number of Black individuals who are labeled “career offender” based on drug-trafficking convictions that are themselves impacted by race); see also [2026 Data Briefing](#) at 7 (showing that for fiscal year 2024, 59% of career offenders were Black, compared with 24% of all federal cases). Even the DOJ has acknowledged that “[d]ecades of research show that the career offender guideline produces a clear racial disparity in application.” [DOJ Comment on the USSC’s 2023 Proposed Amendments](#) at 27 (Feb. 27, 2023).

⁴⁴ See [Fifteen Years Report](#) at 134. This report highlighted the disconnect between career-offender sentences, as applied to drug-trafficking offenses, and the goals of protecting the public and deterring crime. As for protecting the public, “[i]ncapacitating a low-level drug seller”—even if for a very long time—“prevents little, if any, drug selling; the crime is simply committed by someone else.” *Id.* As for deterrence, “[t]he recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual*.” *Id.* The Commission has also long known that the career-offender guideline is not aligned with notions of just punishment, either: In an ambitious public survey that the Commission published in 1997, Americans who were asked what sentence was appropriate for various street crimes (drug-trafficking, robbery, etc.) based their assessment on the nature of the instant offense far more than prior criminal record; to be sure, sentences went up as criminal history increased, but only “modest[ly]”—“even for the ‘four strike’ offender,” with

For anyone not intimately acquainted with the Sentencing Reform Act, this reality raises the obvious question: Why is the career-offender guideline tied to drug offenses at all? But as Commissioners and stakeholders know, the answer is simple: § 994(h). If Congress had not directed the Commission to create a guideline calling for stat-max sentences based in part on the mere existence of drug-trafficking convictions, surely, the Commission would not have invented such a counterproductive guideline.

The Commission has the authority to make the guideline better, though, by substantially narrowing the definition of “controlled substance offense.” And Defenders are pleased that the Commission has presented multiple options for doing just that sort of narrowing this year.

B. The Commission should pick the option that does the least harm: Option 1 without the bracketed language.

The fact that the career-offender guideline’s inclusion of “controlled substance offense” has no penological justification—it exists solely because of a directive—makes clear what the Commission should do here: narrow the CSO definition to only what the directive requires. As discussed in this comment’s first section, the Commission defined “controlled substance offense” more broadly than required by the directive from the start, and it has expanded that definition many times over the years. The result: a “controlled substance offense” definition that advances no penological purpose and yet encompasses every conceivable offense related to drug-trafficking, with no escape—other than, potentially, the categorical approach. But the good news is that this is a definition the Commission can—and should—scale back substantially.

The easiest and most straightforward way to accomplish this would be to adopt Option 1 without the bracketed language. Congress set a narrow baseline, requiring only the following felony drug offenses to be included:

sentencing decisions focused on injuries to victims. See USSC, [Survey of Public Opinion on Sentencing Federal Crimes](#) at 96 (1997). Beyond protection of the public, deterrence, and just punishment, there is one additional penological goal—rehabilitation, see § 3553(a)(2)(D)—but long prison sentences cannot serve this purpose. See 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).

an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46[.]⁴⁵

The Commission could satisfy this directive by simply stating:

The term ‘controlled substance offense’ means an offense, if punishable by imprisonment for a term exceeding one year,⁴⁶ under 21 U.S.C. §§ 841, 952(a), 955, or 959; or 46 U.S.C. §§ 70503(a) or 70506(b).

Defenders urge the Commission to do precisely that. The Commission is seeking to limit the CSO definition and nothing more is needed. We further suggest that the Commission also limit the CSO definition such that, as with the new COV definition, a prior conviction for one of these offenses does not count if it garnered a sentence of 13 months or less (*e.g.*, did not get three points under §4A1.1(a)). This minimal prior-sentence limitation would not impact many cases. But at least it might exclude low-level trafficking, which is perhaps most likely on tribal nation lands (where drug convictions are frequently federal).

To the extent that anyone might suggest the directive requires the Commission’s CSO definition to cover state drug-trafficking priors, Defenders refuted this hypothetical argument in a prior comment.⁴⁷ If the Commission eliminates state drug priors from the CSO definition, Defenders are hopeful that the DOJ would not challenge this decision—both because the text of the directive would not support such a challenge and because it would be good policy for the career-offender guideline to focus more on serious violent

⁴⁵ 28 U.S.C. § 994(h)(2)(B).

⁴⁶ The Commission’s Option 1 does not include this “punishable by” language. We include it to maintain consistency with the current CSO definition.

⁴⁷ See [Defenders’ Comment on the USSC’s 2023 Proposed Amendments: Career Offender](#) at 22-25 (Mar. 14, 2023). Prior cases interpreting the directive focused on whether the Commission *may* include offenses beyond those identified in the directive, not whether it was *required* to do so. See, *e.g.*, *United States v. Knox*, 573 F.3d 441, 449 (7th Cir. 2009) (recognizing that “nothing in the text of § 994(h) requires the Commission” to go further than the directive, so any additional offenses “reflect[] an exercise of discretion”).

offenses and less on drug offenses. But if the DOJ chooses to litigate this issue, Defenders are ready for that fight.

There is no reason to include the bracketed federal offenses going beyond the directive. In last year's comment, Defenders went through each of these offenses to show that there was no policy justification for adding them and there's no need to retain them now.⁴⁸ Three of the bracketed offenses aren't even trafficking offenses per se; they are merely *related to* trafficking.⁴⁹

Last year, the Commission proposed eliminating state drug priors from the CSO definition in precisely the same way as Option 1 this year. And although Defenders, many judges, and others, supported this proposal, POAG and DOJ suggested that eliminating state drug priors would create an unwarranted disparity.⁵⁰ The idea was that there are some state drug offenses that are as serious (or even more serious) than some federal drug offenses—at least in places like New York City.⁵¹ Thus, eliminating state drug offenses from the CSO definition would create a disparity among people who committed serious drug crimes based on the jurisdiction of conviction.

⁴⁸ [2025 Defender Comment on Career Offender](#) at 8-9.

⁴⁹ See 21 U.S.C. §§ 843(a)(6) (possession of drug-manufacturing paraphernalia), 843(b) (use of a communication facility to commit any felony offense under the Controlled Substances Act, which includes non-trafficking offenses), and 856 (maintaining a premises for various purposes, including mere storage or use of a controlled substance). With offenses like these, the Commission has ensured that every federal instant offense with any relationship to trafficking triggers a career-offender analysis. That never should have been the goal: in 1988, the Commission's career offender working group recommended that the Commission adopt ACCA's "serious drug offense" formulation in part because the alternative definition "would include drug offenses often used for peripheral defendants (*e.g.*, telephone counts) and might go well beyond the intent of the [career-offender directive]." [1988 Peters Memo](#) at 23. Less than 10 years later, the Commission affirmatively, expressly added telephone counts under § 843(b) (and other, similar offenses) to the guideline, ensuring that "peripheral defendants" would have no escape from a guideline that was meant for the worst of the worst. USSG, App. C, [Amend. 568](#) (1997).

⁵⁰ [POAG Comment on the USSC's 2025 Proposed Amendments](#) at 4-5 (Feb. 3, 2025); [DOJ Comment on the USSC's 2025 Proposed Amendments](#) at 14 (Feb. 3, 2025).

⁵¹ See [Tr. of 2025 Hearing on Career Offender](#) at 37-39 (testimony of Saritha Komatireddy, Deputy Chief of Appeals at the U.S. Attorney's Office for the EDNY, discussing major narcotics cases out of NYC).

First of all, the career-offender guideline *inherently* creates jurisdiction-related disparities. Low-level drug activity might trigger a full-blown undercover operation in a smaller city although it wouldn't warrant attention in a larger one. One county might routinely allow young people to plead to possession offenses while another would throw the book at them. Many states continue to criminalize marijuana but a growing number do not. And as the Commission observed back in 2004, race is relevant here: "Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods, which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers."⁵² As we have said before: The career-offender guideline "is an unwarranted-disparity-creating machine."⁵³

Secondly, a person who escapes the career-offender guideline although his state drug-trafficking offenses were for unusually aggravated conduct is not, as discussed, getting a slap on the wrist. That person would only "escape" to §2D1.1 and to the ordinary operation of Chapter Four's criminal-history rules, which famously—notoriously—result in high sentencing ranges. Most courts find §2D1.1-based ranges to be too high for most drug-trafficking defendants.⁵⁴ Indeed, if the career-offender guideline captured fewer drug-trafficking defendants based on their state priors, perhaps we'd see a higher percentage of within-range sentences under §2D1.1.

Finally (and most importantly), the potential disparity between individuals convicted of federal drug-trafficking offenses and individuals convicted of state drug-trafficking offenses for aggravated conduct is looking at this from the wrong side: people unfairly *excluded*, rather than people unfairly *included*. As discussed, ideally, the Commission would exclude *all* drug-trafficking cases from the career offender guideline. There is no penological justification for their inclusion, which both results in unjust sentencing ranges and exacerbates racial disparities. But unfortunately,

⁵² [Fifteen Years Report](#) at 134.

⁵³ See [2023 Defender Comment on Career Offender](#) at 3.

⁵⁴ See USSC, [Proposed Amendment on Drug Offenses: Public Data Briefing](#) at 6-7 (2025) (showing that in FY23, the vast majority of individuals sentenced under §2D1.1 received a well-below-guideline-range sentence).

§ 994(h) does not permit the Commission to exclude federal drug-trafficking cases; the Commission can only exclude state cases.

This presents a unique trolley problem. Unlike in the classic philosophical problem, this trolley is certain to go off a cliff. The (remote) driver cannot save everyone; many passengers are locked into their seats. But the driver can slow down long enough to let the not-locked-in passengers off. One could complain that it would be irrational or unfair to let *any* passengers off, when some of the passengers who would escape are similarly situated to the ones still trapped on the trolley. But unlike in the classic trolley problem, the correct choice here is clear: the Commission should narrow the CSO definition to only what is required by the directive and save at least some individuals from careening off a cliff.

C. Option 2 is much better than nothing, but it is not preferable to Option 1.

Option 2 is not ideal, but it could be workable, if properly calibrated. Certainly, it is much, much better than the current situation. Among the alternatives, Defenders would slightly prefer 2C (over 2A or 2B), but we are not overly concerned with the precise mechanism for implementing a prior-sentence-length minimum. Our focus is on the length of that minimum, and we urge the Commission to set it as high as possible: 5 years—served.

The goal here is (or should be) to substantially reduce the number of qualifying drug-trafficking offenses; in other words, not just to exclude minor offenses, as with the COV exclusion at subsection (a)(3); but also to exclude garden-variety trafficking offenses that currently clog the career-offender guideline. So, one year is clearly inadequate.⁵⁵ And even three years is too low.⁵⁶ With drug-trafficking offenses, many states have mandatory

⁵⁵ Last year's data briefing reported that the great majority of prior drug-trafficking sentences were at least a year long. USSC, [Individuals Sentenced Under §4B1.1: Proposed Amendment Data Background](#) at 26 (2025). Also, as noted above, in California, the lowest incarcerative sentence possible for a felony is 16 months. See Cal. Penal Code § 1170(h)(1).

⁵⁶ Last year's data briefing indicated that with a three-year threshold, around half of all drug-trafficking priors would still qualify. [2025 Data Background](#) at 26.

minimums that impact sentencing.⁵⁷ Also, as discussed above, with state offenses, it is extremely common to see plea deals for “time served”—or for the numerical equivalent of “time served”—which means that the length of sentence isn’t really about the seriousness of the offense.⁵⁸ A modest prior-sentence minimum will not tease out these cases, particularly given states’ overburdened courts and indigent-defense systems.⁵⁹

As for sentence served (versus imposed), last year we explained a similar position; the bottom line is that focusing on sentence served avoids disparities related to parole, good time, and the like.⁶⁰ Some stakeholders claimed last year that there would be administrability problems with proving the length of sentence served. Defenders doubt this would present a real problem; now that § 851 enhancements require the government to prove time served,⁶¹ we haven’t noticed prosecutors having a hard time meeting their burden. But last year, Defenders said that, if the Commission sees this as a problem, we would be willing to take on the burden of proving sentence served.⁶² And although we prefer Option 2C over 2A or 2B, because it has just one step (rather than two or three), Option 2A could work, with the bracketed language: automatically exclude priors that don’t get three points under §4A1.1(a), but with the defense invited to prove that the defendant did not serve a significantly longer sentence.

⁵⁷ See, e.g., Fla. Stat. Ann. § 893.135 (providing mandatory penalties for drug offenses); Me. Rev. Stat. Ann. 17-A § 1125 (same); N.C. Gen. Stat. Ann. § 90-95(h) (same); see also Ram Subramanian & Ruth Delaney, Vera Inst. of Just., [Playbook for Change? States Reconsider Mandatory Sentences](#) at 5-8 (2014) (discussing states’ creation of mandatory minimums in the 1980s and 90s); The Sentencing Project, [How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It](#) at 1 (2024) (same).

⁵⁸ See generally Kimberly Kessler Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. Rev. 2001 (2023).

⁵⁹ See, e.g., Kat Albrecht, et al., *Justice Delayed: The Complex System of Delays in Criminal Court*, 53 Loy. U. Chi. L.J. 747, 753 (2022); Emily Rose, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 Mich. L. Rev. 279 (2014).

⁶⁰ [2025 Defender Comment on Career Offender](#) at 29-32.

⁶¹ See 21 U.S.C. § 802(58)(A), (59)(A).

⁶² See [Defenders’ Reply Comment on the USSC’s 2025 Proposed Amendments](#) at 3-4 (Feb. 18, 2025).

Commission’s Issue for Comment #7 asks whether Option 2 is consistent with the career-offender directive. Unfortunately, we can see how Commissioners might be concerned with setting a lengthy minimum-sentence requirement for federal drug-trafficking offenses that are enumerated in the directive.⁶³ Federal drug-trafficking offenses generally result in lengthy sentences, so this issue wouldn’t come up much; and we are hopeful that the DOJ would not ask courts to strike down this sort of amendment in deference to the Commission’s policy choices. But this potential concern is a reason for the Commission to choose Option 1 rather than Option 2. If Option 1 is off the table, there is a less-appealing alternative: attach the minimum-sentence requirement only to prior state offenses (and any bracketed federal offenses that the Commission includes). Because those predicates were added through the Commission’s discretionary authority, the Commission unquestionably retains the authority to limit them.

IV. 2K2.1: Cross-referencing ACCA is the simplest way to comply with the 1994 congressional directive that itself cross-references ACCA.

Although §4B1.2 is titled “Definitions of Terms Used in Section 4B1.1,” the section’s definitions apply (by cross-reference) to many other provisions—including the third-most-commonly applied Chapter Two guideline: 2K2.1.⁶⁴ That is, judges wrestle with the §4B1.2’s definitions more frequently in the §2K2.1 (firearms) context than in the career-offender context.

The Commission has proposed two options for dealing with §2K2.1’s cross-reference: (1) enshrining the current definitions of “crime of violence” and “controlled substance offense” in §2K2.1 commentary,⁶⁵ or (2) replacing

⁶³ We don’t see a similar concern about a 13-month (§4A1.1(a)) restriction for de minimis priors, as proposed related to Option 1.

⁶⁴ See USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 44-45 (tbl 20) (noting that §2K2.1 applies to the third-highest percentage of cases (at 13%)).

⁶⁵ Option 1’s proposed amendment to §2K2.1 commentary does not precisely accomplish this. It retains the cross-reference to §4B1.2(b), which would maintain the status quo only if the Commission either promulgates CSO Option 2 or does not take any action to limit the CSO definition. Defenders are advocating for CSO Option 1, under which a §2K2.1 cross-reference to §4B1.2(b) would not maintain the status quo. But the introduction to this proposal expressly says that Firearms Option 1 is intended to “maintain the status quo.” So, for the purpose of writing this

the definitional cross-reference to §4B1.2 with a definitional cross-reference to ACCA.⁶⁶ Defenders urge the Commission to choose the second option, which more faithfully adheres to a relevant congressional directive and would be easier to apply, but with at least one clarification (excluding the “residual clause”) and ideally one other (excluding burglary).

The career-offender directive does not apply to §2K2.1 but, as Commissioners know, there’s another relevant directive: the Violent Crime Control and Law Enforcement Act of 1994, which required the Commission to enhance penalties in cases where a defendant convicted under 18 U.S.C. § 922(g) has one prior conviction for a “violent felony” or a “serious drug offense,” and again where a defendant has two such convictions—using the ACCA definitions for these terms.⁶⁷ As Defenders said in our comment last year, we don’t think the Commission needs to be concerned about this directive.⁶⁸ But regardless, the Commission’s proposal to cross-reference ACCA is a good one, for three reasons:

First, cross-referencing ACCA’s definitions would put to rest any concerns about the directive; it would align §2K2.1 with the directive more closely than ever. And as a policy matter, Congress apparently wanted individuals who almost—but don’t quite—qualify for the ACCA enhancement to get tiered enhancements that move their sentencing ranges ever closer to the 15-year ACCA minimum. Relatedly, but from a guideline-structure perspective, the Commission added the recidivist-based base offense levels (before Congress had even enacted the relevant directive) to make §2K2.1 sentences more “proportional” to ACCA sentences for defendants whose

comment, we presume that if the Commission were to promulgate CSO Option 1, the proposal would be modified to maintain the current definitions (similar to how it proposes maintaining the “crime of violence” definition).

⁶⁶ There is a third option, as the Commission notes in IFC #10: maintaining §2K2.1’s current cross-reference to §4B1.2. And Defenders would not object to that. But we wouldn’t want the Commission to decline to significantly narrow §4B1.2’s definitions out of fear that it might run afoul of the §2K2.1-specific directive. With the ACCA cross-reference as a good option here, there is no need for the Commission to attempt to walk a tightrope between two distinct directives.

⁶⁷ Pub. L. No. 103-322, § 110513, 108 Stat. 1796, 2019 (1994).

⁶⁸ [2025 Defender Comment on Career Offender](#) at 34.

criminal histories weren't all that different.⁶⁹ From either perspective, tiered enhancements moving toward an ACCA-length sentence make sense only if a person's criminal history might be moving toward an ACCA sentence, which works only if the definitions are aligned.⁷⁰

Second, cross-referencing ACCA's definitions would simplify things. To be sure, ACCA is the source of most Supreme Court caselaw regarding the categorical approach, which is not known for simplicity. But the fact that most categorical-approach caselaw addresses ACCA, and that Congress has not amended ACCA for 40 years, makes ACCA—in 2026—straightforward to apply. At this point, courts have addressed nearly every potential predicate and placed it on one side of the § 924(e) ledger or the other. Certainly, ACCA has long been easier to apply than the current §4B1.2 (*i.e.* Firearms Option 1), which triggers new waves of litigation every time it gets amended—often requiring debate over how it differs not just from its former incarnations and from ACCA but also from similar definitions at 18 U.S.C. §§ 924(c) and 16(b), and/or 21 U.S.C. § 802(44), (57), and (58). With ACCA, stakeholders generally know the score. Moreover, to the extent there are unsettled questions, courts will have to work out those questions in the ACCA context anyway.

Third, it just makes sense for the firearms guideline's recidivist provision to use definitions from the firearms chapter of the criminal code, which were designed specifically to apply to cases that §2K2.1 sets sentencing ranges for. Relatedly, Congress may well amend ACCA in the future; and surely, the Commission would want §2K2.1's recidivist provision to ride along with that amendment.

However, there is a potential deal-breaker: the residual clause.⁷¹ If §2K2.1 adopts ACCA's definitions without the residual clause—that is, the

⁶⁹ USSC, [*Report of the Firearms and Explosive Materials Working Group*](#) at 20-23 (Dec. 11, 1990).

⁷⁰ The current §4B1.2's definitions are so much broader than ACCA's definitions that they do not serve this purpose.

⁷¹ 18 U.S.C. § 924(e)(2)(B)(ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another"); *see also Johnson*, 576 U.S. at 598-606 (2015) (striking ACCA's residual clause as void for vagueness; the "Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy"). In 2016, the

definitions as they work *in ACCA cases*—that would be simplifying. But if courts were to find that the cross-reference incorporates the residual clause, there would be chaos. To start, there’d be substantial litigation over whether the cross-reference had revived the defunct residual clause; certainly, it would be possible.⁷² And if courts answered this question affirmatively, we’d be back where we left off in June of 2015, struggling to apply a provision that the Supreme Court has called a “judicial morass that defies systemic solution” and “a black hole of confusion and uncertainty that frustrates any effort to impart some sense of order and direction.”⁷³

Defenders further suggest that the Commission expressly exclude “burglary”—for two reasons. First, the Commission already removed it once, after finding that burglary is not appropriately designated a “violent” offense.⁷⁴ And the Commission was right about that.⁷⁵ Relatedly, courts and practitioners are no longer used to accounting for burglary convictions in §2K2.1 cases, which could lead to errors. Second, if the Commission does not exclude burglary, it will create disparities. The Supreme Court’s definition of generic burglary is restrictive (more restrictive than generic definitions of other offenses), causing burglary offenses to be heavily litigated; the result is that, in Defenders’ experience, only a small percentage of states’ burglary offenses at this point count as ACCA “burglary.” So, in addition to removing a mostly nonviolent crime, excluding burglary would place defendants from around the country on more equal footing.

Putting these suggestions together, the relevant definitional note would read:

“Controlled substance offense” has the meaning given the term “serious drug offense” in 18 U.S.C. § 924(e).

Commission deleted the residual clause from the Guidelines Manual (with support from all corners). USSG, App. C, [Amend. 798](#) (2016).

⁷² See *Beckles v. United States*, 580 U.S. 256 (2017) (holding that *Johnson* did not apply to the U.S. Sentencing Guidelines, because the void-for-vagueness doctrine does not apply to advisory guidelines).

⁷³ *Johnson*, 576 U.S. at 605.

⁷⁴ USSG, App. C, [Amend. 798](#) (2016).

⁷⁵ See [Statement of Molly Roth on behalf of Defenders to USSC on Crime of Violence](#) at 33-38 (Nov. 5, 2015) (explaining why burglary should not qualify).

“Crime of violence” has the meaning given the term “violent felony” in 18 U.S.C. § 924(e), except that it does not include “burglary” and it also does not include § 924(e)’s residual clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”), which the Supreme Court struck from that statute in *Johnson v. United States*, 576 U.S. 591 (2015).

Beyond §2K2.1, there are a handful of other cross-references to §4B1.2, and the Commission has asked for comment on what to do about those (IFC #10). Each cross-reference appears in the context of some provision increasing sentence severity based on whether something is a COV or CSO. Ideally, the Commission would delete altogether the provisions in which the cross-references appear; each unnecessarily adds complexity and increases sentence severity based solely on offense type, regardless of individualized circumstances. If the Commission is not able to delete those provisions altogether this year, it can simply leave the cross-references in place for now and mark the provisions in which they appear for deletion in the future.

V. Proposal 3: If the Commission does not resolve the circuit conflicts by redefining “controlled substance offense,” it should resolve the conflicts by choosing Option 1 in both instances.

If the Commission eliminates state-drug priors—which is the right call—that would resolve both of Proposal 3’s circuit conflicts outright. Otherwise, it would have to confront both existing splits: whether CSOs incorporate only federal drug schedules or also state schedules, and whether the relevant schedule is determined at the time of the prior conviction or of the federal sentencing.

A. The Commission should clarify that “controlled substance” is limited to *federally* controlled substances.

If the Commission retains state-drug-offense predicates under §4B1.2 then, at a minimum, it should clarify that its definition of “controlled substance offense” is limited to substances identified in the Controlled Substances Act (Option 1). Defenders addressed this issue in detail in our

2023 comment and encourage the Commission to revisit that submission.⁷⁶ We briefly summarize three principal reasons here:

First, Option 1 reflects the principle, “do the least harm.”⁷⁷ Option 2 would define “controlled substance” in a way that has no limiting principle, creating an enhancement that neither Congress nor the Commission could control.⁷⁸ By limiting the definition to federally scheduled substances, Option 1 places control where it belongs: the federal government.

Second, limiting the CSO definition to federally scheduled substances in Option 1 advances the Guidelines’ goal of uniformity.⁷⁹ Option 2, in contrast, would make enhancements turn “on whatever substance is illegal under the particular law of the State where the [individual] was convicted.”⁸⁰ This would produce arbitrary results and unwarranted sentencing disparities: a defendant could have a career-offender sentence triggered by a

⁷⁶ [2023 Defender Comment on Career Offender](#) at 26-30.

⁷⁷ As reflected in the [data handout](#) on the 2026 proposed circuit-conflicts amendment, circuits that count state drug priors involving substances not listed on the federal schedules (and that apply the time-of-conviction approach) generally see more people qualifying as career offenders and also qualifying for enhanced base offense levels under §2K2.1.

⁷⁸ There are real substances at issue here. For example, “kratom” is not federally controlled; but it is criminalized in some states and sold in gas stations in others. See Sophie Levine, [Kratom: The Biggest Drug You’ve Never Heard Of](#), Swift Currie (Fall 2023); Marquise Francis, [‘Gas-station heroin’ targeted in crackdowns by states and cities](#), NBC News (Aug. 17, 2024). Similarly, although not federally controlled, some states control “salvia”, a ceremonial herb, and “hemp,” an agricultural fiber. See [Statement of Michael Caruso on behalf of Defenders to USSC on Acceptance of Responsibility and Controlled Substance Offenses](#) at 31-32 (Mar. 7, 2023) (providing these and other examples with citations).

⁷⁹ *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (“construing the phrase in the Guidelines to refer to the definition of ‘controlled substance’ in the CSA—rather than to the varying definitions of ‘controlled substance’ in the different states—further uniform application of federal sentencing law”); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015) (rejecting what is effectively Option 2 because it “would conflict with *Taylor’s* vision for a uniform generic definition under federal law independent of the definition applied by any particular state”).

⁸⁰ *United States v. Townsend*, 897 F.3d 66, 70 (2d Cir. 2018) (internal quotation marks and citation omitted).

substance that's not controlled in any other state, while a defendant from another state wouldn't be subject to the same range.⁸¹

Third, Option 2 would represent a sharp and unjustified break from the Commission's promulgation history and policy judgments. The definition of "controlled substance offense" was originally modeled on ACCA's definition of "serious drug offense," which clearly includes only federally controlled substances; and although §4B1.2 has been amended numerous times, each iteration has always been anchored to federally controlled substances.⁸² Relatedly, other federal recidivist provisions triggered by drug offenses continue to relate only to federally controlled substances.⁸³

B. The Commission should adopt the time-of-sentencing approach.

With respect to the second circuit conflict, the Commission should adopt the time-of-sentencing approach in Option 1 (not the time-of-prior-conviction approach in Option 2).

Federal courts generally apply the Guidelines "in effect on the date the defendant is sentenced."⁸⁴ Congress codified this rule in the Sentencing Reform Act, 18 U.S.C. § 3553(a)(4)(A)(ii), and the Guidelines reiterate it at §1B1.11(a). There is no reason to carve out an exception to this rule for drug offenses in the career-offender context. After all, if §4B1.2 contained an enumerated list of CSOs—"marijuana, cocaine, and heroin"—and that list was later amended to exclude "marijuana," courts would apply the current version at sentencing, such that marijuana could not serve as a predicate. The Commission's choice to incorporate the Controlled Substances Act by reference—rather than specify drugs—should not alter that conclusion. Incorporation by reference is simply a more efficient way of identifying CSOs: the Commission avoids the need to engage in notice-and-comment each time

⁸¹ See *United States v. Jamison*, 502 F. Supp. 3d 923, 929 (M.D. Pa. 2020) ("The dictates of fairness and consistency compel a uniform standard, especially when such drastic differences result.").

⁸² See [2023 Caruso Statement](#) at 32-34.

⁸³ See 18 U.S.C. §§ 924(e)(2)(A) ("serious drug offense") and 3559(c)(2)(H) ("serious drug offense"); and 21 U.S.C. § 802(44) ("felony drug offense") and (57) ("serious drug felony").

⁸⁴ *Dorsey v. United States*, 567 U.S. 260, 275 (2012).

Congress updates the drug schedules and also ensures the Guidelines remain current with evolving scientific knowledge and legislative judgments.⁸⁵

Adopting a time-of-prior-conviction approach (Option 2) would have the opposite effect. It would freeze obsolete drug schedules in place, “prevent amendments to federal criminal law from affecting federal sentencing,” and “hamper Congress’ ability to revise federal criminal law.”⁸⁶ If the Commission were to adopt Option 2 for both circuit splits—*i.e.*, allowing state-controlled substances beyond the CSA to qualify as CSOs *and* adopting the time-of-conviction approach—the results could get even more absurd. A person could be subjected to enhanced penalties for conduct never criminalized by the federal government and no longer criminalized by any state. In other words, conduct that is presently *legal everywhere*.

VI. Conclusion

Two years ago, the Commission hosted a roundtable on the career-offender guideline and, since that time, there has been significant progress toward an improved guideline. Defenders are grateful that we’ve had opportunities to provide input throughout this process. We will continue to carefully analyze the Commission’s “crime of violence” proposal in preparation for submitting supplemental comments by March 18, and we look forward to hearing from Commissioners and other stakeholders at the upcoming hearing.

⁸⁵ See *United States v. Gibson*, 55 F.4th 153, 163 (2d. Cir. 2022) (discussing requirements for updating and republishing drug schedules).

⁸⁶ *Bautista*, 989 F.3d at 703; see also *Gibson*, 55 F.4th at 166 (explaining that there is “no reason to believe that Congress, which required that federal drug schedules . . . be updated with appropriate additions, reclassifications, and deletions every year, would have intended that such changes in the federal substantive criminal law should be ignored in connection with controlled-substance-related principles of enhanced sentencing for a contemporaneous offense” (internal quotation marks omitted)).

**Federal Public and Community Defenders
Supplemental Comment on Human Smuggling
(January Proposal 4)**

March 18, 2026

The Commission’s March 9 hearing on the human smuggling proposal confirmed what Defenders said before: the proposal lacks empirical support. Commissioners repeatedly asked for data supporting the DOJ’s request for the enhancements—or even where such data might be found—but none was offered. Instead, DOJ’s witness relied on headlines and anecdotes from the specialized unit that prosecutes the most extreme smuggling cases.¹ And at the same time, the Commission’s own data point in the opposite direction.²

The hearing thus exposed the basic problem: There is no support for adding enhancements to a guideline covering more than 4,000 cases per year whose ranges have already proved too high.³ As Defenders have urged, the Commission should follow the data, not headlines from outlier cases.⁴

This supplemental comment highlights exchanges at the hearing that reinforce this conclusion. At multiple points, Commissioners probed the evidentiary basis to justify the proposed amendments. And in each instance, the DOJ did not offer data to support the government’s claims:

- As a threshold matter, the DOJ’s written witness statement appears to conflate human smuggling with human *trafficking*, claiming that human smuggling “inherently exploits” the smuggled.⁵ At the hearing, DOJ’s witness acknowledged that trafficking and smuggling are different

¹ Defenders respect the DOJ witness’s experience as Deputy Chief of the DOJ Human Rights and Special Prosecutions Section, which describes itself as focusing on “complex international immigration, violent crime, and other victim-centered cases.” DOJ, [Human Rights and Special Prosecutions Section](#). But that targeted focus on the most serious outlier cases and conduct necessarily excludes the more typical human smuggling cases. See [Defenders’ Comment on the USSC’s 2026 Proposed Human Smuggling Amendment](#) at 3-5 (Mar. 2, 2026) (“Defenders’ Initial 2026 Comment on Human Smuggling”) (describing mine-run smuggling cases). As the former co-director of Joint Task Force Alpha (which the Human Rights and Special Prosecutions Section helps lead) has explained: “There is a distinction between routine alien smuggling and aggravated cases focused on by this task force.” Ian Hanna & James Hepburn, U.S. Dep’t of State, [Foreign Press Center Briefing: Targeting Human Smuggling and Trafficking in the Northern Triangle and Mexico](#) (June 5, 2024).

² See [Defenders’ Initial 2026 Comment on Human Smuggling](#) at 6-8 (discussing how Commission’s data shows that even the more aggravated cases targeted by these amendments regularly see below-guidelines sentences).

³ *Id.*

⁴ *Id.* at 3-5

⁵ [DOJ Witness Statement of Christina Giffin](#) at 1 (Mar. 2, 2026).

offenses, yet claimed that voluntary smuggling offenses often evolve into trafficking offenses, with people being held against their will and subjected to coercion.⁶ The data simply do not bear this out. Section 2L1.1 has an enhancement for cases where a person is “involuntarily detained through coercion or threat” or for certain aggravated cases involving harboring for purposes of prostitution.⁷ From fiscal years 2020 to 2024, that enhancement has applied in approximately only one percent of cases sentenced under §2L1.1, with no trend of increasing or decreasing.⁸

- Commissioner Wong asked whether there are other sources of data that the Commission should consult to determine the extent of smuggling cases involving mass casualties or sexual abuse, outside of the Commission’s data (which indicates such cases are rare).⁹ Ms. Griffin conceded that the DOJ had not collected information “systematically,”¹⁰ acknowledging that her evidence was “anecdotal” and based on media reports.¹¹ Notably, smuggling researchers Dr. Gabriella Sanchez and Dr. Luigi Achilli highlighted for the Commission the overall lack of empirical research on

⁶ See USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 5:23:23-5:24:22 (Mar. 9, 2026). The witness claimed that “we are seeing” this in large-scale smuggling operations, without citing more than anecdotal experience.

⁷ USSG §2L1.1(b)(8).

⁸ The data for these analyses were extracted from the USSC “Individual Datafiles” spanning fiscal years 2020 to 2024. The dataset is publicly available for download on the Commission’s [website](#).

⁹ USSC, [Public Hearing](#) at 5:03:09-5:03:50. The data briefing showed that both are extremely rare. USSC, [Public Data Briefing on Proposed Amendment on Human Smuggling](#) at 16 (96% of cases did not involve injury/death enhancement, while only 1% involved death); 20 (showing that the median number of victims in cases involving death in FY 2024 was 1 person, and the average was 4); 28 (“In fiscal year 2024, 35 cases [out of 4,179] involved some form of sexual conduct against one or multiple victims.”).

¹⁰ USSC, [Public Hearing](#) at 5:06:03-5:06:54.

¹¹ See *id.* at 5:06:13-5:06:52 (stating that Department’s basis for asserting an increase in large-scale smuggling came from “look[ing] at the mass casualty events we could find on Lexis”).

smuggling, and the media's "focus on the most lethal or high-profile cases, which leads to reproducing stereotypical notions of smuggling."¹²

- Commissioner Wong returned to this theme later in the hearing, asking whether panelists were seeing cases where there is more sexual abuse than reflected in presentence reports.¹³ The DOJ witness claimed that sexual assault is underreported in PSRs, alluding to forthcoming sources and data to support that statement.¹⁴ Defenders are not sure what the presaged data will be,¹⁵ but are confident in encouraging the Commission to use its empirical study tools, including special coding projects, receiving information from experts, and the kind of comprehensive review Defenders have urged.¹⁶ Particularly given the extraordinarily broad reach of the current (b)(7) enhancement, the routine deportation of migrant material witnesses prior to sentencing in these cases, and the

¹² Gabriella E. Sanchez & Luigi Achilli, [Comment on the USSC's Proposed Human Smuggling Amendment](#) at 2 (Mar. 8, 2026). In fact, Drs. Sanchez and Achilli describe this Commission as "the only agency in the Western Hemisphere that systematically publishes official data concerning smuggling." *Id.*

¹³ USSC, [Public Hearing](#) at 5:18:08-5:18:20. See [Data Briefing](#) at 28 ("In fiscal year 2024, 35 cases [out of 4,179] involved some form of sexual conduct against one or multiple victims.").

¹⁴ USSC, [Public Hearing](#) at 5:16:53-5:17:52; 5:18:20-5:18:30. To the extent that the witness was referring to incidents of sexual abuse that are never reported to law enforcement, it is not possible to quantify these; no SOC can capture misconduct that is never reported. As for the suggestion that the Commission's data is incomplete because *reported* sexual assaults are not always reflected in PSRs, POAG's witness explained that PSRs usually do not include allegations of sexual assaults when those allegations do not involve the sentenced individual (i.e. because the alleged sexual assault happened before, after, or unrelated to the sentenced individual's participation in the smuggling conduct). *Id.* at 5:49:00-5:50:23. This is as it should be: individuals should not be penalized for the unknown or unforeseeable misconduct of someone else. In our experience, if there is an allegation that the person being sentenced was involved in a sexual assault, that allegation is always included in the PSR.

¹⁵ As smuggling researchers point out, when it comes to quantification of sexual misconduct it is "fundamental to examine the source and the politics behind quantification" and to proceed carefully to avoid compounding racial disparities. [Sanchez & Achilli Comment](#) at 5.

¹⁶ See generally [Defenders' Initial 2026 Comment on Human Smuggling](#).

lower standard of proof at sentencing, the Commission should use those tools before promulgating any further enhancements.

- When asked if states prosecute cases of sexual assault against migrants that occur in relation to smuggling offenses, the DOJ witness said this sort of prosecution is difficult because victims often cannot identify the state where the alleged assault occurred.¹⁷ But in Defenders' experience, migrants in mine-run, border-district smuggling cases are not typically transported from one U.S. state to another U.S. state; they pay to cross into (and most often are arrested in) a particular U.S. border state of their choosing. And if an alleged sexual assault is not subject to prosecution in the U.S. because it happened in Mexico, then it can be prosecuted by Mexican authorities. More importantly, any jurisdictional barriers to prosecution do not justify the use of an offense-based enhancement or cross reference that would penalize a person for unforeseen/unknown sexual abuse committed by someone else (whether by another migrant, a smuggler, or an immigration enforcement agent) during a smuggling offense. Otherwise, our clients and other sentenced individuals who help migrants cross the border could have their sentences enhanced for alleged assaults by others that occurred hundreds or thousands of miles away, long before (or after) the sentenced person even became involved in the migrant's journey—without any opportunity to investigate or question the accuser, and with a low burden of proof. Strict liability guideline enhancements or cross-references that lack those procedural protections do not track culpability; nor will they prevent future sexual assaults.
- Vice Chair Murray noted that there is a high proportion of below-range §2L1.1 cases and asked the DOJ's witness whether there is a counter to this institutional feedback signal indicating that sentencing ranges are too high already.¹⁸ The witness responded that fast-track and substantial-assistance departures account for the gap.¹⁹ But DOJ cannot make claims as to what the below-range rate would look like without fast-track and substantial-assistance cases because the data do not permit that

¹⁷ See USSC, [Public Hearing](#) at 5:22:43-5:23:22. We assume the DOJ witness was discussing states within the U.S., not states in Mexico.

¹⁸ *Id.* at 5:07:00-5:07:30.

¹⁹ *Id.* at 5:07:30-5:08:40.

conclusion. As Defenders have explained, the way Commission data records sentence placement makes it difficult to determine how many cases receiving a substantial-assistance or fast-track reduction *also* received a downward variance.²⁰ Regardless of the unknowns surrounding potential additional variances, the fact that there are considerable percentages of (non-substantial assistance, non-fast track) below-range sentences, even in aggravated cases, shows that the guideline ranges are greater than necessary.²¹

- Finally, the hearing revealed that the DOJ lacks data justifying an enhancement for offenses involving transnational criminal organizations (TCOs). Vice Chair Restrepo asked the DOJ witness whether there was anecdotal evidence as to how often TCO leaders are actually prosecuted; the witness did not offer anything precise, but replied that “we are looking at the leaders of these organizations as consistently as possible.”²² Vice Chair Restrepo then asked whether there was information on how often individuals in these cases receive leader-organizer role adjustments; again, the witness did not have numbers.²³ Not only is DOJ’s claim that smuggling cases increasingly involve TCOs empirically unsupported, it also repeats the same unsupported claims that U.S. immigration enforcement agencies have been making for decades.²⁴ Such claims have

²⁰ The Commission’s current variable for sentence placement with respect to guideline range reflects only one outcome. For example, a case recorded as receiving a fast-track reduction could have also received an *additional* variance or departure, but that information will not be reflected in the sentence placement data. [Defenders’ Initial 2026 Comment on Human Smuggling](#) at 6 n.17.

²¹ See *id.* at 6-8; see also [Data Briefing](#) at 7, 18 (indicating 30% below range sentences in cases involving 100 or more individuals under §2L1.1(b)(2) and 42% below range sentences in cases involving death under §2L1.1(b)(7)). Also, in our experience, severe cases often do not receive fast-track reductions.

²² USSC, [Public Hearing](#) at 5:12:12-5:13:03. Of §2L1.1 cases sentenced from fiscal year 2020 to fiscal year 2024, only 4% involved some sort of aggravated role adjustment. USSC, [Individual Datafiles](#). Of course, that does not mean individuals who received such an enhancement are affiliated with a TCO.

²³ USSC, [Public Hearing](#) at 5:13:03-5:13:10.

²⁴ See David Spener, *Clandestine Crossings: Migrants and Coyotes on the Texas-Mexico Border* 151-152, 203 (2009) (noting that since the 1970s, U.S. law enforcement agencies have made claims portraying human smuggling networks as

been squarely refuted by scholars who have studied smuggling pathways.²⁵ Moreover, the DOJ's request for a broader definition of TCOs confirms Defenders' concerns that an enhancement based on the TCO label could exacerbate ethnic profiling and sweep in minor conspiracies.²⁶

* * *

Last week's hearing highlighted the many unknowns lurking around the proposed increases to a guideline already haunted by a history of unstudied increases. The Commission should not raise penalties until and unless it has undertaken a comprehensive study of these offenses. If anything, the Commission should instead take the opportunity to fix this broken guideline by narrowing and limiting existing enhancements (as discussed in our initial comment), to better effectuate the statutory purposes of sentencing.

increasingly dangerous and sophisticated organizations that pose a growing threat to national security).

²⁵ See [Defenders' Initial 2026 Comment on Human Smuggling](#) at 29 n. 94, 95 (discussing scholarship); see also [2026 Sanchez and Achilli Comment on Human Smuggling](#) at 2 (noting that "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[,] and "the vast majority of smuggling cases involve tasks performed by loosely organized local groups, often comprised by friends and family members," rather than by TCOs (emphasis omitted)); Samuel Loroña Celaya and Gabriella Sanchez, [A Borderlands Perspective on the Interaction Between Migrant Smuggling and Drug Trafficking: The Case of the Altar Valley](#) in Hope Border Inst. and Temple Univ., *Reimagining the Migration Protection System: Critical Reflections from the Border* at 24 (2024) ("Contrary to the argument that migrant smuggling and drug trafficking have become one and the same, it's important to point out that the people involved in migrant smuggling limit themselves to having a relationship with the faction that charges them for passage of each person through their territory. In other words, there is no structural convergence between those who smuggle migrants and those who traffic drugs. The connection between groups is limited to so-called 'right of passage' payment or fee.") (internal citation omitted) (The original piece is in Spanish; translation is available upon request).

²⁶ [DOJ Witness Statement](#) at 5-6 ("The guidelines should incorporate the objective elements of this definition, *i.e.*, that the organization is transnational and engages in criminal activity."). Given the inherently transnational nature of these offenses, such a broad definition risks covering every small cross-border conspiracy. See also [Defenders' Initial 2026 Comment on Human Smuggling](#) at 29-32 (discussing risks of ethnic profiling and disparity).

**Federal Public and Community Defenders
Comment on Human Smuggling
(January Proposal 4)**

March 2, 2026

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Federal Public and Community Defenders urge the Commission to reject the proposed increases to §2L1.1. Defenders represent both those accused of smuggling and those being smuggled, who are detained as material witnesses or prosecuted for entering illegally. This gives us deep insight into the nature of these offenses. The Department of Justice (the Department) has asked the Commission, with no empirical basis, to expand or add several specific offense characteristics (SOCs) to this broken guideline. But as explained below, this guideline already lacks an empirical basis for its high guideline ranges, which overstate culpability and are often ignored by courts. There is no need for additional unstudied increases that will fall largely on the backs of people of color in low-income border communities, especially given the lack of evidence that doing so will make migrants any safer.

The Commission should conduct a comprehensive study of §2L1.1 offenses before taking action. Defenders are more concerned than anyone about the safety of migrants; they are our largest group of clients.¹ But these unempirical and unnecessary penalty increases will not make border-crossing safer, and history shows increased criminal penalties will not impact the demand for clandestine border-crossing services. As discussed below, the data show that sentences often fall below the guideline range in cases sentenced under §2L1.1, even those with aggravated facts, which means the ranges are already too high in many cases.

In general, offenses sentenced under §2L1.1 are not hostage situations, and they almost never involve people trapped in shipping containers. These are market-driven cooperative offenses (comparable in some ways to drug offenses), in which those being smuggled pay for assistance in committing criminal offenses themselves (illegal re/entry). Most commonly, Defenders see scenarios in which a group of individuals is arrested hiding in a passenger vehicle at a checkpoint or walking through the desert (trying to bypass checkpoints)—all desperately seeking a better life. Upon capture, the government often prosecutes migrants for their immigration offenses. Those migrants who are not immediately prosecuted are held as material witnesses

¹ Defenders and panel attorneys represent a wide variety of those being smuggled; some are held as material witnesses, but many are prosecuted separately for illegal entry and/or reentry.

and detained in jail, prior to their transfer to detention by the Department of Homeland Security (DHS) and removal from the country.

Much like in drug-trafficking cases, the majority of our clients sentenced for smuggling are low-level players in a larger conspiracy. They receive small sums of money for very limited participation (usually driving a group concealed in a vehicle for a very short period of time or guiding a group through the brush to make it around a checkpoint; sometimes part of their own smuggling fee might be paid in exchange for performing other tasks). In general, they have little control over the offense logistics, and they are fungible. Also, like in drug-trafficking cases, the applicable guideline involves empirically deficient, quantity-driven sentencing that produces guideline ranges out of touch with culpability, with an outsized impact on people of color.

This comment proceeds in three parts. Section I lays out the ways in which this guideline is already broken, and it explains why the proposed amendments lack an empirical basis. Section II explains how the proposed amendments will not further the statutory purposes of sentencing and will compound unwarranted disparities. Section III explores an alternative suggestion: if the Commission feels that it must act now, it should focus on improving the guideline's ability to distinguish between more and less culpable individuals. Several existing enhancements—including the current (b)(7)—lack mens rea or causation requirements and routinely hold individuals accountable for harms caused by others, including by immigration enforcement agents—that they had absolutely no control over and could not have foreseen. Further, if the Commission feels that it must take action related to sexual offenses, it can simply move the commentary's instruction that “serious bodily injury” includes criminal sexual abuse to the text of the guideline itself.

I. Section 2L1.1 is broken, and the Commission should not increase the sentencing ranges it produces without significant further study.

Section 2L1.1, the fifth-most commonly applied guideline,² is broken due to decades of unstudied increases that weren't empirically grounded. Sentences routinely fall below the guideline range in §2L1.1 cases (even in cases involving bodily injury or death).³ The Commission should pause and study this fundamentally flawed guideline before taking any action that would increase sentencing ranges that judges are finding already too high.

This section first discusses what the heartland smuggling case looks like, which is nothing like the sensationalized media accounts; then it addresses the lack of empirical support for this proposal; and finally, it addresses the decades of unempirical increases and factor creep, which led to a guideline largely out of touch with offense seriousness.

A. Beyond the headlines: the mine-run §2L1.1 case

What do these cases really look like? In the last five fiscal years, 96% of cases sentenced under §2L1.1 came from the five Southwest border districts.⁴ And if the Commission were to study smuggling offenses, it would find that these cases look different in different border communities. With vehicular smuggling cases, Defenders often see cases involving an individual, desperately in need of money, who gets paid a few hundred dollars to drive a small group of people a short distance through a checkpoint.⁵ If people are

² See USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 44-45 tbl. 20 (showing that §2L1.1 applies in the fifth-highest percentage of cases (at 7.3%)).

³ Sentences were below the guideline range in 55% of cases from FY 2020-2024 in §2L1.1 cases. In §2L1.1 cases with levels applied for the specific offense characteristic for bodily injury or death (§2L1.1(b)(7)), the below-range rate was 54%. The data for these analyses were extracted from the USSC "[Individual Datafiles](#)" spanning fiscal years 2020 to 2024. The dataset is publicly available for download on its [website](#).

⁴ [Individual Datafiles](#), FY 2020 to 2024.

⁵ Border Patrol operates several immigration checkpoints within the interior of the country, north of the border. See U.S. Gov't Accounting Off., [Border Patrol Lacks Important Information about Immigration Checkpoints Within the United States](#) (June 29, 2022). They are part of a longstanding policy of "prevention through deterrence," which involves aggressive enforcement to make illegally entering the

concealed in the trunk or cargo area of a car, they are generally there only for a very short period of time to get through the checkpoint, and they often have access to egress methods, airflow, and the ability to communicate with the driver.⁶ We also have clients who get paid a small sum to guide a group of people on foot through rough terrain to circumvent a checkpoint. Sometimes our smuggling clients are related to the individuals being transported, or they are even part of the migrant group themselves. The vast majority of people sentenced under this guideline are people of color (81% Hispanic, 9% Black).⁷ And most are American citizens.⁸

As migration experts have pointed out, there is a key difference between *smugglers* and *traffickers*: “smugglers have clients while traffickers have captives.”⁹ Almost none of our cases involve coercion; the people being smuggled want to avoid detection, as they are committing criminal offenses themselves (illegal entry or illegal reentry), and they pay large sums of money to avoid detection. Many of our smuggling clients are often low-level players in a diffused conspiracy, with little knowledge regarding the other players or those with more responsibility, and they are often just as fungible and unknowledgeable as drug couriers.

Scholars of irregular migration have documented the collaborative nature of illegal border crossings in the U.S. Southwest, dispelling myths surrounding the media portrayal of dangerous “coyotes.”¹⁰ They have shown that those aiding migrants to enter illegally are often themselves part of the

country so deadly and costly that fewer people attempt to do so. See U.S. Gen. Acct. Off., GAO-99-44, [*Illegal Immigration: Status of Southwest Border Strategy Implementation*](#) 3 (1999) (describing policy’s attempt to “shift [migrant] traffic [to] areas that were more remote and difficult to cross).

⁶ See section II.B.2.

⁷ [Individual Datafiles](#), FY 2024.

⁸ *Id.*

⁹ Jasper Gilardi, Migration Pol’y Inst., [*Ally or Exploiter? The Smuggler-Migrant Relationship is a Complex One*](#) (Feb. 5, 2020).

¹⁰ See David Spener, *Clandestine Crossings: Migrants and Coyotes on the Texas-Mexico Border* 163-71 (2011) (documenting how migrants and coyotes collaboratively draw on their social connections and cultural knowledge to stage successful border crossings); Gabriella Sanchez, *Human Smuggling and Border Crossings* at Chapter 2 (2015) (describing the legal history of immigration enforcement and the collaborative nature of irregular crossing in the Sonoran desert).

border communities, which were historically fluid until immigration enforcement ramped up near the turn of this century.¹¹ The involvement of large transnational criminal organizations in these offenses is rare, although smugglers and migrants often have to pay a “piso,” or a sort of tax, to such organizations in order to pass through certain territories.¹²

B. Data do not support the Department’s requests to increase sentencing ranges in §2L1.1 cases, and increased sentences would fall largely on Hispanic individuals in low-income border communities.

Data show that we cannot criminalize our way out of immigration offenses, specifically human smuggling, via guideline increases.¹³ While overall unauthorized border crossings have dropped sharply over the past year,¹⁴ no data suggest that is because of increased Guidelines penalties in immigration offenses.¹⁵ And turning to data regarding §2L1.1, sentences under this guideline routinely fall below the guideline range.¹⁶ This indicates

¹¹ Spener, *Clandestine Crossings* at 160-73 (describing decentralized structure of smuggling networks).

¹² See Gilardi, [Ally or Exploiter?](#) (Feb. 5, 2020); see also Victoria A. Greenfield, et al., [Human Smuggling and Associated Revenues: What Do or Can We Know About Routes from Central America to the United States?](#), Homeland Sec. Operational Analysis Ctr., RAND Corp. at 9, 22-23 (2019).

¹³ See Section I.C. *infra* (discussing Guidelines increases in the 1990s). Compare USSC, [1996 Sourcebook of Federal Sentencing Statistics](#) at Table 17 (1,005 cases sentenced with §2L1.1 as primary guideline) with USSC, [2024 Sourcebook of Federal Sentencing Statistics](#) at Table 20 (4,345 cases sentenced with §2L1.1 as primary guideline).

¹⁴ See U.S. Dept. of Homeland Sec., [Historic 9th Straight Month of Zero Releases at the Border](#) (Feb. 4, 2026); see also Madeline Halpert, [Illegal US-Mexico border crossings hit lowest level in over 50 years](#), BBC (Oct. 7, 2025).

¹⁵ Defenders have previously highlighted how ineffective criminal penalties are in deterring undocumented immigration offenses. [Statement of Marjorie Meyers on behalf of Defenders to USSC](#) at 9-11 (Mar. 16, 2016). Increased penalties have little impact on the demand for illegal crossing services for migrants driven by economic, humanitarian, and familial reasons. And decades of criminalized immigration enforcement have done little to impact the frequency of these cases. See *infra* notes 41-42 and accompanying text (discussing increased frequency of sentenced smuggling cases and previous guideline increases).

¹⁶ [Individual Datafiles](#), FY 2020 to 2024.

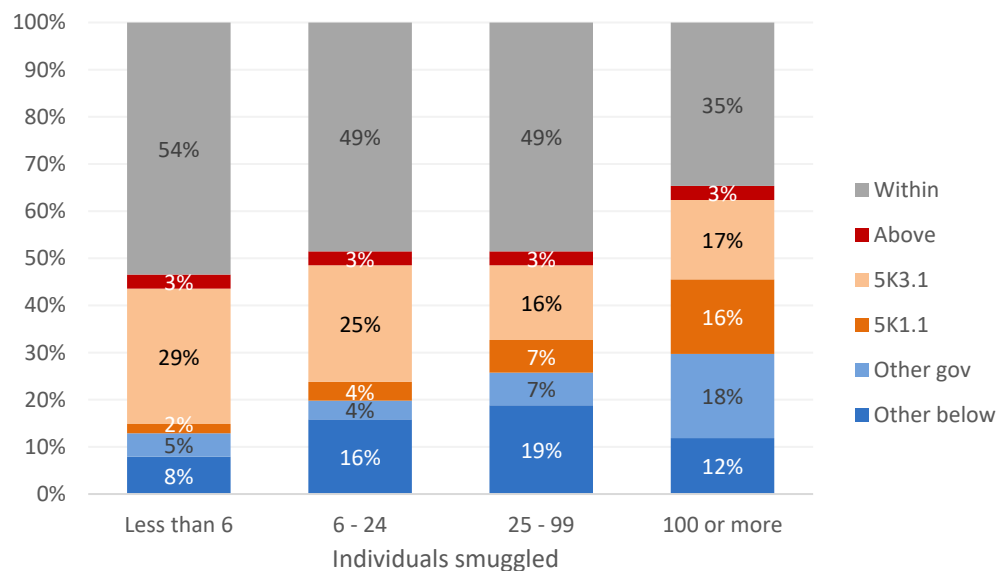
there is a problem in these cases, but the problem is not that the guideline is generating ranges that are too low.

1. Even in aggravated cases, data show that §2L1.1's sentencing ranges are not well calibrated.

In the past five fiscal years, only 43% of cases sentenced under primary guideline §2L1.1 received a within-guidelines sentence; 55% of such cases were sentenced below the advisory guideline range.¹⁷

And this holds true even in cases involving aggravating circumstances. The data briefing shows that cases involving increases under SOC (b)(2) for increased number of smuggled persons actually had *higher* incidences of below-range sentences than cases involving no increase under SOC (b)(2).¹⁸

Placement relative to the Guidelines for cases from fiscal year 2024 with primary guideline 2L1.1(b)(2)



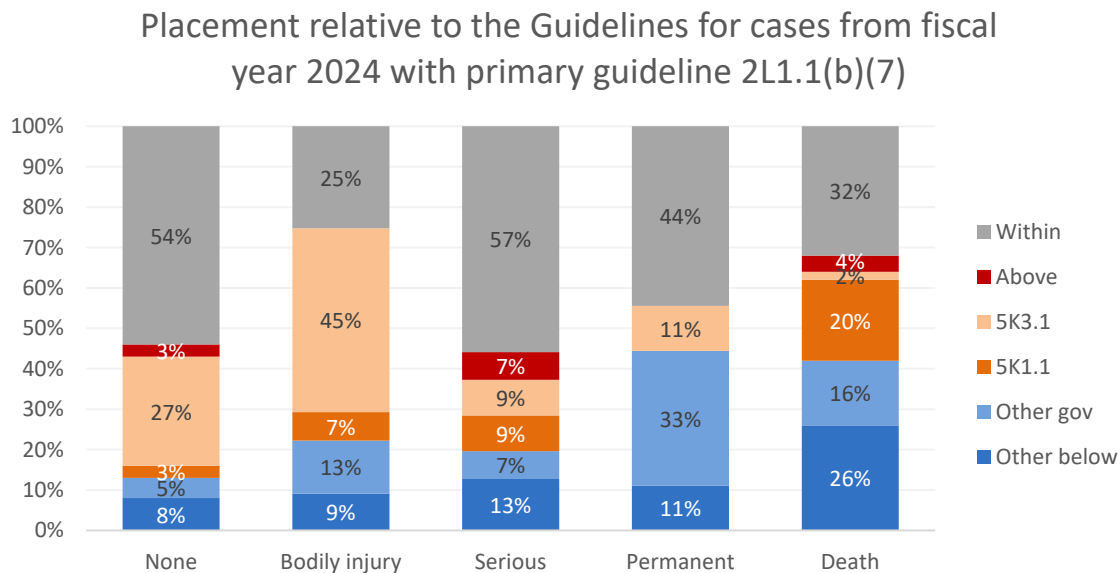
¹⁷ [Individual Datafiles](#), FY 2020 to 2024. Because of the way that placement relative to guideline range is recorded, it is difficult to determine how many cases receiving a fast-track reduction (35% of these cases) also might have received a variance or departure. But the percentage of within-range sentences rose in fiscal year 2024 to 52%, while the percentage of cases receiving fast-track reductions dropped to 27%. See USSC, [Quick Facts: Alien Smuggling Offenses](#) (FY 2024).

¹⁸ Figure created from USSC, [Public Data Briefing on Proposed Amendment on Human Smuggling](#) at 7 (Feb. 13, 2026).

Less than half of cases that received an enhancement under (b)(2) fell within the guideline range.¹⁹

Data also show that over the last five fiscal years, only 34% of cases receiving the harsh (b)(6) SOC enhancement, which automatically moves cases up to at least offense level 18, received within-guidelines sentences, while 65% of such cases received sentences below the guideline range.²⁰

And on average, sentences fell below-range even in the rare cases where the (b)(7) enhancements (related to injury or death) applied,²¹ indicating that this enhancement, too, fails to properly calibrate sentences that are sufficient but not greater than necessary.²²



¹⁹ *Id.*

²⁰ [Individual Datafiles](#), FY 2020 to 2024.

²¹ [Public Data Briefing](#) at 17.

²² Figure created from [Public Data Briefing](#) at 18.

Thus, the data do not support the Department's request for increased penalties.²³ Although one thing that the data is clear on is that additional (unnecessary) enhancements would largely impact Hispanic individuals.²⁴

2. The ranges §2L1.1 currently generates, coupled with § 3553(a), are more than sufficient for outlier cases.

In outlier cases involving increased culpability, the government has a variety of tools at its disposal to seek higher penalties. The Department can charge multiple counts, and it can bring § 1324 charges carrying the possibility of the death penalty in death-resulting cases. Also, in cases resulting in death, the guideline has a cross-reference instructing courts to apply the appropriate homicide guideline “if the resulting offense level is greater than that determined under this guideline.”²⁵

And §2L1.1 already has a plethora of other enhancements available to account for aggravated conduct in outlier cases. As the co-director of Joint Task Force Alpha for the Western District of Texas, targeting human smuggling, has explained: “There is a distinction between routine alien smuggling” and aggravated cases focused on by this task force.²⁶ Task force leaders explained that, even for the outlier cases, the Department can use existing guideline enhancements coupled with charging decisions to “get to a deterrent message.”²⁷

²³ And the data are limited with respect to harms to multiple people: the data briefing slide on harms to more than one person provides averages, which can be impacted by outlier cases, especially in such a small pool of cases (160 cases). [Public Data Briefing](#) at 16-17.

²⁴ *Id.* at 9, 25.

²⁵ USSG §2L1.1(c)(1).

²⁶ Ian Hanna & James Hepburn, U.S. Dep't of State, [Foreign Press Center Briefing: Targeting Human Smuggling and Trafficking in the Northern Triangle and Mexico](#) (June 5, 2024).

²⁷ *See id.* (emphasizing the importance of “focus[ing] our resources to go after the most egregious targets” to be able to use the guideline's enhancements for over 100 persons smuggled or death resulting). Mr. Hanna discussed ways to increase sentences under §2L1.1's structure, favorably invoking the more harsh drug trafficking guideline. However, it does not appear that increased guideline penalties provide a “deterrent message” in smuggling cases, given that §2L1.1 frequencies have increased over time, despite past increases in offense levels. *See infra* n. 41 and

C. Section 2L1.1's history is one of unstudied increases, resulting in overinflated guideline ranges that overstate offense seriousness and individual culpability.

A look at the history of §2L1.1 provides insight into why sentences routinely fall below guideline ranges here. After years of unstudied increases and factor creep, §2L1.1 has drifted away from measuring culpability, and toward producing overinflated ranges.

The original 1987 Guideline carried a base offense level of 6: half of today's lowest base level.²⁸ It had only two SOC enhancements; both were specific to the individual being sentenced.²⁹ In 1987, the Commission estimated that 50% of "first time offenders" sentenced for smuggling undocumented people after being convicted at trial would be sentenced to prison under the new Guidelines scheme.³⁰ By contrast, in fiscal year 2024, 80% of individuals in Criminal History Category I sentenced under primary - guideline §2L1.1 received prison terms, even *after* pleading guilty.³¹

What happened? While there have been several amendments to §2L1.1 over the years, two are particularly relevant to the proposed amendment. First, the Commission created the ancestor of current SOC (b)(2) in 1992, with tiered increases based on the number of people smuggled (replacing language in the commentary suggesting upward departures for cases

accompanying text (discussing history of guideline increases and increased frequency of sentenced smuggling cases).

²⁸ Compare USSG §2L1.1(a) (1987) (providing base offense level 6) *with* USSG §2L1.1(a) (2025) (providing base offense levels between 12 and 25). There is scant information in the original Manual or the Supplemental Report to Congress as to whether this guideline was created by looking at pre-SRA sentences, but the original §2L1.1 guideline levels appear to have been similar to that of the Parole Commission guideline that preceded it. USSC, [Supplementary Report on the Initial Sentencing Guidelines and Policy Statements](#) 25, Appx. C 45 (1987).

²⁹ One SOC enhancement applied "if the defendant committed the offense for profit or with knowledge that the alien was excludable as a subversive," and another applied if the defendant was previously convicted of a similar offense. USSG §2L1.1(b)(1), (2) (1987).

³⁰ [1987 Supplementary Report](#) at 33 tbl. 1(a). No estimate was provided for sentences for individuals who plead guilty.

³¹ This statistic does not include cases that had any law enforcement contact or any specific offense characteristics applied. [Individual Datafiles](#), FY 2024.

involving “large numbers of aliens”).³² There was little explanation for this, although the amendment noted that the Commission designed the new SOC to “work in conjunction with the operation of the [aggravating] role enhancements from §3B1.1.”³³ Like other quantity-based enhancements in the Manual, the (b)(2) enhancement proved to be a flawed proxy for individual offense culpability,³⁴ and it currently does not track the application of role increases.³⁵

But a later, unstudied package of increases shaped §2L1.1 into the overinflated guideline we know today. A congressional directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), mandated a variety of increases to the guideline, including increased penalties for number of persons smuggled, among other enhancements.³⁶ Congress directed the Commission to increase the (b)(2) enhancement for number of persons by “at least 50 percent,”³⁷ but the Commission went beyond even that baseline in creating the new table at (b)(2).³⁸ Congress also

³² USSG App. C, [Amend. 450](#) (Nov. 1, 1992).

³³ *Id.* at Reason for Amendment.

³⁴ See [Defenders’ Comment on the USSC’s 2025-2026 Economic Offenses Proposed Amendments](#) at 4-6 (Feb. 10, 2026) (discussing flaws of loss as quantity-based increases); [Defenders’ Comment on the USSC’s 2024-2025 Drug Offenses Proposed Amendments](#) at 3, 7-8 (Mar. 3, 2025) (discussing flaws of drug quantity-based increases).

³⁵ In the past five fiscal years, only 4% of individuals who received the (b)(2)(A) enhancement (6-24 persons smuggled) also received an aggravated role increase, whereas 24% received a minor role reduction. For those who received an increase under (b)(2)(B) (25-99 persons smuggled), 13% received an aggravated role increase, whereas 23% received a minor role reduction. For those who received an increase under (b)(2)(C) (100 or more persons smuggled), 39% received an aggravated role increase, whereas 10% received a minor role reduction. [Individual Datafiles](#), FY 2020 to 2024.

³⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 203(e); 110 Stat. 3009.

³⁷ *Id.* at § 203(e)(2).

³⁸ With respect to the number of persons enhancement, Congress directed the Commission to “review the sentencing enhancement for the number of aliens involved (U.S.S.G. 2L1.1(b)(2)), and increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act.” *Id.*; see also [Defenders’ Comment on the USSC’s 1997 Alien Smuggling](#)

directed the Commission to “impose an appropriate sentencing enhancement” on an individual who, in the course of committing a smuggling offense “(i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual; . . . or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury.”³⁹ This directive, and the Commission’s rushed response,⁴⁰ rather than any exercise of the Commission’s empirical function, led to the §2L1.1 guideline we know today, with its higher base offense levels and present-day SOC(b)(6) (reckless endangerment) and (b)(7) (injury or death), which—unlike the directive’s mandate—are not limited to the sentenced individual’s own acts.

As it turns out, this sharp increase in punishment did not deter smuggling offenses: by 2006, cases with §2L1.1 as primary guideline rose to more than triple the amount in 1996.⁴¹ This should surprise no one: as Defenders and others have explained before, criminal penalties are ineffective at deterring human smuggling, which is driven by market forces related to geopolitical, socioeconomic, and humanitarian factors.⁴² And the Guidelines cannot change the nature of smuggling offenses. To the extent that smuggling offenses may be riskier than in the past, scholars have noted that as increasingly militarized immigration enforcement grew over the past three decades, migrants have had to take more dangerous routes through

[Proposed Amendments](#) at 2-4 (noting amendment far exceeded mandated increase in congressional directive and was unsupported by Commission data).

³⁹ *Id.* at Div. C § 203(e)(2)(E).

⁴⁰ The Commission first implemented a package of temporary emergency post-IIRIRA amendments, without notice and comment. USSC, [Proposed Emergency and Non-Emergency Amendments to the Sentencing Guidelines for 1997](#) (Jan. 2, 1997).

⁴¹ Compare USSC, [1996 Sourcebook of Federal Sentencing Statistics](#) at Table 17 (1,005 cases sentenced with §2L1.1 as primary guideline) with USSC, [2006 Sourcebook of Federal Sentencing Statistics](#) at Table 17 (3,462 cases sentenced with §2L1.1 as primary guideline).

⁴² See [Meyers Statement](#) at 9-11 (discussing lack of deterrent effect of increased sentences in immigration context); [ACLU Comment on the USSC’s 2016 Proposed Amendments](#) at 3 (Mar. 21, 2016) (discussing lack of deterrent effect of prosecutions on illegal reentry offenses); [Human Rights Watch Comment on the USSC’s 2016 Proposed Amendments](#) at 8 (Mar. 21, 2016) (discussing lack of deterrent effect of criminal prosecutions on irregular migration).

harsh terrain, increasing both risks to migrants and their perceived need for clandestine crossing methods.⁴³

D. The current §2L1.1(b)(6) and (b)(7) are already overbroad and result in unwarranted similarities and unwarranted disparities.

The SOC at §2L1.1(b)(6) and (b)(7)—which the Commission has proposed broadening—are part of this broken guideline, and they are too broad as things stand.

SOC (b)(6) is far broader than the Congressional directive that spawned it. This provision imposes a two-level increase whenever an offense “involved intentionally or recklessly creating a substantial risk of death or serious bodily injury.”⁴⁴ Congress’s directive in IIRIRA required an enhancement only for an individual who “engages in conduct that consciously or recklessly places another in serious danger.”⁴⁵ The directive focused narrowly on an individual’s conduct and culpable mental state. Yet the SOC as written can, and frequently does, apply based on the actions of others, not the sentenced individual.⁴⁶

⁴³ See Irene I. Vega, [“Reasonable Force” at the U.S.-Mexico Border](#), 69 Social Problems 1154, 1155 (2022) (explaining that “prevention through deterrence” is a “deadly policy” that redirected migration flows into remote terrain); Wayne A. Cornelius, [Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy](#), 27 Population & Development Rev. 661, 674-77 (2001), (finding that intensified border enforcement displaced crossings toward hazardous desert regions, increasing migrant mortality risks); U.S. Gov’t Accountability Off., GAO-06-770, [Illegal Immigration: Border-Crossing Deaths Have Doubled Since 1995: Border Patrol’s Efforts to Prevent Deaths Have Not Been Fully Evaluated](#) 14-18 (Aug. 15, 2006) (reporting increased migrant deaths associated with enforcement strategies that shifted crossings into more remote terrain).

⁴⁴ USSG § 2L1.1(b)(6).

⁴⁵ [IIRIRA](#), Pub. L. 104-208, Div. C at § 203(e)(2)(E)(iii).

⁴⁶ See, e.g., *United States v. De Jesus-Ojeda*, 515 F.3d 434, 443 (5th Cir. 2008) (upholding application of reckless endangerment enhancement for “cohorts” reckless or intentional creation of a substantial risk of death or serious bodily injury); *United States v. Wilkerson*, No. 24-50404, 2025 WL 1605123, at *1 (5th Cir. June 6, 2025) (upholding application of (b)(6) enhancement for co-conspirator’s conduct of “transporting aliens in a vehicle’s trunk” as it was “was reasonably foreseeable to

Commission data suggest that the overbroad (b)(6) does a poor job of quantifying risk. In fiscal year 2024, §2L1.1(b)(6) applied in 1,550 cases, yet 90% of those cases involved no injury or death, suggesting that the enhancement routinely punishes *theoretical* risk.⁴⁷ At the same time, sentences frequently fell below the guideline range in §2L1.1 cases involving the (b)(6) enhancement, suggesting that this enhancement produces guideline ranges that overstate both risk and an individual's culpability.⁴⁸

The (b)(7) SOC adds between two and ten offense levels when bodily injury or death occurs, yet it does not contain a requirement of causation or a nexus to the sentenced individual's conduct, and it has no mental state requirement. Because the current (b)(7) enhancement is so broad, it fails to advance just punishment, cannot promote deterrence, and risks producing unwarranted similarity, running afoul of § 3553(a)(6). The current (b)(7) SOC is far broader than the directive, which instructed the Commission to enhance punishment for a "defendant" who "murders or otherwise causes death, bodily injury serious bodily injury to an individual."⁴⁹ The directive's focus on causation contrasts sharply with the guideline's broad language, which does not require that a sentenced individual act intentionally or even recklessly, which combined with expansive relevant-conduct principles,⁵⁰ means sentenced individuals can receive massive increases based on events only tenuously connected to their conduct,⁵¹ or for the conduct of others even

her given her knowing participation in the conspiracy to transport illegal aliens in their vehicles").

⁴⁷ [Public Data Briefing](#) at 13.

⁴⁸ Nearly 65% of these cases received below guidelines sentence. [Individual Datafiles](#), FY 2020 to 2024.

⁴⁹ [IIRIRA](#), Pub. L. 104-208, Div. C at § 203(e)(2)(E)(i).

⁵⁰ See U.S.S.G. § 1B1.3(a)(1)(B).

⁵¹ See *United States v. Mondragon-Gonzalez*, No. 24-50758, 2025 WL 2465752, at *1 (5th Cir. Aug. 27, 2025) (affirming 480-month sentence in smuggling offense where Mr. Mondragon "hired a co-conspirator to transport illegal aliens," resulting in a fatal crash that he was not present for); *United States v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003) (applying injury/death SOC when smuggler arranged for transport in an overloaded van and the migrants were injured or killed in accident resulting from a tire blow-out, even though that individual was not driving); *United States v. Flores-Flores*, 356 F.3d 861, 863 (8th Cir. 2004) (applying enhancement where sentenced individual was smuggling van full of undocumented people and let a migrant drive the van, resulting in an accident).

if the individual himself was also in danger.⁵²

The result: (b)(7) can increase a sentencing range by *years* based on the (accidental or intentional) conduct of others, including codefendants or DHS agents, regardless of whether it was entirely unforeseeable to the sentenced individual. The Supreme Court has repeatedly recognized that a culpable mental state is a “bedrock” principle separating wrongful conduct from mere accident.⁵³ Yet §2L1.1(b)(7) permits dramatic sentencing increases—even 10 offense levels for death—without proof that the sentenced individual intended, or even recklessly disregarded, the risk of harm. As Defenders and others have written before, strict liability sentencing enhancements carry no deterrent value, as one cannot deter unintentional conduct.⁵⁴ It also results in unwarranted similarity, by treating an individual who cannot foresee and does not inflict harm the same as one who intentionally inflicts harm on a migrant.⁵⁵ The resulting increase often results in strict liability sentencing, inconsistent with proportionality and just punishment.⁵⁶ And this is no doubt part of the reason why cases involving application of this enhancement often produce sentences that fall below the guideline range.⁵⁷

⁵² See Ignacio Castañeda Perez, et. al, [Homeland Secrets, Chapter 2, The Chase](#), Cronkite News (Feb. 24, 2020) (describing HSI unmarked interdiction units performing “pinch” maneuver and opening fire on vehicle transporting migrants in a residential area, killing the driver and injuring defendant and a migrant); see also Defendant’s Sent. Memo., *United States v. Warren Evan Jose*, No. 4:19-1050 ECF No. 304 (D. Ariz., Oct. 20, 2022), Dkt. No. 304.

⁵³ See *Ruan v. United States*, 597 U.S. 450, 457, (2022) (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952)); see also [Statement of Deirdre D. von Dornum on behalf of Defenders to USSC on Proposal 4: Circuit Conflicts](#) at 17 (Feb. 27, 2024); [Defenders’ Comment on the USSC’s 2023 Proposed Amendments: Firearms Offenses](#) at 24 (Mar. 14, 2023).

⁵⁴ [Defenders’ 2023 Firearms Comment](#) at 24.

⁵⁵ See [von Dornum Statement](#) at 17; [Defenders’ 2023 Firearms Comment](#) at 24.

⁵⁶ The Ninth Circuit has previously “suggested that a mens rea of recklessness is required to impose an enhancement under section 2L1.1(b)(7)(4)” for the +10 death resulting enhancement. *United States v. Ramirez Lopez*, 315 F.3d 1143, 1159 (9th Cir. (9th Cir. 2003) (citing *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1059 (9th Cir. 2001), *opinion withdrawn due to dismissed indictment, appeal dismissed*, 327 F.3d 829 (9th Cir. 2003)).

⁵⁷ See Sec. I.B.1.

What’s more, (b)(7)’s breadth has produced a persistent circuit split regarding causation standards: Some circuits require only but-for causation, others demand a showing closer to proximate causation, and at least one has held that courts cannot impose a causation requirement at all.⁵⁸ This means that similarly situated individuals face dramatically different sentencing exposure depending on their location, creating additional unwarranted disparity.

The breadth of §2L1.1(b)(7) also allows enhancements based on actions of DHS agents, rather than on those of sentenced individuals or their codefendants. In *United States v. Gaspar-Felipe*, Border Patrol agents engaged in a high speed chase of a vehicle transporting migrants and “fired their rifles at” the vehicle, shooting and killing one of the migrants.⁵⁹ The Fifth Circuit upheld application of the 10-level (b)(7)(D) enhancement to Mr. Gaspar-Felipe, who had been identified as the foot guide who had previously guided the group including the deceased migrant on foot. Mr. Gaspar-Felipe was not a part of the high speed chase, and he was acquitted of causing the migrant’s death at trial.⁶⁰ Applying the broad but-for causation standard, the Fifth Circuit reasoned that “[a]bsent Gaspar-Felipe’s guiding [the deceased individual] from Mexico to the rendezvous point in Texas, [the deceased] would have not found himself in the Chrysler where he was killed by police

⁵⁸ Compare *United States v. Ramos-Delgado*, 763 F.3d 398, 401-02 (5th Cir. 2014) (concluding §2L1.1(b)(7)(D) requires at least but-for causation); with *United States v. Flores-Flores*, 356 F.3d 861, 862-63 (8th Cir. 2004) (focusing on whether the death was “causally connected to the dangerous conditions created by [the defendant’s] unlawful conduct”); compare *United States v. Zaldivar*, 615 F.3d 1346, 1350-51 (11th Cir. 2010) (focusing on whether it was “reasonably foreseeable ... that [the defendant’s] actions or the actions of any other member of [his criminal] operation could create the sort of dangerous circumstances” likely to result in death); with *United States v. Cardena-Garcia*, 362 F.3d 663, 666 (10th Cir. 2004) (because § 2L1.1(b)(7)(D) “contains no causation requirement” courts “have no license to impose one”). No circuit requires that the individual himself cause the injury or death, since (b)(7) is clear that’s not required.

⁵⁹ *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

⁶⁰ *Id.* at 343 (“[T]he government need show only that the defendant’s alien-smuggling conduct was a but-for cause of someone’s death”). This case was decided prior to the Commission’s acquitted conduct amendment, but absent an acquittal at trial, the relevant conduct rules would allow for expansive liability under this SOC.

firing at the fleeing car.”⁶¹ The lack of causation in the (b)(7) enhancement therefore transfers liability to individuals based on the downstream actions of immigration agents.

Gaspar-Felipe is not an aberration. Scholars have documented what Defenders at the border have known for decades: U.S. Border Patrol has a longstanding practice of routinely utilizing force, which can result in injury or death to migrants (and others).⁶² Border Patrol does not publicly track use-of-force incidents that lead to death, but the Southern Borders Community Coalition reports that since 2010, 367 people have been killed in encounters with Border Patrol; 58 were killed in 2021 alone.⁶³ Agency practices are particularly troubling in vehicular smuggling cases; Border Patrol has a well-documented practice of engaging in high-speed chases that lead to deaths or serious injuries when they are attempting to apprehend suspected migrants.⁶⁴ Given the but-for causation standard the Fifth Circuit has read

⁶¹ *Id.*

⁶² See Robin C. Reineke and Daniel E. Martinez, [Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona](#), 12 J. on Migration and Hum. Sec. 243, 247-250 (2024) (cataloguing reports and studies documenting Border Patrol’s long history of physically abusing migrants and describing routine tactics including high-speed vehicle chases; aggressive chase and use of helicopter tactics against migrants on foot; and the use of lethal force, including fatal shootings, asphyxiation, tasers, and beatings); Vega, [“Reasonable Force”](#) at 1154-55 (“[V]iolence against Mexicans and other migrants has been a feature of the Border Patrol since its founding in 1924”); Inter-Am. Comm’n on Hum. Rts, [Report No. 60/25, Case 14.042, Merits Report \(Publication\), Anastasio Hernández Rojas and Family, United States](#) at 23-25 (April 28, 2025) (finding U.S. Customs and Border Protection (“CBP”) agents tortured a migrant, violating his rights to life, personal integrity, and access to justice, and that the violations occurred in a broader context of “discrimination against migrants of Latin American origin”).

⁶³ See Southern Borders Community Coalition, [Abuse of Power and its Consequences](#) (Feb. 3, 2026) (reporting data collected by monitoring media reports and CBP press releases); see also Robin C. Reineke and Daniel E. Martinez, [Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona](#), 12 J. on Migration and Hum. Sec. 243, 246 (2024) (describing a “culture of force” within the agency that, along with other factors, “creates a milieu where there is routine abuse of migrants with low levels of accountability”).

⁶⁴ See, e.g., Eileen Sullivan, [A Rise in Deadly Border Patrol Chases Renews Accountability Concerns](#), N.Y. Times (Jan. 9, 2022) (reporting 21 deaths from Border Patrol vehicle chases in 2021). In 2023, after public outcry, CBP updated their policy regarding vehicle pursuits. U.S. Customs and Border Protection, [CBP Updates](#)

into (b)(7), our clients can, and in fact do, receive the (b)(7) enhancement for this official conduct.⁶⁵

Finally, the unique nature of smuggling cases compounds all these concerns. The facts alleged to support the (b)(6) and (b)(7) enhancements frequently rely on statements from migrants who are either detained as material witnesses and at risk of potential prosecution themselves, or who are removed from the United States at the beginning of the case, giving defense counsel little to no ability to investigate facts. Material witnesses are routinely removed from the country after being deposed by the government early in the case, which makes later additional investigation of alleged facts underlying sentencing enhancements nearly impossible.⁶⁶

II. The proposed enhancements would not effectuate the statutory purposes of sentencing and would make this broken guideline even worse.

This year's proposed amendments would compound the disparities created by this broken guideline. Unlike the unstudied increases of the past, there is no emergency directive and no need to act at this time. In fact,

[*Emergency Driving and Vehicular Pursuits Directive*](#) (Jan. 11, 2023). However, the updated policy was rescinded on January 20, 2025. U.S. Customs and Border Protection, [*Emergency Driving Including Vehicular Emergency Driving Including Vehicular Pursuits by U.S. Customs and Border Protection Personnel: Directive 4510-026*](#) (indicating rescission of the 2023 policy as of Jan. 20, 2025). Currently, the full scope of the CPB's vehicle pursuits policy is not known, as large sections of the updated policy, including the entire section labeled "Tactics," have been redacted from the policy posted on CBP's website. See U.S. Dept. of Homeland Sec., U.S. Customs and Border Protection, [CBP Directive No. 4510-026B](#) (effective Oct. 2025).

⁶⁵ *Gaspar-Felipe*, 4 F.4th at 343. The two Texas border districts (in the Fifth Circuit) produced over half of sentenced §2L1.1 cases last year. USSC, [Quick Facts: Alien Smuggling](#) (FY 2024).

⁶⁶ See, e.g., *Gaspar-Felipe*, 4 F.4th at 336 (migrant witnesses deported after government deposed them, but before the defense could cross-examine them); *United States v. Hernandez*, 347 F. Supp. 2d 375, 383-384 (S.D. Tex. 2004) (granting motion to dismiss a case involving an assault on a USBP agent because a migrant witness who had given a statement favorable to the defense was deported without notice to defense counsel); *United States v. Jose Manuel Gutierrez, et al.*, No. 2:22-CR-251, Dkt. 105 (Order on Defendant's Motion to Dismiss) (S.D. Tex. 2022) (granting motion to dismiss a § 1324 case because migrant witness with exculpatory information was deported).

unauthorized border crossings are currently *down*. And the rates of below-guidelines sentences in §2L1.1 function as institutional feedback showing that additional unstudied guideline increases would be inappropriate. The Commission should not repeat its past mistakes here.

Just as we have in the past,⁶⁷ we urge the Commission to pause and study these offenses instead of proceeding with unstudied and unnecessary increases that will fall on the backs of low-income people of color.

A. The proposed changes to §2L1.1(b)(2) make this enhancement more complicated and less useful to judges seeking to base sentences on culpability.

The existing enhancement at (b)(2) for the number of persons smuggled already generates penalty ranges that are beyond sufficient to account for offense seriousness. As things stand, Commission data indicate that the (b)(2) enhancements currently produce overinflated guideline ranges, with average sentences consistently falling below the average guideline minimums for each ordinal increase in number of undocumented persons smuggled.⁶⁸ There is no need to make this enhancement more complex, or to call for even higher enhancements in most cases.

The Commission originally believed that in cases involving large numbers of people, this enhancement would work in tandem with the aggravated role enhancement.⁶⁹ But that has not happened, as discussed above.⁷⁰ What Defenders see is that, much like in drug-trafficking cases, the relevant conduct rules, coupled with quantity-based increases, result in low-level players being held liable for the actions of others.

⁶⁷ See [Defenders' Comment on the USSC's 1997 Proposed Amendments](#) at 1-4 (noting the amendment far exceeded the mandated increase in the Congressional directive and was unsupported by Commission data).

⁶⁸ See [Public Data Briefing](#) at 6.

⁶⁹ See USSC App. C, [Amend. 450](#), Reason for Amend. (1992) (describing increase as designed to work with aggravated role adjustment).

⁷⁰ Section I.B.1.

B. The proposed new §2L1.1(b)(6) (trunk enhancement) would create new problems while solving nothing.

There is no need to add another unempirical and expansive strict-liability enhancement untethered from an individual's conduct or intent into this already flawed guideline. The proposed SOC related to a migrant in a trunk or overcrowded vehicle would fail to effectuate the statutory purposes of sentencing.

1. Without any mens rea requirement, and without defendant-specific language, the trunk/overcrowding enhancement will compound the guideline's existing flaws.

As with the current (b)(7), the new unstudied vehicular enhancement in the proposed (b)(6) has no mens rea requirement and is not defendant-specific, in contrast to the original Congressional directive. This means that a court might find that a foot-guide who never gets into a vehicle could receive this enhancement, based on actions that occurred after his conduct ended. Among other problems, the lack of mens rea makes the enhancement worthless as a potential deterrent.⁷¹

The proposed enhancement is also dramatic, acting not only as a two-level increase but also as a portal to offense level 18 if the offense level isn't at 18 already. This would lead to increased unwarranted *similarity* in sentences for differently situated individuals.

2. The existing enhancements already address risky transportation involving trunks.

The Commission has provided no public data on how often smuggling offenses involve migrants riding in trunks or overcrowded vehicles. But Defenders are concerned that the proposed (b)(6) could result in a de facto base offense level in many vehicular smuggling cases simply because of how these cases work. Migrants do not want to be caught; they often voluntarily

⁷¹ See *United States v. Handy*, 570 F. Supp. 2d 437, 478, 479 (E.D.N.Y. 2008) (noting strict liability enhancement for possession of a stolen firearm is an ineffective deterrent "since a person cannot be deterred from doing what he or she does not know is being done").

conceal themselves for brief periods of time, in vehicles passing through the interior checkpoints. The current (b)(6) enhancement already applies when this is done in a risky manner, often including when people are transported in the trunk of a car.

As the Ninth Circuit has explained, “there is a baseline risk inherent in all vehicular travel, and we focus on the ways in which the method of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger” when considering application of the current risk-focused (b)(6) enhancement.⁷² Every case is different, and the application of the current (b)(6) enhancement hinges on an assessment of the facts.⁷³ This makes sense, as an offense involving two people willingly transported in a large trunk for less than 10 minutes to clear a checkpoint, who had cell phones, airflow, the ability to talk to the driver, and access to and understanding of how to use the glow-in-the-dark trunk release handle is very different than a situation involving multiple people trapped in a trunk of an older vehicle for an extended period. The Commission has provided no data on why all offenses involving trunks (regardless of if it was only for a short duration, at very slow speeds, and where the migrants had multiple methods of egress) should be considered more inherently risky than those involved in normal highway automobile transportation, such as riding unrestrained in a vehicle’s front seat.⁷⁴

⁷² *United States v. Bernardo*, 818 F.3d 983, 986 (9th Cir. 2016) (quoting *United States v. Torres–Flores*, 502 F.3d 885, 889 (9th Cir. 2007)).

⁷³ The Fifth Circuit “has identified five factors to consider when applying the current § 2L1.1(b)(6) to situations involving migrants concealed in vehicles: ‘the availability of oxygen, exposure to temperature extremes, the aliens’ ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs.’” *See United States v. Rodriguez*, 630 F.3d 377, 381 (5th Cir. 2011) (citing *United States v. Zuniga–Amezquita*, 468 F.3d 886, 889 (5th Cir.2006)).

⁷⁴ To the extent this proposal acts as a proxy for perceived risk of injury from vehicular crashes, this enhancement is also particularly troubling, because as laid out above, high-speed immigration enforcement chases and shootings pose a serious risk to migrants. *See* section I.D. To the extent the Commission wants to keep migrants safe and reduce the risk of vehicular crashes, it could also consider a *reduction* in these cases (to deter government use of force against migrants) where immigration enforcement conduct created a risk of injury.

Further, many of our clients sentenced under §2L1.1 lack authority over transportation or logistics decisions. Vehicle type, routes, and timing are typically determined by others or factors outside of their control. So, increasing penalties for low-level participants has no ability to impact the conduct the enhancement seeks to address. The existing enhancement (along with courts' miserly approach to applying minor role adjustments) provides more than adequate increases to punish risky situations, while giving judges flexibility to make individualized assessments.

3. The proposed increase for overcapacity vehicles overestimates risk and removes discretion from sentencers closest to the facts of the case.

With respect to a new (b)(6) enhancement for “carrying substantially more passengers than the rated capacity of a motor vehicle,” the proposed amendment is unnecessary, overly vague, and would result in double counting with the (b)(2) amendment. The Commission has provided no data on how often offenses involve vehicles with “substantially more” passengers than the rated capacity. This language is also vague: What does “substantially more passengers” mean? This enhancement would likely lead to disparate interpretations and litigation.

It will also punish conduct that is not necessarily inherently risky. Law-abiding families occasionally pack more people into their vehicle than ideal for short periods of time, out of necessity. And in four out of the five border districts, there is no applicable state law restricting adults from riding in the back of pickup trucks—a routine practice in rural and agricultural communities that could well receive an increase under the new proposed SOC.⁷⁵ To the extent the Commission is considering this proposed enhancement to account for the risk of vehicle crashes, it should stop and study the matter, particularly given the immigration enforcement practices described above.⁷⁶

⁷⁵ Compare [2026 Proposed Amendments: Human Smuggling](#) at 6 with Insurance Inst. for Highway Safety and Highway Loss Data Inst., [Restrictions on riding in pickup beds](#) (February 2026).

⁷⁶ See Section I.D.

C. The proposed new (b)(8)(B) (currently (b)(7), re bodily injury/death) would make an already problematic enhancement far worse.

The Commission has proposed expanding what is currently (b)(7) (but would become (b)(8) under the full proposal) to include certain sexual crimes; and it has separately proposed to create a new sub. (B) to this enhancement dealing with multiple victims who sustain varying degrees of bodily injury. As a general matter, this comment has already explained that the current (b)(7) is deeply flawed and overstates culpability, largely because it lacks any mens rea or causation requirements, and also because it does not look to the conduct of the sentenced individual. The Commission should not expand this broken SOC further unless it first also acts to cabin the already overexpansive existing injury/death enhancement.

As for the specific proposed changes, the next section of this comment addresses changes to the existing enhancement related to sexual crimes. Here, we will address the proposed new sub(B) in general. Of the two options presented, the scope of covered conduct in Option 2 is more attuned with the statutory purposes of sentencing. Option 2 limits the enhancement for additional instances of “death or permanent or life-threatening bodily injury,” with the second set of bracketed language that would apply to offenses where “the defendant intentionally or knowingly caused” death or permanent or life-threatening bodily injury. Defenders appreciate that, for both options, at least the second set of bracketed language is both defendant-specific and contains a mens rea requirement, which is consistent with the directive language that the original enhancement was based on (but was broader than). But the scope of Option 1, which includes less serious injuries as well as relatively minor sexual-contact offenses like touching an adult’s buttocks over the clothes—more on that in the next section—is far too broad. That said, the offense-level increases in Option 2 are too large and could potentially render the cross-reference irrelevant.

That is why Defenders strongly urge the Commission not to promulgate either option. Commission data on number of victims in cases involving what is currently a (b)(7) enhancement show that for more serious or permanent injuries, there is a median of one victim, so it is unclear why

this proposed increase is necessary.⁷⁷ For cases involving multiple deaths, the Department can charge multiple counts, and has its choice of charges under § 1324, including charges that carry the *death penalty*.⁷⁸ And the homicide cross-reference in §2L1.1 is more than sufficient to handle serious cases involving one or more death; in fact, the proposed (b)(8) could increase sentences to the point that it renders the cross-reference moot. The Department has stated this increase is needed due to language in 28 U.S.C. § 994(c)(3), which directs the Commission to consider the “nature and degree of the harm caused by the offense, including whether it involved . . . a person, a number of persons” But the factors in § 994(c) matter “only to the extent that they do have relevance” to an appropriate sentence.⁷⁹ And the (b)(7) injury/death enhancement already lacks an empirical foundation and sweeps too broadly. It would not help judges impose sentences consistent with § 3553(a) to increase it further.

D. The remaining portions of the proposed amendment, addressing sexual conduct, are overbroad and unwarranted.

The Commission has proposed to make several changes to §2L1.1 related to smuggling offenses involving sexual misconduct:

- a new provision in what is now (b)(6) (but under the proposal would be (b)(7)) increasing the sentence where the offense “created a substantial risk of . . . serious bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law”);
- a new provision in what is now (b)(7) (but under the proposal would be (b)(8)) treating “criminal sexual contact under 18 U.S.C. § 2244” the same as “bodily injury” for purpose of that enhancement; and
- a new cross-reference for sexual offense conduct.⁸⁰

⁷⁷ [*Public Data Briefing*](#) at 20.

⁷⁸ See 8 U.S.C. § 1324(a)(1)(B)(iv).

⁷⁹ 28 U.S.C. §994(c).

⁸⁰ The Commission also has proposed adding language to the current (b)(7) that effectively would move from commentary to text an instruction providing that a

As noted in the preceding section, there's also Option 1 of the proposal for a new subsection of the current (b)(7) enhancement, which would enhance a sentence based on additional injuries—including “criminal sexual contact” under § 2244. But as we explained earlier, Option 1 is problematic for additional reasons; and in any event, our discussion of the breadth of § 2244 should make clear why enhancing a sentence based on “criminal sexual contact” would be a nonstarter.

1. Enhancing a sentence based on a “risk of . . . criminal sexual abuse” does not make sense.

The most obvious problem with the proposal to enhance a sentence based on a risk of criminal sexual abuse is that it is nonsensical: How does conduct create a substantial risk that a migrant will be subject to criminal sexual abuse? Perhaps a smuggler who works with a co-conspirator who is a known registered sex offender? What about just housing people of different genders in the same room? Or for that matter, the same gender? And should the judge not care that no sexual crime was actually committed?

The one thing we do know is that the enhancement will apply in every case in which sexual abuse *actually occurs*, regardless of whether the sentenced individual was involved or could possibly foresee that event, because the proposed amendment would mandate the application of the risk enhancement in every case in which a person receives an enhancement for bodily injury on the basis of criminal sexual abuse. This is straight double-counting, and it would grossly overstate the sentenced person's culpability, particularly since the application of the risk enhancement automatically increases a person's base offense level to 18.

Moreover, this expansion of what is currently (b)(6) comes with the problem that already plagues (b)(6): no requirement that the defendant

violation of § 2241 or § 2242 “or any similar offense under state law” is treated the same as “serious bodily injury” for purposes of that enhancement. But this is not a change per se, since the rule is already in the commentary, and the Guidelines also specifically define “serious bodily injury” to encompass “conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.” USSG §1B1.1, cmt. n.1(L).

himself engaged in this conduct—here, no requirement that the sentenced individual created the risk.⁸¹

Given that Defenders do not understand this enhancement, it might never apply in the absence of sexual abuse that does not occur; or it might apply sometimes in ways we cannot foresee. The only thing that is clear is that whenever a PSR might suggest this provision applies, significant litigation would ensue.

2. The Commission should not expand the already overbroad (b)(7) enhancement to include “sexual contact.”

The Commission should not expand the already overbroad injury/death SOC further by adding “sexual contact” under § 2244 to the types of “bodily injury” that result in an enhancement.⁸² While the enhancement currently applies (through commentary) if the offense involved conduct under § 2241 or § 2242 (or similar conduct under state law), it does not currently apply to mere “sexual contact” under § 2244—with good reason. The conduct covered by § 2244 is extremely broad. “Sexual contact” includes touching, over

⁸¹ The SOC is worded so broadly that it could conceivably apply even to sexual abuse by immigration officials, which is a well-documented problem that the Department and DHS could focus on preventing. See Michael Sainato, [*‘Horrific’: report reveals abuse of pregnant women and children at US Ice facilities*](#), The Guardian (Aug. 6, 2025) (describing report compiled by Sen. Ossoff’s office finding “deaths in custody, physical and sexual abuse of detainees” among other things); Emily Bregel, [*Border agent charged with child sex trafficking, fraud in Cochise County*](#), Arizona Daily Star (July 24, 2025) (discussing Border Patrol agent who was arrested on allegations of criminal wrongdoing, including child sex trafficking); DOJ, [*Former Customs and Border Patrol Agent Found Guilty of Federal Civil Rights and Kidnapping Charges for Sexually Assaulting and Abducting Minor Victim*](#) (Aug. 30, 2024) (reporting that a former Border Patrol agent was found guilty of kidnapping and repeated sexual assault of a minor); Lomi Kriel, [*ICE Guards “Systematically” Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*](#), ProPublica (Aug. 14, 2020) (describing alleged sexual abuse of migrants in immigration detention).

⁸² [*Proposed 2026 Amendments: Human Smuggling*](#) at 4-5. In addition to adding conduct constituting criminal sexual contact under § 2244, the amendment would move the instructions to equate criminal sexual abuse with serious bodily injury from the commentary to the text of § 2L1.1. *Id.*

clothing, a person's breast or buttocks, with a sexual purpose.⁸³ And the specific offenses at § 2244 include nonconsensual sexual contact (*e.g.* buttocks-touching) with an adult⁸⁴ and consensual sexual contact (*e.g.* buttocks-touching) with a teenager.⁸⁵

It is likely no accident that of the many SOC's in the Guidelines that address bodily injury, *not one of them* incorporates § 2244's broad definition of "sexual contact."⁸⁶ Under this definition, and under the proposed amendment, touching the rear pockets of a person's jeans (with sexual intent) could result in an enhanced sentence. This could apply, for example, if a migrant claims that a smuggler touched her buttocks when lifting her into a truck, or if he grazed her breast while helping her cross a fence. And because the enhancement is offense-based, it would apply regardless of whether the person sentenced is the person who (allegedly) touched the migrant.

These sorts of allegations would be much more difficult for the defense to rebut than allegations of the types of sexual abuse that are criminalized by §2241 and § 2242, which require more significant and invasive sexual acts, which would not happen accidentally.⁸⁷ And people subject to the enhancement will likely be deprived of the opportunity to question other migrants who might have witnessed the purportedly intentional touching and could shed light on its context, because, as noted earlier, migrant witnesses are generally removed from the country well before trial, much less

⁸³ 18 U.S.C. §2246(3) (defining "sexual contact" under Chapter 109A, which includes § 2244).

⁸⁴ 18 U.S.C. § 2244(a)(2).

⁸⁵ 18 U.S.C. § 2244(a)(3).

⁸⁶ Guidelines that include SOC's for bodily injury—including, for example, §2A6.2(b)(1)(B) (stalking or domestic violence) and 2H4.2(b)(1) (willful violations of the Migrant and Seasonal Agricultural Workers Act) incorporate § 1B1.1's definition of "bodily injury," which means "any significant injury; *e.g.* an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." USSG § 1B1.1, cmt. n.1(B). The conduct covered by § 2244 will rarely meet that definition; nor can it be equated to that level of injury.

⁸⁷ 18 U.S.C. § 2246(2) (defining the "sexual act[s]" that are criminalized by §§ 2241 and 2242 to require either penetration or contact between a person's genitals or mouth and the anus or genitals of another).

sentencing. The only certainty this proposal brings is that of increased litigation and hearings at sentencing.

3. The proposed cross-reference to Chapter 2 guidelines for offenses involving sexual conduct can overstate individual culpability in smuggling cases involving sexual abuse, and it would rarely be applicable in cases involving sexual contact.

The Commission should not adopt the expanded cross-reference for offenses involving sexual conduct.⁸⁸ The proposed cross-reference to Chapter Two, Subpart A for §2L1.1 offenses involving conduct described in 18 U.S.C. §§ 2241-2242 will result in guideline ranges that are too severe for, and have no nexus to the offense of conviction, due to the expansive application of the relevant-conduct rules.

Section 2A3.1 is the guideline that applies to offenses under §§ 2241 and 2242, with a base offense level of 30 for most offenses, and many enhancing SOCs.⁸⁹ People who are subject to the proposed cross reference will therefore face substantially higher guideline ranges than they would face under §2L1.1, without the government having to prove the alleged sexual abuse beyond a reasonable doubt.⁹⁰ This end-run around the burden of proof will be even more troubling if the cross-reference is offense-based, and a person can face the guideline range produced by §2A3.1 even without any allegation that they personally committed any sexual misconduct. And as we noted earlier, it can be extremely difficult (or impossible) for our clients to successfully dispute allegations of sexual misconduct, whether the misconduct is alleged against a co-conspirator, another migrant, or

⁸⁸ If the Commission does choose to adopt this cross reference, we urge it to select the “defendant engaged in” bracketed language, given the expansive liability present in this guideline, so that it appropriately tracks individual culpability.

⁸⁹ See USSG §2A3.1. The guideline has a base offense level of 38 if the person was convicted under 18 U.S.C. § 2241(c), which involves aggravated sexual abuse of a child under the age of 12, or between the ages of 12-15 who is 4 years younger than the person committing the abuse. See *id.* at §2A3.1(a)(1). Presumably, that BOL would not apply in human smuggling cases not involving a conviction under § 2241(c); but if it did, that is even more reason not to include the cross-reference.

⁹⁰ The base offense level for a § 1324 offense is 12. See USSG §2L1.1(a)(3).

immigration officials,⁹¹ because witnesses are often detained and rapidly removed from the country.

Defenders, of course, want our migrant clients to be safe from sexual misconduct. But without the proposed cross-reference, the harms it would target will hardly go unaddressed. If the government can prove criminal sexual abuse, the person will receive an enhancement for serious bodily injury under the current §2L1.1(b)(7)—even without the proposed amendments. And there can also be a federal or state prosecution for a sex crime.⁹² Such prosecutions not only provide justice for victims, they also provide procedural fairness to both the accused and victims in a way that simply is not possible when such allegations are subject to a lesser standard of proof at sentencing, often based on reported statements of deported witnesses.

As for offenses involving conduct described in 18 U.S.C. § 2244, a cross-reference to §2A3.4 would result in a base offense level of 12. While §2A3.4 has enhancements for offenses involving sexual conduct with children under the age of 16, §2L1.1 will almost always provide the higher sentence, rendering the cross-reference irrelevant.

Finally, the cross-reference is unwarranted because criminal sexual abuse occurs rarely in smuggling offenses, and when it does, judges are perfectly capable of addressing it under § 3553(a).

⁹¹ See, e.g., U.S. Dept. of Justice, U.S. Att’y’s Off., S. Dist. of Ohio, [*Grand jury indicts former deportation officer with federal crimes related to sexually assaulting immigrant victims*](#) (Dec. 8, 2022) (discussing indictment of ICE deportation officer alleging the sexual assault of “at least two females under his supervision in the ICE Alternatives to Detention program”); U.S. Imm. and Customs Enf’t, [*Former ICE special agent arrested on federal civil rights charges that allege he sexually assaulted 2 women*](#) (Aug. 15, 2018) (alleging ICE special agent attempt to rape one woman and did rape another).

⁹² See, e.g., U.S. Imm. and Customs Enf’t, [*Convicted felon ordered to serve nearly 10 years for sexual assault near the Arizona/Mexico border*](#) (Oct. 17, 2019).

E. An enhancement for offenses conducted in connection with a transnational criminal organization is empirically unsupported and risks compounding unwarranted ethnic disparity.

In response to the Commission’s request for comment,⁹³ Defenders oppose any additional increases for the involvement of transnational criminal organizations (TCOs). Human smuggling is, by definition, a transnational offense, but the involvement of large cartels is rare. Requiring sentencing courts to determine whether a person committed a transnational smuggling offense “in connection with [their] participation” in a TCO will lead to overbroad, inconsistent application of an enhancement that is empirically unsupported. Beyond that, such an enhancement risks double counting and would overlap with existing guideline provisions, and it would create substantial risks of unwarranted ethnic profiling and disparity.

1. The involvement of TCOs in §2L1.1 offenses is empirically unsupported.

Scholarship has shown that involvement of large cartels in smuggling offenses is rare,⁹⁴ and Defenders’ experience confirms that. In our experience, smuggling operations at the Southwest border frequently consist of small-scale facilitators performing discrete tasks—drivers, guides, document providers, or local coordinators—linked through flexible and opportunistic networks.⁹⁵ Even on the other side of the border, in Mexican territories controlled by TCOs, past research indicates that they often do not conduct migrant smuggling operations directly. Instead, they extract tolls from migrants and smugglers for protection, leaving smuggling logistics largely in

⁹³ [Proposed 2026 Amendments: Human Smuggling](#) at 8-9 (Issue for Comment #4).

⁹⁴ See Sanchez, *Human Smuggling and Border Crossings* at Chapter 1 (discussing lack of empirical research on smuggling and racial undertones of discourse surrounding the transnational nature of the offense, noting that most smuggling involves local facilitators).

⁹⁵ See also *id.*; Spener, *Clandestine Crossings* at 160 (describing decentralized structure of smuggling networks). Defenders would hope that the sorts of loose associations that arrange smuggling would not incorrectly be labeled as a TCO (or a subsidiary of a TCO), but we have some concerns with that possibility.

the hands of smaller-scale actors.⁹⁶ As one analysis explains, there has been “little evidence” that cartels themselves smuggle migrants, despite public narratives suggesting otherwise.⁹⁷

The Commission’s data briefing supports that TCO involvement in these cases is rare.⁹⁸ Moreover, the data show that these rare cases were more likely to receive six- and nine-level enhancements for conduct involving at least 25 or 100 migrants, respectively; and they were more likely to receive enhancements for inflicting any bodily injury or death.⁹⁹ Thus, cases involving TCOs are already receiving substantial enhancements that produce higher guideline ranges than those for more typical smuggling offenses. A separate TCO enhancement is not needed.

2. The proposed enhancement would broadly punish alleged association, posing a serious risk of unwarranted ethnic disparity.

A TCO enhancement risks sweeping in broad swaths of Hispanic individuals for alleged associations, without looking to actual conduct. As we previously explained in relation to the gang enhancement in §2K2.1, “[t]he problems with law enforcement methods for documenting criminal affiliation have been widely recognized, and counsel in favor of great caution....”¹⁰⁰ Scholars and stakeholders have shown that law enforcement use broad,

⁹⁶ Greenfield, [Human Smuggling and Associated Revenues](#) at 9 (“Migrants’ payments to drug-trafficking TCOs are not payments for smuggling, per se, but they are the only revenue associated with human smuggling that we could attribute directly to TCOs of some kind.”); *see also* Amelia Frank-Vitale, *Coyotes, caravans, and the Central American migrant smuggling continuum*, 26 Trends in Organized Crime 64, 68 (Feb. 17, 2023) (discussing cartels in Mexico requiring fees to move migrants within their territory).

⁹⁷ Gilardi, [Ally or Exploiter?](#) (Feb. 5, 2020).

⁹⁸ According to the recent Commission data briefing, in fiscal year 2024, an estimated 201 (or 5%) of §2L1.1 cases involved a “cartel or [TCO].” [Public Data Briefing](#) at 30; *see also* USSC, [Transcript of Public Data Briefing on Proposed Amendment on Human Smuggling](#) at 7 (Feb. 13, 2026). This indicates TCO involvement is rare, although the data briefing does not explain the exact parameters of the special coding project used to identify which cases involved a cartel or TCO or how these findings of fact were made.

⁹⁹ [Public Data Briefing](#) at 30-31.

¹⁰⁰ [Defenders’ 2023 Firearms Comment](#) at 15 (Mar. 14, 2023).

unbridled discretion in determining whether someone is involved in a criminal organization, designating people as gang members (or “affiliated” with a gang) based on mere suspicion—leading gang databases to be significantly overinclusive, and riddled with racial bias.¹⁰¹

These problems will be compounded in determining if someone is affiliated with a TCO, since TCOs are typically based in other countries. In some border districts, Defenders find that prosecutors already sometimes insinuate that our Mexican or Mexican-American clients have cartel ties and should not receive role reductions, where evidence on the ground is scant. For instance, if a client in a drug case admits even just to being from the Sinaloa region, Defenders often worry that he will unjustifiably be thought to be associated with the Sinaloa cartel.

This raises another problem that we flagged in connection with gang enhancements: participation in the activities of a criminal organization is “not a reliable identifier of culpability,” as teens “who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis.”¹⁰² Instead, “[i]t is not mere participation that predicts criminality—it is the degree of the person’s participation that matters.”¹⁰³ The same is true of TCOs, which dominate some regions in northern Mexico. Given the disparity risks inherent in the determination of whether a person participated in a TCO, the Commission should not take action without comprehensive study of smuggling offenses.

3. A TCO enhancement would overlap with existing enhancements that already address the targeted harms.

Finally, such an enhancement would not properly track offense seriousness because organizational affiliation does not reliably correlate with culpability or role. A common low-level driver recruited for a single trip in a large conspiracy could receive the same enhancement as the rarely-prosecuted genuine cartel member.

¹⁰¹ *Id.* at 15-18.

¹⁰² *Id.* at 18 (quoting Brady United Against Gun Violence’s [Comments on the USSC’s 2023 Proposed Priorities](#) at 5 (Oct. 17, 2022)).

¹⁰³ [Defenders’ 2023 Firearms Comment](#) at 18.

Relatedly, the proposed enhancement would also fail to properly gauge offense seriousness because the Guidelines already contain enhancements that account for the harms caused by hypothetical TCO involvement. Section §2L1.1(b)(9) provides for a 2-level enhancement if the sentenced individual was convicted under § 1324(a)(4), which includes cases where “the offense was part of an ongoing commercial organization or enterprise.”¹⁰⁴ Also, aggravating role adjustments can address the conduct of the rarely prosecuted individuals with actual decisional responsibility in a TCO.

Finally, we note that in 2016, the Commission considered adding an enhancement to §2L1.1 (in the form of a higher base offense level) if a person “smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization.”¹⁰⁵ After a hearing and public comment, the Commission opted not to adopt the amendment. There is no reason to change course now.

III. Rather than adding empirically unsupported enhancements that would make a broken guideline worse, the Commission should contemplate changes that could actually make it better.

The Commission should not take any action with §2L1.1 that would drive sentencing ranges higher, when data show that the existing ranges are already too high. At least, it should not do so without first pausing and studying these offenses. There is no need to act now, particularly given the documented decrease in irregular border crossings in the past year. But if the Commission wants to take action to amend §2L1.1 now, it should use the opportunity to actually improve its functionality.

The two SOC's addressing risk, injury, and death—the current §2L1.1(b)(6) and (b)(7)—are broken, and they produce sentencing ranges that data indicate are frequently disregarded. The Commission should not be expanding those SOC's; it should fix them instead. The injury/death SOC, in particular, operates without meaningful mens rea, individualization, or causation guardrails, unduly transferring liability for the unforeseen actions

¹⁰⁴ 8 U.S.C. § 1324(a)(4)(A).

¹⁰⁵ USSC, [2016 Proposed Guidelines Amendment: Immigration](#) at 56-58 (Jan. 15, 2016).

of co-conspirators or immigration enforcement agents onto the individual being sentenced. The result is unwarranted disparity and sentencing ranges that are often greater than necessary.

In particular, the Commission could:

- amend the current reckless endangerment enhancement to focus on the “defendant’s” conduct, in accordance with the original Congressional directive in IIRIRA, rather than focusing on risks created by other actors;
- cabin the overbroad injury/death SOC to include both mens rea and individual causation, which would add guardrails and track the original Congressional directive;
- move the note defining “serious bodily injury” as criminal sexual abuse to the text of the (b)(7) SOC itself; and
- consider an additional SOC *reduction* for mitigating circumstances such as when immigration enforcement action causes injury, sexual abuse, or death of a migrant.¹⁰⁶

IV. Conclusion

We urge the Commission not to adopt the proposed amendments. Migrants make up one of the largest demographic of clients that we serve, and we care deeply about their safety. But the proposed amendments will not make them safer. The history of §2L1.1 tells a familiar tale of factor creep and severity expanded by unstudied increases justified by perceived enforcement needs and knee-jerk reactions to troubling headlines, while empirical analysis lags behind.¹⁰⁷ These penalty increases have had, and will continue to have, an outsized impact on Hispanic individuals. The Commission should engage in comprehensive study of these offenses instead of adopting the proposed amendments. In the alternative, if the Commission feels it must act, it could take the opportunity to fix this broken guideline to better effectuate the statutory purposes of sentencing, as described above.

¹⁰⁶ See [2026 Proposed Amendments: Human Smuggling](#) at 9 (Issue for Comment #5).

¹⁰⁷ See [Statement of Michael Carter on behalf of Defenders to USSC re: Proposed 2023 Firearms Amendment](#) at 27 (March 7, 2023).

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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March 2, 2026

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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 incarceration⁸, 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

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 judges¹⁵, Federal Defenders¹⁶, 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.

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.

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 range⁴¹ 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 *mens 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.

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

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March 18, 2026

The Honorable Carlton W. Reeves
United States Sentencing Commission
Thurgood Marshall Building
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Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following to the United States Sentencing Commission (the Commission) regarding the proposed amendments issued on January 30, 2026.

Sentencing Options

(A) Changes to Part A of Chapter Five

POAG does not take a position about the inclusion of the proposed addition of the introductory commentary or the new language at USSG §5A1.1. While the sections may be useful for those who are new to the Guidelines, by providing more explanation of the sentencing zones, the language is largely duplicative. There is some concern that the information could result in confusion and the amendment appears to add a formal step-by-step requirement for sentencing courts, which may result in increased litigation. Further, opposition was expressed to the inclusion of §5A1.1(d), as the sentencing factors have already been outlined in the changes made last year to the introductory commentary to Chapter 1 and USSG §1B1.1, and variances are widely known and used.

POAG generally observes the sentencing zones to be somewhat complicated and not often adhered to, in favor of variances. In lieu of the zones, members of POAG believe that the in/out decision, whereby there are factors for the court to consider when determining if a defendant should receive a custodial sentence (in) or a non-custodial sentence (out), which was previously detailed by some commenters to the proposed priorities for the 2025-2026 cycle, could be preferable.

(B) Expansion of Zones B and C of the Sentencing Table

POAG was unanimously opposed to Part B, which increases sentencing Zones B and C. POAG believes that an adoption of Part B may lead to the unintended consequences of increasing recidivism amongst low-risk defendants and possible moderate risk defendants. POAG also believes that there could be unintended interaction with First Step Act provisions. POAG is concerned about creating a generalized approach to sentencing rather than keeping the focus on individual assessments. Further, POAG is concerned about resource availability and appropriate distribution of the currently available resources.

POAG is concerned this proposed amendment may create unintended increases in recidivism amongst the low-risk defendants and possibly amongst the moderate risk defendants. There has been a substantial amount of evidence-based research on the amount of supervision necessary for individuals who are low-risk, and it has repeatedly shown that over supervising low-risk offenders (who typically fall into criminal history category I), can increase their risk of recidivism.¹ Placing these lower-risk offenders in home detention programs or community confinement would result in over supervision because of the amount of supervision contacts necessary to facilitate those programs. The over supervision of these cases can result in higher rates of recidivism for lower-risk offenders. There is an added concern for low-risk offenders in community confinement programs. That concern is that individuals with low levels of criminogenic thinking will develop negative social bonds as they befriend and associate with those who have higher criminogenic thinking while they share a residence with them in community confinement.²

Additionally, the proposed change could also result in an unintentional interaction with incremental reintroduction to society that the First Step Act provisions create. An individual in custody will often be released to community confinement while still under the Bureau of Prisons. After a time, that defendant will then be transitioned to home detention. It could be that the defendant ends up in community confinement and home detention for much longer than the Judge articulated at the time of sentencing. The interactions between the zones and the First Step Act could frustrate positive outcomes for defendants.

POAG would prefer that home and community confinement be generally reserved for intermediate sanctions when there is an issue of compliance on probation or supervised release. POAG observed

¹ See, Cohen T. H., Cook, D., & Lowenkamp, C. T. (2016). The Supervision of Low-Risk Federal Offenders: How the Low-risk Policy Has Changed Federal Supervision Practices without Compromising Community Safety. *Federal Probation*, 80(1), 3-11; Duru, H., Lovins, L. B., & Lovins, B. (2020). Does Reducing Supervision for Low-risk Probationers Jeopardize Community Safety? *Federal Probation*, 84(1), 21-27; Lowenkamp, C. T., Latessa, E. J., & Holsinger, A.M. (2006). The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs? *Crime & Delinquency*, 51(1), 1-17

² See, Klein-Saffran, J. (1995). Electronic Monitoring vs. Halfway Houses: A Study of Federal Offenders. *Alternatives to Incarceration*, Fall Issue, 24-28

that lengthy periods of home detention appear to experience diminished returns after six months and substantial diminished returns after twelve months. Further, when a defendant spends the majority of their term of supervised release on home detention, there are not many graduated sanctions left to use beyond community confinement or imprisonment, both of which could reduce some of the progress the defendant has made in other areas of their rehabilitation. It also does not provide a lot of options to help them acclimate to societal living, as both home detention and community confinement have a very high degree of control and reduced individual autonomy. Rehabilitation necessitates the defendant have opportunities to exercise good decision making. If they are curtailed throughout most of their term of supervised release from fully exercising this discretion, it will likely cause problems in their appropriate use of the discretion.

Members of POAG also observed that the expansion of the zones as proposed seems to generalize criminal sentencing, rather than focus on the need to conduct individualized assessments of the appropriate components of the sentence. Another observation was that the expansion gives preferential treatment to criminal history category I defendants, who may also have benefitted from other reductions, such as zero-point offender and safety valve, while excluding offenders in higher criminal history categories (who sometimes have just one more criminal history point), even if the advisory range within the sentencing table cell is the same or similar. Again, correctional research would suggest that those in the higher criminal history categories, and who tend to be higher-risk offenders, would be better served by those higher levels of supervision and resources. While it may seem counterintuitive, POAG wonders if it would not make more sense to give defendants at criminal history category V and VI more opportunities for Zone B or C sentences. They are already likely moderately high-risk or high-risk, and for them to have resulted in a Zone B or C sentencing range (or slightly above), they likely had a relatively low total offense level. They would also not be negatively impacted by frequent supervision-based interactions.

Finally, POAG cautions that there may not be the infrastructure or resources to effectuate these expanded Zone B and C sentences. Community confinement centers are frequently at capacity, particularly with the expansion of their use with the First Step Act and the Bureau of Prison's overlapping needs to use these resources. Community confinement centers are also used for sanctions and in circumstances in which an offender would otherwise be homeless. Bedspace is already very scarce and waiting lists expand into weeks and months. In addition, POAG observes that it is difficult to staff and retain Location Monitoring Specialists, as that is a very demanding position that requires around-the-clock attention and response, and each probation office has different staffing structures to cover the increased need for Location Monitoring Specialists. More of these positions would need to be created and filled, along with potentially purchasing additional location monitoring equipment, all with the goal of moving resources towards the defendants who need them the least and will likely be hindered by them. Overall, POAG believes that the limited resources should be reserved for those who most need them. POAG cautions against making a change that could inadvertently increase defendant recidivism.

Career Offender

Crime of Violence definition

POAG supports Option 1 for the Crime of Violence amended definition with some suggested adjustments. The majority of POAG in support of Option 1 observe that it drastically simplifies the process by removing the categorical and modified categorical approach. While it relies heavily on a designation-based or title-based enumerated list, we believe that list would benefit from some expansions to capture the way similar state offenses may have alternative designations. When POAG suggested a similar approach in August of 2016, the discussion at the time expected that there would likely be a very long list of offenses, not because of an effort to label everything as violent conduct but as a means of appropriately capturing how different jurisdictions label similar violent conduct. For example, the list currently includes “Rape” and “Sexual Assault,” but other jurisdictions may call rape or sexual assault conduct “Sexual Battery,” “Criminal Sexual Conduct,” or “Criminal Sexual Penetration.” POAG was in agreement that, even if this approach were to cause a list of many pages of titles, it would still be simpler and more effective at capturing actual crimes of violence. POAG also believes other violent crimes that should be added to the list, including: “Carjacking,” “Aggravated Battery,” “Escape,” “Shooting into a Dwelling,” “Aggravated Discharge of a Firearm,” “Domestic Assault,” “Criminal Threat,” and “Infliction of Corporal Injury on a Spouse or Cohabitant.” While Option 1 is simpler in its application, POAG recognizes that it places an added burden on the Commission to try to consider all the various titles of what amounts to the same or similar conduct. While a guideline such as this may end up lengthier, it is still substantially less complicated than a categorical approach or modified categorical approach. A longer list of designated-offenses does not necessarily mean more types of conduct are being captured but rather that the same violent conduct is being appropriately captured.

An additional suggestion was made to further describe the “designated” as “titled,” similar to what was done in synopsis of the proposed amendment. It may also be valuable to add a disclaimer, perhaps with the Inchoate Offenses language, that signals to the courts that these words just need to be a part of the title rather than the only words in the title. For example, if a defendant was convicted of Aggravated Assault with a Deadly Weapon, the “with a Deadly Weapon” part of the title does not invalidate the defendant’s conviction as a Crime of Violence.

POAG believes Option 2 is more complicated and will create application issues similar to a conduct-based approach. It will also operate broadly to capture more offenses that do not necessarily require force. The complication of this methodology will still result from the comparison of elements and means to achieve the appropriate outcome.

A minority of POAG did not like either Option 1 or Option 2. Their concerns focused on the new litigation that would result from either methodology. The current Crime of Violence case law is

established and familiar. There is also concern that it would be difficult to appropriately expand the list of offenses under Option 1 to effectively capture all the state offenses. The minority of POAG is also concerned that there will be two different kinds of analysis

If the Commission is inclined to adopt Option 1, POAG is in unanimous support of the inclusion of Inchoate Offense language at §4B1.2(a)(2).

Again, if the Commission is inclined to adopt Option 1, POAG recommends alternative Exclusion language at §4B1.2(a)(3). POAG suggests that any Crime of Violence that only scores one point under §4A1.1(c) be excluded from consideration. This approach would simplify the language proposed. It can be difficult to get court or probation records about whether a term was unsupervised, supervised, or a combination of the two. Additionally, there are other forms of state-imposed supervision that are not probation such as community control and good behavior. It would be simpler and clearer to rely on the criminal history scoring structure already in place. Additionally, it would imperfectly cover some of the same cases that would be covered by the proposed Limitation under §4B1.2(a)(4)(A). While the proposed (a)(4)(A) language includes actual time served instead of time imposed, POAG continues to observe that the amount of time served on a sentence is inconsistent with criminal history rules in §4A1.1 and is problematic as a metric. Probation officers have trouble uniformly obtaining records related to the amount of time served. Additionally, the reasons why a defendant is released earlier than their sentence imposed articulates often involves a myriad of reasons other than the seriousness of the offense. The use of time served on a sentence in any area of the Guidelines will result in disparity based on availability of records.

POAG was not in favor of the proposed §4B1.2(a)(4)(B), as many of the Crimes of Violence are decades old convictions. It would be extremely time-consuming to relitigate the intentions of the defendant and degrees of injury perpetuated or threatened. These types of litigation would almost certainly involve the victim of the old convictions in some capacity. The availability of evidence the court may find relevant may no longer be available, leading to disparity. If the Commission intends to include the Bodily Injury language, POAG suggests removing “did not intend to inflict” as that would be the most difficult part of the initial sentence. We would also suggest leaving the standard at Bodily Injury and not adopting any of the bracketed language.

POAG supports the Recklessness and Negligence Limitation under §4B1.2(a)(4)(C) but with the alteration that the statute of conviction’s *mens rea* be the controlling determination rather than the defendant’s “conduct during the commission of the offense.”

Limiting the Scope of Controlled Substance Offense

With regard to limiting the scope of controlled substance offenses, while there was some support for Option 1, which enumerates only certain federal drug statutes, the majority of POAG is in favor of Option 2, which allows for qualifying state convictions to continue to serve as predicate

controlled substance offenses. However, POAG is split between Suboptions 2A and 2B, which limit some state drug convictions based on the sentence that was imposed.

In February 2025, POAG submitted written testimony regarding the proposal to revise the definition of “controlled substance” in USSG §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses, as proposed in Option 1. POAG recognizes that this approach would allow for an easier and more straightforward application of the Guideline. Further, caselaw in several circuits already prohibits the counting of certain controlled substance offenses as qualifying prior convictions. This includes instances where the state offense is broader than the guideline definition because it addresses the possession with intent to sell, deliver, or purchase substances not covered by the Federal Controlled Substances Act (CSA). Additionally, if the circuit split resolves towards including state scheduled drugs, the support for Option 1 further diminishes. Despite the ease of application under Option 1, the majority of POAG members were in favor of Option 2.

Those in favor of Option 2 noted that in most cases, a state drug offense involves the same conduct as a federal drug offense. It seems disparate that the jurisdiction of prosecution would be the reason one defendant qualifies as a career offender while another defendant does not. Additionally, limiting qualifying controlled substance offenses to specific federal drug offenses could have an unintended consequence in rural and tribal areas and smaller counties, where due to a lack of resources or crimes committed on federal land, cases are disproportionately prosecuted federally. This could result in higher levels of punishment concentrated in those population groups and rural areas. Moreover, reducing the number of predicates that qualify as a controlled substance offense will impact how often a defendant with a single Crime of Violence predicate will qualify as a career offender and, consequently, drastically reduce the total number of defendants who qualify as career offenders. Finally, POAG has previously raised the issue that there is a high downward variance rate amongst career offender cases. If Option 1 is adopted and less defendants qualify as career offenders, it may have a bearing on a sentencing judge’s decision to impose variances, or the amount of variance, if they no longer believe that the offense level and criminal history category is overstated. If certain offenses are disqualified from career offender eligibility, especially with a defendant who has incurred multiple convictions for state-controlled substance offenses, we may see judges accounting for that aggravating conduct by fashioning a sentence within or even above the guideline range.

Although the majority of POAG is in favor of Option 2, a consensus could not be reached between Suboption 2A or 2B. However, POAG is unanimously against the bracketed exclusion language under either Suboption 2A or 2B. POAG is also unanimously against Suboption 2C for the same reason. POAG has significant concerns regarding the use of a time-served approach. POAG has previously noted that in many cases, determining the amount of time a defendant served could be impossible due to restrictions in the availability of this information or records that pertain to it, leaving concerns that the Career Offender guideline would rarely be used or disparately applied

based on availability of records. Determining the amount of time served becomes even more difficult to decipher when there are multiple sentences being served at one time. Also, unlike publicly available court records, records pertaining to incarceration are not necessarily available to the public and vary per correctional system. The time a defendant serves on a sentence can also have more to do with correctional resources than the sentencing court's measurement of the degree of seriousness of the offense. POAG believes the time-served approach would not adequately capture individuals with more severe criminal histories, who would otherwise be exposed to greater levels of punishment under the Career Offender guideline. Additionally, utilizing a time-served approach to determine career offender eligibility would be contrary and inconsistent with the method already used throughout the Guidelines of a sentence-imposed approach to determine criminal history points.

Those in favor of Suboption 2A, which limits qualifying state drug offenses to those convictions that receive three criminal history points under §4A1.1(a), believe it would have the easiest applicability while limiting qualifying state drug offenses to those that were either treated more seriously by the state court based on the original sentence imposed or to those defendants who sustain revocation, pursuant to §4A1.2(k).

The majority of POAG members in favor of Suboption 2B believe any state drug offense that resulted in a sentence imposed of 1 year should serve as a qualifying conviction for career offender. Many noted that there is little difference between a defendant who receives a sentence of 13 months and 1 day compared to a defendant who receives a sentence of 12 months. Excluding those convictions seems arbitrary, and they were in favor of the limited consideration of §4A1.1(b) cases that had a custody sentence of a year.

Definitions elsewhere in the Guidelines

With respect to Crime of Violence and Controlled Substance Offense as it relates to the Career Offender enhancement, POAG unanimously supports the Guidelines being consistent with the definition established at §4B1.2. Though less stringent than the requirements of 18 U.S.C. § 924(e), POAG observes that using the consistent rules and application found throughout the Guidelines helps users follow the same logic and standards throughout its application. Likewise, for simplification and consistent application, POAG unanimously suggests the Commission refer to §4B1.2 when defining Crime of Violence and Controlled Substance Offense. POAG did not support the movement of the categorical and modified categorical approaches into the definitions of §2K2.1 because it retains the complexity of that system. Additionally, it would require three different approaches when trying to consider violent convictions: the new Crime of Violence, the old Crime of Violence, and the ACCA violent felony standard. In the alternative to retaining a consistent Guideline standard throughout the manual by using the same standard from §4A1.2, POAG would prefer the ACCA standard be adopted into the definition of §2K2.1. POAG also suggests moving the definitions from the commentary to the main body of the Guideline to avoid

circumstances wherein the commentary is not given as much deference as the main text of the Guideline being assessed.

Circuit Conflicts Concerning §4B1.2(b)

POAG appreciates that the Commission is addressing two circuit conflicts involving the definition of “Controlled Substance Offense” in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

Conflict Regarding Controlled Substances Covered under CSA vs. State Offenses

The first conflict concerns whether the term “controlled substance” in §4B1.2(b) refers exclusively to a substance controlled by the CSA pursuant to 21 U.S.C. § 801, or whether the definition also includes substances that are either federally controlled or controlled under applicable state law. Resolution of this issue is significant, given that the definition in USSG §4B1.2(b) applies to the Career Offender guideline at §4B1.1, as well as several other guidelines that incorporate this definition by reference and rely on prior convictions for a Controlled Substance Offense to determine the offense level.

Option 1 and Option 2 each define “controlled substance” as a drug or other substance, or immediate precursor listed in the CSA, however, Option 2 has the added language “or otherwise controlled under applicable state law.”

POAG believes that an expansive definition of a “controlled substance,” which allows one to factor substances either included in the CSA or otherwise controlled under applicable state law, is ultimately the most appropriate approach if the goal is to punish a pattern of conduct. POAG recognizes that Option 2 will result in more offenses qualifying as predicate priors for career offender purposes. However, as endorsed above, POAG believes limitations regarding the sentence imposed balances this concern. Additionally, it does not represent a substantive departure from the long-established understanding of Controlled Substance Offenses prior to the recent divergence in circuit interpretations. POAG discussed that Option 1 has introduced substantial doctrinal and administrative complexity when applied through the categorical and modified categorical frameworks that govern prior-conviction analysis. As such, the majority of POAG believes that Option 1 is too narrow and could create significant complications at sentencing.

The core difficulty lies in the structure of state drug statutes. Many states define “controlled substance” by reference to their own schedules, which are frequently broader than the federal schedules. Some states criminalize substances that are not listed under federal law. Others employ broader definitions of isomers, salts, or analogues. As a result, under a CSA-only definition, numerous state statutes would be categorically overbroad because they encompass substances outside Schedules I–V of the CSA.

Determining whether a statute is divisible requires careful analysis of the governing state law, including statutory text, jury instructions, and relevant appellate decisions. Probation Officers are not trained to conduct this type of legal analysis, and the primary stakeholders – the AUSA and defense counsel – often advance competing interpretations when advocating for their respective positions. Until a case reaches the Circuit Court, and there is a holding relevant to that statute, courts are often left with differing interpretations, resulting in inconsistent application.

As the Commission addresses in the Synopsis of the Proposed Amendments, federal courts have grappled with slight differences between the federal and state definitions of cocaine, heroin, and methamphetamine, including in the context of § 4B1.2(b), with some courts holding that the relevant state definitions are categorically broader than the federal definitions. This has resulted in most state offenses not qualifying as a predicate Controlled Substance Offense for Career Offender purposes.

Additionally, stakeholders challenge the definition of state statutes which also include isomers, analogues, or chemical variants that are not federally controlled. This can result in resource-intensive analysis including expert testimony regarding the chemistry of the controlled substance. There are times when this causes delays in sentencing as parties wait to see the outcome of pending cases.

If the statute is determined to be divisible, courts may apply the modified categorical approach and consult *Shepard* documents to determine whether the conviction rested on a federally controlled substance. However, *Shepard* documents often do not resolve the question. Many older charging instruments and plea records refer generically to a “controlled substance” without specifying the particular drug. In those cases, a conviction under a divisible but overbroad statute may fail to qualify because the record does not establish which statutory alternative formed the basis of conviction. Similarly, there are disparities in access to *Shepard* documents. As such, defendants with materially similar criminal histories may receive different treatment based solely on the level of detail preserved in records or availability of documents.

While Option 2 is the preferred approach, potential disparity concerns regarding the applicable state law within Option 2 were discussed as well. The controlled substance schedules and their corresponding quantity thresholds vary from state to state. Meaning a defendant with a prior conviction from one state will qualify as a career offender, but a defendant in the neighboring state who trafficked the same substance would not qualify as a career offender because the substance trafficked was not a Controlled Substance Offense in that state or the same quantity received different treatment state-to-state.

POAG recognizes that under either framework – whether the prior offense involves only a federally controlled substance or substance regulated under state law – the application of the rule necessarily produces disparate outcomes. These concerns notwithstanding, a defendant’s choice to violate those rules is the central issue that should be focused upon.

Conflict Regarding Temporal Version of the Applicable Drug Schedule

The Commission seeks to resolve the temporal issue with regard to “when” a predicate offense is considered a controlled substance offense for career offender designation. POAG supports the Commission using the proposed Option 2 language to clarify that controlled substance offenses refer to those substances that were classified as controlled at the time of the original conviction.

In 2024, the Supreme Court considered this same question with regard to a state Serious Drug Offense in light of ACCA applications (*Brown v United States*, 602 U.S. 101, 123; 144 S. Ct. 1195, 1210 (2024)). In *Brown*, the Court held that a predicate offense qualified if it involved a drug designated as a controlled substance at the time of the original offense. Specifically, the Court held that “...a defendant’s “history of criminal activity” does not “cease to exist” merely because the crime was later redefined...”. The majority of POAG supports this same approach to predicate controlled substance offenses for career offender enhancements.

Section 4B1.2 is, by its very nature, a backward-looking guideline. It is meant to assess whether prior convictions, already adjudicated and sentenced, qualify as predicates for enhanced punishment. Because this guideline looks backwards, POAG believes the determination should be based on the nature of the predicate offense at the time the convictions for those offenses occurred.

Comparing the state statute of conviction to the CSA to determine if the “controlled substance” charged in the prior offense remains a “controlled substance” under current law requires cumbersome analysis that is most often resolved through continued litigation, with no bright-line distinction. To reinterpret a prior conviction through statutory amendments or evolving case law changes the object of the inquiry. It turns a historical question (“What was this conviction?”) into a moving target (“How would this conviction be classified today?”). That approach is inconsistent with the guideline’s backward-looking design. Treating the conviction differently years later based on legal changes that did not exist and, therefore, could not be considered at the time, alters the legal consequences of a completed judgment. POAG believes that a backward-looking enhancement should attach to what the conviction was, not to future changes in the law.

Human Smuggling

POAG observed that the current guideline structure of §2L1.1 does not always sufficiently differentiate between scale and activity in human smuggling cases. A low-level courier transporting a small number of individuals under less aggravated circumstances may fall within a framework that does not meaningfully distinguish the conduct from organized operations involving several individuals and extreme risk. While POAG recognizes that this is a significant issue, only a handful of districts have regular experience handling these cases. While we received feedback about these amendments, the feedback is based on a limited number of districts’ experience.

POAG is unanimously in favor of the new structure at §2L1.1(b)(2) which creates more tiers based on the number of individuals smuggled, transported or harbored. POAG recognizes that this new structure increases a defendant's overall exposure, but this also reflects an understanding that the volume of individuals smuggled is itself a meaningful proxy for an organization's scope, profit motivation, and risk. By lowering the numerical thresholds and increasing the corresponding offense levels, the amendments more accurately capture the seriousness of larger-scale conduct and better differentiate it from lower-level activity.

POAG was nearly split with a slight majority supporting a recommendation that the table should capture fewer than six unlawful aliens (i.e., 2-5), stating each additional alien is significant while those opposed are of the opinion the guideline as written adequately accounts for such a low number.

POAG was also unanimously in support of the new proposed amendment at §2L1.1(b)(6), which addresses dangerous transportation conditions. POAG recognizes that this language was derived from the current Application Note 3 but suggests clarity regarding the terms "trunk or engine compartment" and "substantially more passengers than the rated capacity."

Regarding the first phrase, probation officers frequently encounter cases in which individuals are transported in other areas of vehicles including the beds of pickup trucks, in cargo areas of SUVs, or in tractor-trailers with no ventilation. Likewise, individuals traveling via panga-type boats are often concealed in small areas covered by tarps. Therefore, POAG suggests using language such as "in a trunk or other non-passenger area of a vehicle or vessel (such as a bed of a truck, behind the rearmost upright seat of a vehicle, in a tractor-trailer, or in a non-passenger compartment)." Alternatively, POAG suggests that these terms be presented as a non-exhaustive list of examples and not the only way to trigger the enhancement.

Similarly, the word "substantial" is vague and could be measured in different ways in different courts. Without clear guidance, similarly situated defendants may receive materially different treatment across districts. As most modern vehicles and vessels are marked with their maximum recommended capacity, an enhancement for simply having "more passengers than the rated capacity" may be appropriate.

POAG believes that the proposed §2L1.1(b)(7), addresses a separate, serious harm from the proposed (b)(6) and reflects some of the most tragic cases prosecuted in border districts. Law enforcement officers trained to recognize smuggling patterns often attempt vehicle stops that result in high-speed flights. Drivers frequently flee at excessive speeds, veer in multiple directions, or attempt to evade capture on rural roads. These pursuits too often end in rollover crashes, gruesome fatalities, and catastrophic injuries requiring surgery or resulting in permanent impairment. When traveling by sea, boats usually only travel at night, and during the day, the passengers in the boats are covered with a tarp to avoid detection. While sitting under the tarp in the hot sun, passengers

are forced to sit in their excrement. In other circumstances, individuals transported from Canada to the Midwest in winter conditions, have been left in freezing temperatures.

Regarding sexual abuse or criminal sexual contact, POAG is not in favor of an increase at §2L1.1(b)(7), as it would be difficult to prove that an offense involved a substantial risk that sexual abuse or criminal sexual contact would occur. However, POAG is unanimously in favor of the increase at §2L1.1(b)(8). Unlawful sexual conduct presents a distinct and serious concern in smuggling operations. Migrants are often isolated, unfamiliar with the language, and dependent on smugglers while being held in stash houses or transported between locations. Accounts of unlawful sexual conduct during these stages are common. Currently, courts may consider this additional harm differently through variances. By including this into the body of the guideline, this conduct would be accounted for more consistently. POAG also suggests the Commission consider how this enhancement may interact with Vulnerable Victim enhancement at §3A1.1 as many of the victims of these smuggling operations are vulnerable due to immigration status, language barrier, and lack of resources. These conditions may make them more susceptible to abuse and less likely to report the abuse to law enforcement officers.

POAG was in favor of including these enhancements as offense-based specific offense characteristics while limiting the cross-reference regarding sexual conduct to being defendant-based. Enhancements addressing the nature of the conduct—such as overcrowded transport or resulting injury—are appropriately offense-based. Cross-references, on the other hand, generally redirect to guidelines that result in significantly higher offense levels. POAG believes that the significantly increased penalties should remain grounded in defendant-specific findings to better reflect the defendant’s culpability.

Regarding the options for subpart (8)(B), the majority of POAG was in support of Option 2 which provides for a greater increase when additional individuals suffered permanent or life-threatening injuries or death. The initial enhancement under subsection (8)(A) already accounts for the severity of injury to a victim. POAG believes that additional stacking should be reserved for situations where the magnitude of the harm dramatically increases the seriousness of the offense. Multiple permanent or life-threatening injuries alter the nature of the crime. Multiple minor injuries, while serious, do not necessarily warrant the same exponential increase.

Option 1 includes the same increase based on the number of victims, regardless of the degree of injury. Option 1 does not appear to differentiate between vastly different levels of harm.

Nevertheless, POAG believes that when additional injuries are present, there should be some incremental increase in punishment. Therefore, POAG suggests a hybrid approach to better capture this additional harm. This hybrid approach would reflect gradations of harm while avoiding an overly binary structure. POAG has provided an example of this hybrid approach:

(B) Additional injuries (Apply the Greatest):

(1) if subsection (b)(8)(A) applies and the offense resulted in additional bodily injury or criminal sexual contact described in (8)(A)(i), or serious bodily injury including criminal sexual abuse described in (8)(A)(ii) -

(a) to one or two additional people, increase by 1 level; or

(b) to three or more additional people, increase by 2 levels.

(2) if subsection (b)(8)(A) applies and the offense resulted in permanent or life-threatening injuries described in (8)(A)(iii) or death in (8)(A)(iv) –

(a) to one or two additional people, increase by 3 levels; or

(b) to three or more additional people, increase by 6 levels.

The Commission has also considered enhancements related to transnational criminal organizations. In certain districts, particularly along the southern border, law enforcement encounter large-scale smuggling enterprises moving hundreds of individuals with substantial logistical coordination. These operations may involve recruitment networks, staging locations, coordinated transportation, and significant financial gain. When such organized activity is present, the risks to migrants often increase.

Determining what constitutes a “transnational criminal organization” and proving a defendant was knowingly involved can be difficult, particularly where the defendant is a lower-level courier rather than a leader or organizer. If the Commission adopts such an enhancement, POAG suggests that the definition align with existing statutory definitions to help promote clarity and consistency. A definition that diverges from established statutory language risks underuse due to evidentiary uncertainty or inconsistent application across districts. Further, POAG notes that proof challenges are substantial. Just like any other case, obtaining proof is contingent upon the quality of the investigation and, thus, can result in this enhancement being applied disparately.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to submit written comment on these important amendments.

Respectfully,

Probation Officers Advisory Group
March 2026

SENTENCE IMPACT ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

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Via Electronic Delivery

March 17, 2026

The United States Sentencing Commission
Attention: Public Affairs – Proposed Amendments
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments to the Sentencing Guidelines – 2026 Amendment Cycle

Dear Chairman Reeves and Members of the Commission:

The Sentence Impact Advisory Group (“SIAG”) respectfully submits the following commentary regarding the Commission’s proposed amendments for the 2026 amendment cycle.

I. BACKGROUND

A. What Is SIAG?

The Sentence Impact Advisory Group (“SIAG”) was formed in 2025 to assist the United States Sentencing Commission (“the Commission” or “USSC”) in carrying out its statutory responsibilities under 28 U.S.C. § 995 and Rule 5.4 of the Commission’s Rules of Practice and Procedure.

SIAG is composed of individuals who have been sentenced for federal offenses, family members of individuals who have been sentenced, and professionals whose careers are deeply informed by justice-impacted communities. The group was established to bring lived experience into the Commission’s work and to ensure that the perspectives of those directly affected by federal sentencing are meaningfully incorporated into the development and revision of the Sentencing Guidelines.

Drawing from lived experience, direct family impact, and professional engagement within the criminal justice system, SIAG offers firsthand insight into the practical consequences of incarceration.

We submit these comments with respect for the Commission's expertise and appreciation for its continued engagement with impacted communities. SIAG's goal is to support Guidelines that reflect proportionality, clarity, accountability, and public safety.

II. SIAG'S APPROACH TO SENTENCING

In evaluating the proposed amendments in this cycle, SIAG applies the principles of proportionality, predictability, fairness, transparency, and public safety. For purposes of this submission, two guiding principles are particularly central: simplification and retroactivity.

A. Simplification

SIAG believes that the justice system gains credibility and is more effective at deterring crime when individuals understand the consequences of their actions. If escalating punishments in finite degrees are intended to deter criminogenic behavior, individuals must be able to understand how specific aspects of their conduct affect the sentences they receive. Accordingly, a Guidelines-driven system of justice must be predictable and comprehensible—not only for courts and practitioners, but also for the broader public.

Structural simplification promotes clarity and strengthens the legitimacy of Guidelines-driven sentencing. Conversely, layering enhancements, expanding categorical triggers, or introducing additional complexity without clear empirical justification risks undermining transparency and eroding the Guidelines' capacity to provide meaningful notice or deterrence. To individuals outside the legal system, the interaction of multiple enhancements and cross-references can obscure how specific conduct affects sentencing outcomes.

B. Retroactivity (General SIAG Position)

Across amendment cycles, SIAG has maintained that when the Commission determines a prior Guideline range was excessive, unsupported by empirical evidence, or inconsistent with contemporary sentencing policy, retroactive application should be the default position. This is consistent with the Commission's statutory mandate to promote uniformity and proportionality in

federal sentencing. Limiting relief solely to future defendants risks perpetuating disparities among individuals whose conduct is materially indistinguishable.

Indeed, fairness requires that individuals sentenced under an earlier framework have a meaningful opportunity to benefit from subsequent corrections. To do otherwise creates a system in which individuals serve markedly different sentences for the same conduct solely based on the timing of their offense and sentencing. For example, one SIAG member was sentenced under the former 18 U.S.C. § 924(c) “stacking” regime, wherein multiple § 924(c) counts in a single case were treated as “second or subsequent” offenses, triggering extreme consecutive mandatory minimum sentences even when the conduct arose from the same course of events. Congress later amended this rule in the First Step Act so that the enhanced penalty applies only after a prior § 924(c) conviction has become final. In making this statutory change, Congress recognized that the previous approach produced unjust outcomes. However, the amendment applied only prospectively, leaving thousands of similarly situated individuals serving substantially longer sentences based solely on timing, despite Congress’s recognition that the prior approach produced unjust outcomes.

The Commission has previously recognized both the administrative feasibility and systemic value of retroactive application in connection with major drug-related amendments, including Amendments 706 and 782.¹ Those decisions reflected a considered judgment that the need to mitigate unwarranted sentencing disparities — and to correct excessive guideline ranges — outweighed any associated administrative burdens.

Accordingly, when amendments reduce sentencing severity or expand eligibility for non-incarceration options, retroactivity should be the presumptive starting point absent compelling countervailing considerations.

III. SUMMARY OF SIAG’S POSITION ON PROPOSED AMENDMENTS

The table below summarizes SIAG’s positions on the Commission’s proposed amendments to the Sentencing Guidelines released on January 30, 2026, in light of the principles described above. The following sections address each proposed amendment and explain SIAG’s position in greater detail.

¹ See the Commission’s retroactivity analyses for amendments 706 and 782, recognized both the administrative feasibility of retroactive application and the importance of mitigating unwarranted sentencing disparities, while simultaneously promoting the consistent application of federal sentencing policy when guideline ranges are reduced.

Proposed Amendment	SIAG's Position	Key Rationale
<i>Expansion of Sentencing Options (Zones B & C)</i>	Support with Guardrails	Promotes proportionality and structured alternatives to incarceration while requiring safeguards to prevent disparity and ensure consistent national application.
<i>Career Offender – §4B1.1</i>	Oppose Expansion; Preserve Limiting Principles	§4B1.1 materially increases sentencing exposure and reflects high rates of judicial downward variance, indicating structural proportionality concerns. Revisions should narrow—not broaden—eligibility.
<i>Circuit Conflicts Concerning §4B1.2(b)</i>	Support Resolution with Limiting Principles; Oppose Expansion of Predicate Eligibility	Eliminate geographic disparities in predicate qualification while preserving narrow interpretations and preventing expansion of career offender exposure or reinforcement of excessive sentencing floors.
<i>Human Smuggling</i>	SIAG does not oppose amendments implementing Congress's directive regarding alien-smuggling penalties; however, SIAG urges the Commission to incorporate sentencing mitigation for victims of human trafficking whose criminal conduct arose from coercion or exploitation.	Congress has directed the Commission to account for the number of persons smuggled; the Guidelines should also allow courts to account for coercion where individuals charged with related offenses were themselves victims of trafficking.

IV. COMMENTARY ON PROPOSED AMENDMENTS

A. Expansion of Sentencing Options (Zones B & C)

SIAG supports expanding judicial authority to impose probation with conditions of confinement and split sentences in appropriate cases. Incarceration should not be reflexive where alternative sanctions can achieve accountability and protect public safety.

Structured probation, split sentences, home confinement, and supervised alternatives provide meaningful ways to hold individuals accountable while avoiding unnecessary incarceration costs and minimizing collateral consequences for families, employers, and communities.

Some have argued that prison sentences are necessary to reduce recidivism. However, the Commission's own research indicates that recidivism outcomes are more strongly associated with factors such as criminal history and age than with incremental increases in sentence length.²

The Commission has also found no evidence that incarceration for sentences of five years or less produces a measurable deterrent or preventive effect.³

Public safety considerations remain important, particularly where incapacitation is necessary to address ongoing risk. But where accountability can be achieved through structured supervision and home confinement, alternatives to incarceration may accomplish sentencing objectives while avoiding unnecessary disruption to families, communities, employers, and taxpayers.

² See U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (Mar. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf (documenting that recidivism outcomes are more strongly correlated with criminal history and age than with incremental increases in sentence length and noting that "[o]ffenders with shorter lengths of imprisonment generally had lower recidivism rates"). Although shorter sentences often reflect less serious offenses and thus a reduced need for incapacitation, the findings nonetheless suggest that not every offense requires a lengthy term of incarceration to deter future criminogenic behavior. See also U.S. Sent'g Comm'n, *Retroactivity and Recidivism: The Drugs Minus Two Amendment* (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf (finding a marginal reduction in recidivism among individuals released earlier following a retroactive reduction in the applicable guideline range and further questioning the assumption that sentence length is a significant driver of recidivism).

³ See U.S. Sent'g Comm'n, *Length of Incarceration and Recidivism* (June 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivism-SentLength.pdf

Ensuring that these alternatives operate effectively will also require consistent and equitable application. Expansion of sentencing options should therefore include guardrails that minimize disparities among similarly situated individuals and promote consistent national implementation regardless of differences in district-level resources.

B. Career Offender (§4B1.1)

1. Overview

Congress has directed the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized” for defendants convicted of a drug or violent offense who have previously been convicted of two or more felonies constituting crimes of violence or drug offenses.⁴ This directive has been implemented in Guideline §4B1.1.

The Career Offender enhancement, set forth at §4B1.1, has generated substantial litigation across the federal courts concerning the scope and application of predicate offenses. These disputes have produced a number of circuit conflicts, particularly with respect to the definitions of “crime of violence” and “controlled substance offense,” as well as the application of the categorical approach. The resulting divergence has led to inconsistent sentencing outcomes across jurisdictions, raising concerns regarding national uniformity, administrability, and proportionality in the application of the Career Offender guideline.

Commission data continue to demonstrate that application of the §4B1.1 Career Offender enhancement materially increases guideline exposure by automatically elevating both the offense level and criminal history category. As a result, the enhancement frequently produces sentencing ranges substantially higher than those applicable to similarly situated non-career offenders.

Commission data also show that a substantial proportion of Career Offender cases result in sentences below the advisory guideline range, reflecting the frequency with which sentencing courts conclude that the guideline range exceeds what is necessary to satisfy the purposes of sentencing under 18 U.S.C. §3553(a). For example, in Fiscal Year 2024, approximately 30 percent of Career Offender cases resulted in sentences below the advisory guideline range.⁵ This

⁴ 28 U.S.C. §994(h).

⁵ See David Rutter, *2026 Proposed Amendments on Career Offender*, U.S. Sent’g Comm’n Public Data Briefing Video Transcript, at 3 (Feb. 2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2026_Career-Offender.pdf

indicates sentencing courts regularly conclude that the prescribed range exceeds what is necessary to satisfy the purposes of sentencing under 18 USC §3553(a).

While there are numerous issues with the Career Offender enhancement, three are addressed in the 2026 Proposed Amendments:

- The definition of “Crime of Violence”;
- The definition of “Controlled Substance Offense”; and
- Which definition of “Controlled Substance” applies—the definition at the time of the prior offense or the definition at the time of the offense for which the defendant is facing a Career Offender enhancement.

2. SIAG’s Approach to Career Offender

SIAG begins its analysis with a simple fact: in any consideration of a §4B1.1 enhancement, whether based on crimes of violence or controlled-substance offenses, the defendant has already been found guilty and sentenced for the underlying offenses. Accordingly, the Career Offender enhancement should function to identify individuals whose criminal histories demonstrate a heightened need for deterrence or incapacitation, rather than simply compounding punishment for conduct that has already been adjudicated and sentenced. The purpose of §4B1.1 should therefore be to deter individuals from engaging in future criminal behavior after they have served their sentences for prior offenses, and to incapacitate those who continue to pose a substantial danger to the community.

3. Commentary

The Career Offender enhancement functions as a categorical enhancement of extraordinary consequence within the Guidelines framework. Its design substantially increases sentencing exposure based on prior convictions, regardless of whether those prior offenses reflect current dangerousness or a meaningful escalation in culpability. While prior criminal history is an appropriate factor in sentencing, the automatic and dramatic inflation of guideline ranges warrants careful scrutiny.

The categorical approach currently embedded in §4B1.1 serves as an important limiting principle. It constrains relitigation of prior conduct and provides administrable boundaries on the enhancement’s reach. Modifications that shift toward offense-list expansions or fact-driven

analyses risk weakening these structural constraints and broadening the population subject to heightened penalties.

Given the documented severity of Career Offender applications and the frequency with which courts impose downward variances, SIAG urges the Commission to preserve meaningful limiting mechanisms and ensure that any proposed revisions demonstrably narrow overbreadth rather than expand sentencing exposure.

Absent clear empirical evidence that a revision would reduce severity and improve proportionality, alterations to §4B1.1 risk compounding existing disparities and undermining confidence in guideline-driven sentencing outcomes. That said, SIAG sees opportunities to improve §4B1.1 by providing unambiguous definitions of predicate offenses, promoting consistent and fair application of the Career Offender enhancement.

(i) *Definition of “Crime of Violence”*

The challenge with the current definition of a “Crime of Violence” is that it incorporates, by reference, both violent crimes under state law and federal crimes explicitly defined as “violent.” Because state laws vary across jurisdictions in defining violent offenses, this approach can create inconsistency.

Currently, Guideline §4B1.1 employs a categorical approach to making this determination. The difficulty with this approach in the context of the Career Offender enhancement is that it requires courts to analyze the statutes governing a defendant’s prior conduct, rather than the conduct itself. Variations in state law can therefore produce inconsistent outcomes.

Any modification to the current framework should therefore be evaluated not only for clarity, but also for its potential impact on the scope of defendants subject to the Career Offender enhancement.

To address these issues, the Commission has proposed two options to clarify what constitutes a crime of violence:

- *Option 1.* The Amendment would do away with the categorical approach and replace it with a clearer definition. Under Option 1, the proposed amendment lists federal crimes

that would be considered crimes of violence for the purposes of §4B1.1. In addition, nine state crimes would meet the definition of a violent crime.⁶

- *Option 2.* The alternative proposed by the Commission would treat certain state offenses as violent crimes if the elements of those offenses would be sufficient to support a conviction under comparable federal statutes, provided the defendant received more than a minimal term of probation or incarceration.⁷ Additionally, application of the §4B1.1 enhancement would require a showing of *mens rea*.⁸ A further limitation proposed by the Commission would exclude reckless or negligent conduct from the definition of a violent crime.

SIAG recognizes that the current categorical framework has produced significant interpretive complexity and inconsistent outcomes across jurisdictions. To the extent the Commission considers alternatives, any revised approach should prioritize clarity while preserving meaningful limiting principles so that the Career Offender enhancement does not expand beyond the population Congress intended it to address.

So long as prior convictions are counted separately, as under §4A1.1(c), either could represent an improvement over the status quo.⁹ Given variations in what states classify as “crimes of violence,” however, **SIAG believes Option 2 is preferable.** By requiring sentencing courts to match state offenses with the elements of identified federal crimes when determining whether a prior conviction qualifies as a crime of violence, the Commission can advance the goal of consistent application of the enhancement across circuits.

Moreover, SIAG appreciates the proposed exclusions for convictions resulting in relatively low-level penalties, as well as the limitations excluding conduct lacking *mens rea* or involving reckless or negligent behavior. These guardrails help ensure that the Career Offender enhancement remains focused on meaningful deterrence and incapacitation, rather than

⁶ The state charges would include: aggravated assault, arson, extortion, kidnapping, murder, rape, robbery, sexual assault, and voluntary manslaughter.

⁷ Option 2 would serve to limit application of the Career Offender enhancement to those who were sentenced to supervised probation in excess of either 30 or 60 days, or who were sentenced for longer than one year. SIAG’s preference is the longer of the two.

⁸ The language being considered would exclude “acts for which the defendant is criminally liable did not inflict, did not intend to inflict, and did not threaten to inflict bodily injury or physical harm to another Person.”

⁹ See U.S. Sent’g Guidelines Manual §4A1.2(a)(2) (2025) (providing that prior criminal history points may be added only when there is an intervening arrest between prior charges, a limitation designed to prevent “sentence stacking” from artificially inflating criminal history and guideline ranges); SIAG recommends that the Commission adopt a similar approach to prevent stacked sentences from counting as multiple predicate offenses for purposes of the Career Offender enhancement.

extending its reach to prior convictions that do not reflect the level of culpability the enhancement was intended to address. Option 2 also enhances transparency, as it is more readily understandable to defendants and laypersons than the current categorical approach.

SIAG does have concerns regarding certain offenses that could trigger the enhancement. As a general matter, it is unclear how charges such as driving while intoxicated, simple larceny, traffic violations, or fraud outside the context of drug crimes could reasonably qualify as predicate offenses under §4B1.1. With specific regard to Option 2, the Commission proposes adding certain federal crimes as potential triggers for the Career Offender enhancement, including particular firearms offenses and certain aspects of human trafficking.

To be clear, all of these are serious charges. However, the ambiguity in these statutes creates a real risk of overreach. SIAG's preference is to provide sentencing courts with clear authority to decline a Career Offender enhancement in the absence of some indication of actual and substantial violent conduct or intent to inflict serious bodily harm in prior convictions.¹⁰

(ii) *Prior Controlled Substance Offenses*

Similar to the definition of a “crime of violence,” the Circuits are divided on what constitutes a “controlled substance offense.” Specifically, some courts have included state drug offenses, while others have limited the Career Offender enhancement to prior convictions under federal law. The Commission has identified two options to provide clarification:

- *Option 1.* This option would limit the definition of a prior controlled substance offense solely to convictions under federal law.¹¹
- *Option 2.* This alternative would continue to permit the use of state drug convictions, provided they are punishable by a term of imprisonment exceeding one year.¹² A prior

¹⁰ For example, the proposed amendment specifically references 18 U.S.C. § 924(c), which covers the use of a firearm in connection with drug trafficking. Under the language of this provision, a minor drug dealer who carries a firearm—but never brandishes or otherwise uses it—could be subject to a Career Offender enhancement. Similarly, a victim of human trafficking who is also charged as an accessory (a relatively common occurrence) could be subjected to the enhancement.

¹¹ Specifically, Option 1 would reference the following federal drug statutes: “21 U.S.C. § 841, § 952(a), § 955, or § 959, or 46 U.S.C. § 70503(a) or § 70506(b)” and conspiracies related to specified drug offenses.

¹² Specifically, this includes any charges related to the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance), as well as the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

offense would be excluded if the defendant was actually sentenced to less than a specified period of incarceration—whether five, three, or one year—including any time resulting from the revocation of parole, probation, or supervised release.¹³

SIAG strongly prefers Option 1. State drug offenses vary significantly across jurisdictions: conduct that is legal in one state may be treated as a misdemeanor in another and as a felony in a third.¹⁴ When such state convictions are used as predicates under §4B1.1, those differences can produce materially different federal sentencing outcomes depending solely on where the prior conviction occurred.

The Guidelines were designed to reduce unwarranted sentencing disparities. When geographic boundaries determine whether a prior conviction qualifies as a predicate offense—and, consequently, whether a defendant faces dramatically increased exposure under §4B1.1—the resulting divergence undermines this foundational objective.

(iii) Temporal Context

The Commission has identified a temporal issue in applying the Career Offender enhancement. When considering §4B1.1 in relation to prior drug offenses, which version of the applicable drug schedule should determine whether a prior conviction qualifies as a “controlled substance offense” under §4B1.2(b)—the schedule in effect at the time of the prior conviction, or the schedule in effect at the time of sentencing for the most recent offense?

SIAG’s view is that the schedule in effect at the time the Career Offender enhancement is being considered (i.e., the time of the most recent offense) is most appropriate. Looking to the controlled-substance schedules in effect at the time of a prior conviction to determine the appropriate sentence for current conduct risks effectively re-penalizing conduct for which the defendant has already been charged, convicted, and sentenced. Using the schedules in effect at the time of the instant offense better aligns sentencing with current federal policy while avoiding reliance on outdated classifications that no longer reflect current legislative or Commission judgments regarding controlled substances.

¹³ SIAG’s view is that for prior drug offenses, sentences below five years should be excluded from consideration of the enhancement.

¹⁴ For example, 40 states now permit medical marijuana sales, while 25 permit recreational sales, despite the federal government continuing to classify cannabis as a controlled substance. See Will Yakowicz, “Where Is Cannabis Legal? A Guide to 50 States,” *Forbes Online* (Jan. 24, 2026), <https://www.forbes.com/sites/willyakowicz/2026/01/24/where-is-cannabis-legal-a-guide-to-all-50-states/>

(d) *A Cautionary Note on Career Offender Enhancements and Amendments*

The manner in which these conflicts are resolved warrants careful consideration. The Career Offender enhancement significantly increases sentencing exposure, and the Commission's own research has documented the substantial impact of §4B1.1 designations on sentence length. Efforts to promote uniformity should not result in definitional expansions that increase the number of individuals subject to heightened penalties.

Moreover, because the Career Offender guideline often operates in tandem with statutory mandatory minimums, definitional expansions may effectively reinforce or perpetuate severe sentencing floors rather than providing meaningful opportunities to recalibrate excessive sentencing structures. When circuit conflicts are resolved in ways that broaden predicate eligibility, the combined effect of guideline enhancements and mandatory minimums can entrench lengthy sentences that the Commission has elsewhere recognized warrant careful scrutiny.

In resolving these conflicts, the Commission should also consider the extent to which certain circuits have adopted limiting interpretations to constrain overbroad application of the enhancement. Clarification should not eliminate these safeguards or expand eligibility beyond what principles of proportionality would support.

SIAG therefore urges the Commission to resolve circuit conflicts concerning the Career Offender enhancement in a manner that promotes national consistency while narrowing—not expanding—the reach of severe enhancements. Uniformity should function as a tool for fairness, not as a mechanism for amplifying sentencing severity.

C. Human Smuggling

The Commission has proposed amendments to §2L1.1 to calibrate the Guidelines to reflect trafficking involving multiple persons, trafficking in connection with sexual abuse or prostitution, and injury or death resulting from human smuggling. SIAG's view is that the Guidelines should remain transparent and proportionate, with sentences reflecting the relative harm caused by the defendant(s).

SIAG recognizes that Congress has directed the Commission “to provide increased punishment for each alien smuggled.”¹⁵ We do not oppose amendments that fulfill this directive, nor do we oppose enhancements for activities that result in serious bodily injury or death. In addition, SIAG offers the following consideration.

Many victims of human trafficking are themselves charged with related offenses arising from their victimization, including conspiracy, aiding and abetting, prostitution, drug possession, or possession with intent to distribute.¹⁶ At least two states have enacted legislation providing sentencing relief for victims of human trafficking who face charges arising from their victimization upon a showing of clear and convincing evidence.¹⁷

SIAG therefore encourages the Commission to consider incorporating a mechanism within the Guidelines that would allow sentencing courts to mitigate sentences where credible evidence demonstrates that a defendant’s conduct was substantially the result of human trafficking victimization.

V. CONCLUSION

SIAG appreciates the opportunity to submit commentary during the 2026 amendment cycle and recognizes the Commission’s ongoing responsibility to ensure that the Sentencing Guidelines remain fair, consistent, and grounded in empirical evidence.

In evaluating the proposed amendments, SIAG encourages the Commission to prioritize proportionality, national uniformity, and administrability, while preserving meaningful limiting principles that guard against unwarranted sentencing expansion. Revisions that simplify guideline structure, narrow overbroad provisions, and promote consistent national application strengthen both the integrity and legitimacy of the federal sentencing framework.

¹⁵ See Letter from Scott Meisler, Deputy Chief, Criminal Division, U.S. Dep’t of Justice, to Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/publiccomment/202507/90FR24170_public-comment_R.pdf#page=97

¹⁶ See Hara Estroff Marano, “Trafficking Survivors and the Criminal Justice System: A Felony Record Makes Recovery and Return to Normalcy Difficult,” *Psychology Today* (Mar. 29, 2023), <https://www.psychologytoday.com/us/blog/to-end-human-trafficking/202303/trafficking-survivors-and-the-criminal-justice-system>

¹⁷ In 2024, Oklahoma enacted the Oklahoma Survivors Act, 22 Okla. Stat. § 1090.1 (2024). The following year, Georgia enacted its own Survivors Act, O.C.G.A. §§ 16-3-21, 16-5-1, 17-10-1, and 17-10-22 (2025). These state statutes provide for sentence mitigation when victims of human trafficking are charged with crimes committed under coercion.

The Commission’s work has long sought to reduce unwarranted disparities while promoting transparency and public safety. SIAG respectfully submits that reforms advancing clarity, proportionality, and evidence-based policy will best further those statutory objectives.

In closing, SIAG remains committed to continued engagement with the Commission and looks forward to supporting thoughtful, data-driven refinement of the Guidelines.

Respectfully submitted,

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March 2, 2026

Hon. Carlton W. Reeves, Chair
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Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements, and Official Commentary approved by the U.S. Sentencing Commission on January 30, 2026, and published in the Federal Register on February 6, 2026. See 91 Fed. Reg. 5556 (February 6, 2026); see also 28 U.S.C. § 994(o).

Proposed Amendment No. 1—Sentencing Options

The Commission seeks comment on a proposed amendment setting forth two parts to address how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing options. The two parts include (A) Changes to Part A of Chapter Five and (B) Expansion of Zones B and C of the Sentencing Table.

TIAG supports the proposed guideline at §5A1.1 to provide an overview of the steps necessary for a sentencing court to determine an appropriate sentence, including encouraging probationary sentences as punishment. TIAG further supports the proposed amendment to expand Zone B and C of the Sentencing Table. The expansion is a move in the right direction to encourage probationary sentences.

Proposed Amendment No. 2—Career Offender

TIAG appreciates the opportunity to share its views on the proposed revisions to the career offender guideline. As explained further below, changes to the definition of federal “crimes of violence” are changes that overwhelmingly disproportionately affect Indian Country. TIAG believes, therefore, that it has unique insights and perspectives on these changes.

TIAG supports Sub-option 2C of the portion of the proposed amendment relating to changes to § 4B1.2(b) (controlled substance offenses). TIAG believes that sub-option 2C strikes the right balance in ensuring that repeat, serious drug offenses are punished harshly while also reducing the risk of overincarceration of low-level individuals who are likely to benefit from treatment and services and for whom lengthy incarceration is unnecessary and a burden to the families, taxpayers, and the overcrowded prison system. Sub-option 2C, which defines “controlled substance offense” in terms of time served as opposed to whether the prior offense was state or federal, is the fairest option for Indian Country, where for jurisdictional reasons all drug crimes committed by tribal members fall within the exclusive jurisdiction of the federal government, as well as the tribe itself.

TIAG has concerns, however, about the proposed revision to the definition of crime of violence. TIAG is concerned that the list of federal statutes that qualify as crimes of violence is over-inclusive. TIAG is also concerned that the proposed changes to the federal and state definitions may have significant, undesirable collateral consequences for Indian Country, including imposing unreasonable burdens on criminal defendants and on victims. TIAG is further concerned that if adopted, it may lead to overincarceration of individuals with non-violent prior convictions.

(1) Changes to § 4B1.2(a)(1)(A)—Federal Offenses

Amendments that affect federal statutes constituting crimes of violence are overwhelmingly disproportionately felt by Indians in Indian Country. While Native Americans are a small percent of the total population of the United States, and Indians in Indian Country are a smaller percentage even still, federal prosecution for crimes of violence are, to a very significant degree, Indian Country prosecutions. On many reservations, the federal government, apart from the tribe itself, is the only entity with criminal jurisdiction, with the result that essentially all major crimes on these reservations are federal crimes.

Ultimately, Indians in Indian Country are an enormous percent of the individuals prosecuted under these federal statutes.

Data compiled from United States Courts' Statistical Tables for the Federal Judiciary reflect that for the 3-year period ending June 30, 2025, 69% of all federal homicide charges and 45% of all federal assault charges filed in the United States were filed in one of the 11 districts with the highest number of Indian Country cases.¹ During this same period, there were more robbery cases filed in Arizona than in all of the New York City metropolitan area (including New Jersey) or the entire Los Angeles metropolitan area. For the 12-month period ending June 30, 2025, the US Attorney's Office for District of South Dakota—population 930,000—filed 72 assault cases, while the Northern District of Illinois—population 9.3 million—filed only 2. Moreover, the Commission's data shows that between FY 2020 and FY 2024, 60.5% of individuals in cases involving criminal sex abuse, 85.0% of individuals in cases involving statutory rape, and 48.7% of individuals in cases involving abusive sexual contact were Native American.²

This data shows that federal prosecutions for crimes of violence are disproportionately not prosecutions involving crime taking place in our country's densely populated urban centers but instead are prosecutions that involve Native American defendants, Native American victims, or both, who reside in some of the poorest, most sparsely populated, and most geographically remote parts of the country. For this reason, TIAG has a unique and significant interest in proposals to change the definition of federal offenses that qualify as crimes of violence. With this in mind, TIAG offers the following observations regarding the proposed revised list of federal crimes of violence.

As an initial matter, TIAG observes that many of the crimes listed in the proposed revised § 4B1.1(a)(1)(A) are already crimes of violence for purposes of the career offender guideline. TIAG agrees that those offenses should be included in any revised definition. However, the proposed amendment adds statutes that significantly broadens the scope of the guideline, for example by including the entirety of 18 U.S.C. § 113(a), which includes, inter alia, the

¹ Those districts are the Districts of Minnesota, North Dakota, South Dakota, Arizona, Montana, Eastern District of Washington, New Mexico, Eastern District of Oklahoma, Northern District of Oklahoma, Western District of Oklahoma, and Wyoming.

² U.S. Sent'g Comm'n, Quick Facts on Sexual Abuse Offenses (2024), available at <https://bit.ly/4aWiDyi>.

offenses of assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6), and assault resulting in substantial bodily injury to a spouse or intimate partner, a dating a partner, or an individual who has not attained the age of 16 years, 18 U.S.C. § 113(a)(7), both of which are not presently crimes of violence because they can be committed recklessly and which are, in our collective experience, very often prosecuted in Indian Country on the basis of reckless conduct.³ Examples of qualifying reckless conduct that we regularly see prosecuted under this statute include impaired driving, unsafe handling of firearms, and operation of motor vehicles with knowledge that the vehicle is not in safe operating condition.

The Commission further proposes to expand the crimes listed to include the entirety of 18 U.S.C. § 1112. Section 1112 involves not only voluntary manslaughter but also involuntary manslaughter. Voluntary manslaughter previously has been considered a crime of violence, *see United States v. Draper*, 84 F.4th 797, 800 (9th Cir. 2023), whereas involuntary manslaughter, which is only ever reckless conduct, has to our knowledge never previously been understood to be a crime of violence. Denominating the entirety of 18 U.S.C. § 1112 as a crime of violence creates unexplained and unwarranted disparity with both Option 1 and Option 2 for § 4B1.1(a)(1)(B) (state offenses), both of which expressly exclude involuntary manslaughter. TIAG opposes making federal, but not state, involuntary manslaughter a crime of violence.

The current proposal also adds 18 U.S.C. § 1201, kidnapping, which is not currently a crime of violence with respect to the career offender guidelines. Owing to the extraordinarily broad language of the statute, we very regularly see this offense charged in Indian Country for restraints that are brief, pose no risk of injury, and do not involve the use of force. For example, when an

³ Including the entirety of 18 U.S.C. § 113(a) also has the puzzling effect of designating the misdemeanor offenses of assault by striking, beating, or wounding, 18 U.S.C. § 113(a)(4), and simple assault, 18 U.S.C. § 113(a)(5), as crimes of violence. The inclusion of federal misdemeanor offenses within the list of crimes of violence may create confusion in application given that § 4B1.1(a) purports only to apply when the “instant offense of conviction is a felony.” It also creates an unexplained disparity with the proposed revised § 4B1.2(a)(1)(B) (governing state offenses), which specifies that state offenses qualify as crimes of violence only if they are “punishable by imprisonment for a term exceeding one year.”

individual stands in the doorway of a room during a verbal altercation to prevent someone from leaving. In recent years, both the Ninth and the Tenth Circuits, which together cover a significant majority of Indian Country, have moved to limit the scope of the kidnapping statute, despite its broad statutory language, specifically to avoid providing “prosecutors [with] unfettered discretion to charge the same conduct, such as impeding certain individuals . . . as a mere misdemeanor or a life imprisonment felony.” *United States v. Jackson*, 24 F.4th 1308, 1312 (9th Cir. 2022) (internal quotation omitted); *see also United States v. Murphy*, 100 F.4th 1184 (10th Cir. 2024). It is possible that these cases may alleviate some of TIAG’s concerns with designating kidnapping as a crime of violence, but these decisions are still too new for their full impact to be assessed on charging policies.

TIAG appreciates that the Commission recognizes that its proposed definition is overbroad and has therefore provided an opportunity for defendants to rebut the presumption that designated offenses qualify as crimes of violence, but TIAG is concerned that this proposal insufficiently protects Indians in Indian Country from unwarranted application of the Career Offender guideline for a number of reasons.

First, placing the burden on defendants to rebut a presumption in favor of a Guideline application is a significant departure from the standard, well-established norm that the proponent of the applicability of a guideline sentencing enhancement bears the burden of establishing by a preponderance of the evidence that the enhancement applies. *See, e.g., United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005); *United States v. Brown*, 510 F.3d 57, 75 (1st Cir. 2007); *United States v. Wyatt*, 102 F.3d 241, 246 (7th Cir. 1996). Placing the burden on defendants to defeat application of the guideline will require defense lawyers, as a matter of professional competence, to conduct detailed fact investigations of long-ago offenses, including locating, interviewing, and potentially subpoenaing victims, who may understandably find such contact distressing or detrimental to healing. Inevitably, the passage of time will make such investigations difficult as evidence has been lost or destroyed, memories have faded, and witnesses may no longer be available.

Second, placing the burden on defendants to rebut application of an enhancement is especially fraught in the context of Indian Country cases. As TIAG has previously noted in its submissions to the Commission on possible

revisions to the categorical approach, the process of litigating the facts of prior convictions in the context of Indian Country is uniquely difficult.⁴ Many reservations are physically remote, and circumstances of history have left many tribal communities isolated, insular, and deeply suspicious of outsiders. It is notoriously difficult to investigate incidents that have occurred on Indian reservations as very few witnesses and local residents are willing to openly share information they have with people from the outside. These features of tribal communities make investigations challenging even for federal law enforcement officers and investigators who have had a long-standing presence in the community.

The collateral consequences of these investigatory difficulties are likely to fall hardest on Native American defendants represented by private counsel under the Criminal Justice Act (“CJA”). These CJA lawyers report difficulty finding investigators willing to travel to remote areas—frequently five or more hours away by car—and who have sufficient cultural competence to acquire cooperation from community members. Likewise, in the current federal fiscal environment, judges are reluctant to approve funding for multiple trips to speak with the same witnesses in order to build trust. These concerns are likely to be more aggravated and more frequent when the investigation relates to sentencing issues.

These concerns are further exacerbated by underfunding of the federal criminal defense system, such as the recent funding shortfall that in 2025 left many CJA lawyers working for deferred compensation for more than four months. One member of TIAG, who lives on her tribe’s reservation, runs its indigent defense program and also represents Indian defendants and others in federal court, reports that by the time CJA funds were replenished, she was owed nearly \$200,000 for completed work and was paying support staff out of personal savings. Finding competent investigators—always a challenge in Indian country—becomes even more difficult, and sometimes practically impossible, when the investigators know they will not receive prompt payment. Shifting the burden to defendants to prove predicate offenses were not violent

⁴ See Letter from Hon. Ralph Erickson, TIAG Chair, to Hon. Carlton R W. Reeves (Feb. 5, 2025), available at <https://bit.ly/4bjYWkr>.

places the burden on the individuals in the system with the fewest resources to meet this burden and risks over-incarceration simply for lack of resources.

In sum, if the Commission adopts this proposed amendment, TIAG recommends that it delete from its list of federal crimes of violent crimes: (1) misdemeanors; (2) involuntary manslaughter under 18 U.S.C. § 1112; and (3) offenses that are regularly charged on the basis of reckless conduct and/or conduct that does not pose a significant risk of injury to another person, including 18 U.S.C. §§ 113(a)(6), (a)(7), and 18 U.S.C. § 1201.

(2) Changes to § 4B1.2(a)(1)(B)—State Offenses

While changes to the definition of federal crimes of violence are likely to have the biggest impact on Indians in Indian Country, because many individuals who reside on reservations move back and forth between reservation and off-reservation land, Indian Country also contains individuals with prior convictions for state offenses. In addition, in Eastern Oklahoma, the state unlawfully exercised jurisdiction over Indian defendants until 2020, when the Supreme Court decided *McGirt v. Oklahoma*, 591 U.S. 894 (2020). The recency of this jurisdictional shift means that on these Eastern Oklahoma reservations, the overwhelming majority of prior convictions TIAG sees are for state, rather than federal, crimes.⁵

As between Option 1 and Option 2 of the proposed changes to § 4B1.1(a)(1)(B), TIAG unanimously prefers Option 1, though it finds both options significantly problematic and not an obvious improvement over the status quo. With respect to Option 2, TIAG views its complicated scheme of matching elements from federal statutes to elements from state statutes to bear significant resemblance in methodology to the much-criticized categorical approach. While TIAG understands and appreciates the frustrations with the categorical approach, it has the advantage that at this point, most of the complicated analytical work and litigation surrounding its application has already been accomplished, and everyone is fairly apprised of its results. Option 2 appears to simply replace the complicated and convoluted scheme that is the categorical approach with a different complicated and convoluted scheme

⁵ Obviously, this balance between state and federal prior convictions will change with the passage of time, but there likely remain many years before prior state convictions of Indians in Eastern Oklahoma cease to be a significant issue.

whose parameters will have to be litigated de novo. For this reason, TIAG unanimously disfavored its adoption.

With respect to Option 1, TIAG disfavors its adoption as compared to the status quo for crimes of violence, *i.e.*, the categorical approach, but does prefer it to Option 2. TIAG’s concerns with respect to Option 1 largely mirror those that it expressed with respect to the overbroad federal statutes included in the proposed revised § 4B1.1(a)(1)(A), namely that many of the statutes encompass conduct that is not reasonably a “crime of violence,” and that the safety net provisions set forth in § 4B1.1(a)(4) are impractical and unduly burdensome.

Several members expressed concern that sentencing in Indian Country—which are, for jurisdictional reasons, much more frequently sentencings under Chapter 2, Part A of the Guidelines than they are in other parts of the country—will devolve into “mini-trials” of conduct from many years before. Members who regularly represent Indian defendants in federal court were concerned they would be unable to advise their clients competently regarding potential sentencing exposure, and it would be more difficult to resolve cases without a trial even in cases where the underlying conduct is largely uncontested. A number of members expressed concern about the impact that litigation of the mens rea or possibility of injury associated with past convictions would have on victims of past crimes, who may find themselves in unwelcome receipt of subpoenas requiring them to come to court and face cross-examination about a crime that they believed had long ago been resolved.

TIAG further has concerns about the inclusion of state statutes that penalize a mix of intentional and reckless, or violent and non-violent, conduct that are similar to the concerns it expressed in 2025⁶ about the Commission’s “actual conduct” proposed amendment, including about the possibility of presentence reports and similar documents being used in ways that were not foreseen at the time of the original sentencing. Members were concerned that state records, which vary in quality and completeness, may be incomplete, ambiguous, or otherwise inadequate to determine precisely what conduct formed the basis for the underlying conviction.

⁶ See Letter from Hon. Ralph Erickson, TIAG Chair, to Hon. Carlton R W. Reeves (Feb. 5, 2025), available at <https://bit.ly/4bjYWkr>.

Lastly, TIAG remains concerned about potential disproportionate effect on Native American defendants given the 2025 data briefing, which suggested that then-proposed change might have significant disproportionate impact on tribal populations and might have resulted in unexplained disparity between Indian Country and non-Indian Country defendants.

In sum, while TIAG understands and shares the Commissions frustrations with the categorical approach, TIAG does not believe that either Option 1 or Option 2 represents a clear improvement over the status quo sufficient for TIAG to support its adoption at this time.

(3) Changes to § 4B1.2(b)—Drug Offenses

With respect to the proposed changes to the definition of a controlled substance offense for purposes of the career offender guideline, TIAG supports Sub-option 2C, Limiting Prior Convictions Through a Time-Served Approach. As noted in TIAG’s 2025 letter to the commission regarding then-proposed changes to the career offender guideline,⁷ TIAG believes that the application of the career offender guideline to low-level drug crimes, many committed by individuals who are themselves suffering from addiction—poses an unwarranted burden to individuals, families, communities, and taxpayers and that remedying this feature of the career offender guideline would benefit our communities.

As between the options proposed, TIAG prefers Sub-option 2C because, as we noted in our 2025 letter, simple elimination of state drug priors would in many cases lack the ameliorative effect in Indian Country that it might have elsewhere because the federal government has exclusive jurisdiction over drug crimes committed by tribal members in Indian Country. As a result, the federal government more regularly prosecutes low-level drug conduct, such as sharing or selling small quantities of drugs among a community of addicted persons, which would more typically be handled by the state in other parts of the country.

As also reflected in our 2025 letter, TIAG continues to believe that a 5-year exclusion, defined as time actually served, is the best option. TIAG arrived

⁷ See Letter from Hon. Ralph Erickson, TIAG Chair, to Hon. Carlton R W. Reeves (Feb. 5, 2025), available at <https://bit.ly/4bjYWkr>.

at this five-year exclusion by looking at both the drug tables and the mandatory minimum law, particularly with respect to meth, which remains the drug we see most commonly on most reservations. Both federal mandatory minimum sentence laws and the drug tables envision relatively high penalties for low quantities of meth, and a five-year exclusion would likely be necessary to avoid ensnaring these lower-level individuals.

TIAG prefers a time-served approach because we see individuals residing on reservations, particularly smaller reservations near major off-reservation cities, who have state convictions. A number of the states neighboring reservations have sentencing laws that purport to punish crimes quite harshly, with lengthy sentences, but who only require individuals to serve a small fraction of the sentence imposed. Given different postures of different states regarding how much of a sentence must be served, TIAG felt that using the time served, rather than sentence imposed, was the most reliable available proxy for seriousness of the offense.

Proposed Amendment No. 3—Circuit Conflicts Concerning § 4B1.2(b)

With respect to the circuit conflicts concerning § 4B1.2(b), TIAG supports the time-of-sentencing rule, which is consistent with the Sentencing Reform Act's mandate that when imposing a sentence, courts should consider the Guidelines and any pertinent policy statements that are "in effect on the date the defendant is sentenced." 18 U.S.C. §§ 3553(a)(4)(A)(ii) and (a)(5)(B). It is also consistent with the directive contained within the Guidelines to "use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a).

Proposed Amendment No. 4—Human Smuggling

With one exception, noted below, TIAG opposes the proposed changes to the human smuggling amendment, though its vote was not unanimous. The impact of the amendment to Indian Country is likely to be felt mostly by tribes along the southwest border to the United States, including the Tohono O'odham Nation, which has nearly 30,000 members and straddles the U.S.-Mexico border in Southern Arizona, extending more than 80 miles north to approximately 30 miles south of the Phoenix metropolitan area. Because of its geographic location, the reservation has long been used as a smuggling corridor by unscrupulous outsiders. Community members have at times become entangled

in smuggling activities. Our opposition to the amendment is largely based on our experiences of how the investigation and prosecution of these cases has historically worked in these areas.

TIAG opposes the amendment to add more tiers of enhancement based on the number of individuals smuggled because in our experience, outside of the rare tractor-trailer case, at numbers greater than approximately six, numbers are generally based not on the number of individuals actually apprehended crossing the border with the assistance of a smuggler, but on estimations based on relevant conduct or aggregated as part of conspiracy. These estimates are frequently imprecise and difficult to determine with the degree of precision the revised chart appears to envision, and the proposed revision may result in expensive and resource-intensive litigation for only a small benefit.

TIAG opposes the enhancement for concealing persons in a trunk or in excess of rated capacity because in our experience the overwhelming majority of persons who transport people in under these circumstances already receive the existing enhancement under § 2L1.1(b)(6) for creating a substantial risk of death or serious bodily injury. It is unclear why a separate enhancement is necessary to include the very unusual circumstances where transportation in this manner is, for reasons particular to the facts of that offense, not especially dangerous.

TIAG opposes the amendments regarding criminal sexual acts, including the creation of a cross-reference based on its experience with how smuggling prosecutions unfold, as a practical matter. Victims in smuggling cases are people who are themselves breaking the law but who escape prosecution by giving statements about their smugglers. While no doubt many such persons truthfully describe their experience of attempting to illegally enter the United States, there nevertheless are incentives to lie or to exaggerate given their own potential criminal exposure.⁸ Individuals who have made statements are in our experience not generally held for trial but are removed from the United States and are therefore unavailable by the time of sentencing. The proposed cross-

⁸ These incentives may become even more pronounced if passage of this amendment creates a natural tendency among immigration enforcement officers to ask more questions about sexual assault, which may elicit less-than-truthful responses from individuals who wrongly perceive their questioner to be encouraging them to report behavior that did not occur.

reference threatens to expose defendants to extraordinarily high sentences based on a low, mere preponderance, standard where the only evidence available in support of the enhancement is a past allegation by someone who has long since been removed from the country. To be very clear, TIAG supports criminal prosecution of human smugglers for any and all criminal sexual acts that they commit. What gives us pause is the extraordinary size of the enhancement, the low standard of proof, and the lack of witness availability.

TIAG does support Option 1, which provides for an additional increase in offense level if the defendant caused death or injury to more than one person being transported. TIAG views this enhancement as appropriate to correct for an odd and likely unintentional side effect of the grouping rules wherein because multiple convictions under § 2L1.1 group under § 3D1.2(d), multiple convictions for creating injury or even death are treated the same as a single conviction.⁹ TIAG agrees that Option 1 appropriately corrects for this phenomenon. Option 2 appears, however, to overcorrect for the grouping problem and would result in application of a larger enhancement for someone who transports two people who both sustained life-threatening bodily injury than it would for someone who intentionally assaults two separate people resulting in life-threatening bodily injury to both.¹⁰ TIAG could not identify a reasoned basis for this disparity and therefore declines to support Option 2.

* * *

Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working with you during the remainder of this amendment cycle and to continue our collaboration in the future.

⁹ See, e.g., *United States v. Quevedo-Moncada*, Case No. 23-50029, 2024 WL 3082530 at *1 (9th Cir. 2024) (unpublished) ("Quevedo pleaded guilty to one count of transportation of aliens resulting in death, and one count of transportation of aliens resulting in serious bodily injury At sentencing, the district court erred by not grouping Quevedo's counts of conviction under Guideline § 3D1.2(d) and, in turn, adding one point to its calculation of the total offense level.")

¹⁰ Under current grouping rules, a person who is convicted of two counts of identical assaults on two people resulting in life-threatening injury to both receives a 2-level increase under § 3D1.4.

Sincerely,

A handwritten signature in blue ink that reads "Brian Morris". The signature is written in a cursive style with a horizontal line underneath it.

Brian Morris
Chair

VICTIMS' RIGHTS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission



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March 2, 2026

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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 district¹. 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 violence³.

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.*

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 aliens⁹ 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.

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.*



Via Electronic Public Comment Submission Portal

Greg Glod
Director, Center for American Justice Policy
America First Policy Institute

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission

RE: Comment on Proposed Career Offender Amendment

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

On behalf of America First Policy Institute (AFPI), I submit this response to the Sentencing Commission's ("Commission") request for comment on its proposed amendments to the Sentencing Guidelines in the Federal Register on February 6, 2026.¹ Specifically, this comment will focus on the changes proposed to the definition and application of crimes of violence for purposes of designating a defendant as a "career offender" under Guideline §4B1.1.²

AFPI appreciates the Commission's dedication to this incredibly important topic and its efforts to address the issues that arise from the categorical approach when applied to the Sentencing Guidelines. AFPI has supported eliminating the categorical approach to identifying who should be considered a career offender under the Sentencing Guidelines and appreciates the Commission's willingness to amend the Guidelines to do so.³ While we are generally aligned with the Commission's approach to doing so, we wish to flag several areas in which the proposal may inadvertently undermine Congress's intent to see violent habitual offenders punished "to a term of imprisonment at or near maximum term authorized..." and provide our recommended path forward.

Crime of Violence for Federal Offenses

The amendment proposes modifying the current definition of a federal crime of violence found in U.S.S.G. §4B1.2(a) by 1) removing the force clause completely, and 2) listing which specific federal offenses are crimes of violence. While this may eliminate some of the issues arising from the current categorical approach, it could also bring unintended consequences that undermine the congressional intent to punish repeat offenders "at or near the maximum term authorized," pursuant to 28 U.S.C. 994(h).

¹ Notice and request for public comment and hearing, 91 Fed. Reg. 25, 5556 (Feb. 6, 2026), available at <https://www.govinfo.gov/content/pkg/FR-2026-02-06/pdf/2026-02441.pdf>; see also U.S. Sent'g 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 U.S.S.G. §4B1.1.

³ Glod, Greg. (2026). *How to Fix USSC's Sentencing Guidelines for Career Offenders*. America First Policy Institute.



First, Congress is constantly adding and amending criminal statutes that could make this list incomplete or obsolete quite quickly. Additionally, new categories of violent or coercive conduct are emerging constantly, including technology-facilitated offenses. They may not align exactly with the current list (or any attempt at a list), and amending these guidelines or modifying laws via Congress could take a significant amount of time. Second, by limiting offenses to a list and prohibiting judges from deviating from it, the amendment provides no mechanism for judges to appropriately punish truly dangerous or violent behavior based on the facts of the case if that crime is unlisted. Third, by removing the “force clause” without replacing it, it potentially narrows the range of offenses that can be considered a crime of violence. It could thus allow certain dangerous defendants to avoid the career offender designation, based on its absence from the statutory designation rather than on the conduct of the individual in committing that crime. Taken together, these concerns suggest that the proposed amendment risks creating a potentially more rigid and less effective framework for identifying the repeat violent offenders whom Congress intended the career offender guideline to reach.

AFPI recommends maintaining a “force clause,” but clarifying that a judge may go beyond an elements-based evaluation and consider the underlying facts of the case to determine whether the conviction involved the actual, attempted, or threatened use of physical force against the person of another. The Guidelines could limit the types of documents that may be considered for evaluation under *Shepard v. United States*,⁴ but AFPI would prefer an expanded list that includes other reliable documents, such as presentence investigation reports, sentencing transcripts, or documents that show factual findings by a judge or jury, regardless of whether the defendant agreed to them (as is currently the restriction under *Shepard*). This could establish a presumption of a crime of violence that a defendant could overcome.

Crime of Violence for State Offenses

Of the two options for modifying which state offenses qualify as a crime of violence, AFPI prefers Option Two. Option One, which only lists categories of crime, does avoid some of the issues involved in categorical matching that plagues the current analysis, but still limits an analysis of the actual conduct involved in the crime, and could unnecessarily limit certain offenses from being categorized as violent simply due to how they are labeled via state law.⁵

Option Two, which includes the bracketed language, “proscribes conduct that satisfies the elements...,” would be most preferred, as it allows for a more conduct-based approach to determining whether the underlying offense should be considered a crime of violence. However, as with the concern expressed above under the federal offenses amendments, eliminating the “force” clause entirely could lead to unintended consequences, and providing one here that explicitly allows a conduct-based evaluation would be preferred.

⁴ Charging document, jury instructions and verdict form, a plea agreement, transcript of plea colloquy, and any fact found by the judge that the defendant agreed to. See *Shepard v. United States*, 544 U.S. 13 (2005).

⁵ Glod, *Supra*.



Exclusions

With the removal of the categorical approach, the Commission rightly included limitations and exclusions that a defendant can raise to avoid the over-inclusion of prior offenses that should not qualify as crimes of violence. While *mens rea* and amount-of-harm limitations are appropriate, AFPI cautions against limitations based on the actual sentence or the time served. As we have seen across the country, many violent crimes are not given adequate punishment, and allowing an offense not to qualify as a crime of violence based on a judge's sentence determination could perpetuate this leniency in ways that undermine the seriousness of the offense.

Conclusion

AFPI thanks the Commission for its dedication to this area of the Guidelines and for its willingness to solicit input from outside stakeholders. The career offender designation serves a critical function: ensuring that repeat violent offenders receive sentences that reflect the seriousness of their conduct. The proposed amendments represent meaningful progress toward a more workable framework, and AFPI remains committed to working with the Commission to ensure the final language produces a result that upholds the congressional mandate to punish such defendants at or near the maximum term authorized.

Greg Glod

Director, American Justice Policy

The America First Policy Institute

AFPI is a 501(c)(3) nonprofit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.



RE: Public Comment on Proposed Amendments to §2L1.1 (Human Smuggling) Regarding Criminal Sexual Contact Enhancements

Dear Members of the United States Sentencing Commission:

The America First Policy Institute (AFPI) appreciates the opportunity to submit comments regarding the proposed amendments to the sentencing guideline at U.S.S.G. §2L1.1 addressing sexual abuse and criminal sexual contact during human smuggling offenses. The Commission's request for comment on whether offenses involving criminal sexual contact under 18 U.S.C. § 2241-18 U.S.C. § 2244 should receive a sentencing enhancement, and what level that enhancement should be, raises a critically important issue involving the protection of vulnerable victims.

AFPI strongly supports the Commission's recognition that the current guideline structure does not adequately account for cases in which sexual abuse or criminal sexual contact occurs during a human smuggling offense¹. However, AFPI also suggests even greater enhancements than those recommended. Sentencing guidelines already include a two-level enhancement if the offender knows the victim was unusually vulnerable, due to age or physical or mental conditions,² but when a victim also experiences sexual violence during these crimes, the harm is much more severe.

AFPI's Interest

AFPI is a nonprofit, non-partisan research institute dedicated to advancing policies that prioritize the safety and well-being of the American people. Through its work in criminal justice, national security, and immigration policy, AFPI supports legal frameworks that ensure actual accountability for serious crimes and protect victims of these crimes.

Human smuggling involves the provision of a service, typically transportation or fraudulent documents, to an individual who voluntarily seeks to gain illegal entry into a foreign country.³ However, human smuggling operations can (and often does) involve sexual violence. When sexual violent crimes occur during these offenses, sentencing guidelines must reflect the severity of the crime and the lifelong effects these crimes have on the victims.

Sexual Abuse During Human Smuggling Causes Severe and Lasting Harm

¹ U.S. Sentencing Commission. (2026). *Proposed 2026 amendments to the federal sentencing guidelines published January 2026*. <https://www.ussc.gov/guidelines/amendments/proposed-2026-amendments-federal-sentencing-guidelines-published-january-2026>

² United States Sentencing Commission. (2025). *An overview of the Federal Sentencing Guidelines*. https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf

³ U.S. Immigration and Customs. (2017). *Human trafficking vs human smuggling*. <https://www.ice.gov/sites/default/files/documents/Report/2017/CSReport-13-1.pdf>



When sexual violence occurs during smuggling, the harm inflicted is much more serious and traumatic. Some consequences are psychological, such as depression, anxiety, and suicidal thoughts. The consequences may be chronic. Survivors may suffer from post-traumatic stress disorder, and can experience recurring reproductive, gastrointestinal, cardiovascular, and sexual health problems.⁴

Victims of smuggling are uniquely vulnerable to sexual abuse. Many illegal aliens are fearful of admitting that they have been a victim of a crime in part because they believe they will be removed (deported) from the United States if they report the crime⁵. Because of these vulnerabilities, sexual violence during smuggling is an aggravating factor, and it should be treated more severely than the enhancements that are being proposed.

The Commission's recognition that the current guideline under U.S.S.G. §2L1.1 may not adequately address the severity of these crimes is a crucial step toward ensuring that sentencing outcomes reflect the gravity of such crimes. We agree and support the July 18, 2025, letter from Scott Meisler to the Hon. Carlton W. Reeves, which notes that the guideline "does not adequately address human smuggling cases in which a victim was sexually abused or otherwise sexually assaulted," and calls for increased punishment calibrated to the harms inflicted on each smuggled alien.⁶

Current Enhancements Under §2L1.1 Do Not Adequately Reflect the Severity of Sexual Violence

Under the existing guideline structure, the base offense level for human smuggling under U.S.S.G. §2L1.1 begins at level 12 and may increase through a variety of adjustments.⁷ While enhancements do currently exist for bodily injury or serious bodily injury, the resulting offense level does not capture the severity of sexual abuse committed during a smuggling operation. For example, current proposed provisions may increase the offense level by only two levels for bodily injury or criminal sexual contact and four levels for serious bodily injury, including criminal sexual abuse.⁸ These slight proposed increases do not reflect the seriousness of sexual violence, especially when compared with enhancements applied to other aggravating factors, such as the number of individuals being smuggled.

⁴ U.S. Centers for Disease Control and Prevention. (2025). *About sexual violence*. <https://cdc.gov/sexual-violence/about/index.html>

⁵ U.S. Department of Homeland Security. (n.d.). *Immigration options for victims of crime*. <https://www.dhs.gov/immigration-options-victims-crime>

⁶ Meisler, S. (2025). *Public comment*. United States Sentencing Commission. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=97

⁷ United States Sentencing Commission. (2025). *Guidelines manual*. https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?app_gl_id=§2L1.1

⁸ U.S. Sentencing Commission. (2026). *Proposed 2026 amendments to the federal sentencing guidelines published January 2026*. <https://www.ussc.gov/guidelines/amendments/proposed-2026-amendments-federal-sentencing-guidelines-published-january-2026>

Sexual assault violations should warrant equal treatment as a significant aggravating factor. While the proposed enhancements may be appropriate for large-scale smuggling operations, the guideline structure as proposed does raise an important question: why should the smuggling of multiple individuals warrant harsher penalties and punishment than the sexual violation of even a single victim? The proposal includes slight enhancements for sexual violent offenses, but these enhancements are not enough for such heinous crimes. For that reason, AFPI believes that stronger enhancements are critical and necessary to ensure that penalties appropriately reflect the severity of the crimes committed.

Recommended Enhancement Levels for Criminal Sexual Contact and Sexual Abuse

AFPI recommends that the Commission adopt stronger enhancements when sexual crimes occur during smuggling offenses. Specifically, when a sexual offense under 18 U.S.C. §§ 2241-2244 occurs in connection with a human smuggling offense, the following enhancements should apply:

For bodily injury or criminal sexual contact:

- Increase the offense level by 4 levels, or
- If the resulting offense level is less than level 25, increase the offense level to level 25.

For serious bodily injury, including criminal sexual abuse:

- Increase the offense level by 6 levels, or
- If the resulting offense level is less than level 38, increase the offense level to level 38.

These proposed enhancements align with the seriousness reflected in the sexual abuse guidelines in U.S.S.G. Chapter Two, Part A, Subpart 3, and ensure that the punishment more accurately reflects the seriousness of the crime.

The Importance of a Cross-Reference to the Sexual Abuse Guidelines

AFPI supports the proposed cross-reference directing courts to apply the sexual abuse guideline in U.S.S.G. Chapter Two, Part A, Subpart 3 when the offense involves conduct described in 18 U.S.C. §§ 2241–2244.

Under the current guideline structure, the base offense level under §2A3.1 is significantly higher than the base offense level under §2L1.1. For example, the base offense level under §2A3.1 is 38 for aggravated sexual abuse involving a child under 12 under 18 U.S.C. § 2241(c). Otherwise, the base offense level under §2A3.1 is 30, with further increases possible.⁹ The base offense level under §2L1.1 can be as low as 12, and with adjustment and enhancements, it may increase to 25.

⁹ United States Sentencing Commission. (2025) Guidelines Manual.
https://guidelines.usc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?APP_GL_ID=§2A3.1

When a smuggling offense involves conduct in 18 U.S.C. §§ 2241–2244, applying appropriate guidelines within U.S.S.G. Chapter Two, Part A, Subpart 3 ensures that the sentencing appropriately reflects the severity of the sexual conduct involved. In many cases, the cross-reference will increase the offense level significantly compared to the base smuggling guideline, thereby ensuring that offenders who commit sexual violence are punished severely and justly. Therefore, AFPI strongly favors adopting the broader bracketed option under proposed §2L1.1(c)(2) that applies when “the offense involved such conduct.”

Real-World Cases Demonstrate the Limitations of Current Guidelines

A recent case is a prime example of how the current guideline framework may be under-punishing sexual violence that occurs during smuggling offenses. In *United States v. Ballesteros-Moreno*, a smuggler transporting an undocumented migrant sexually assaulted an 18-year-old woman.¹⁰ The case was sentenced under the smuggling guidelines in §2L1.1 rather than the sexual abuse guidelines in §2A3.1. The court imposed a sentence of 72 months’ imprisonment. Under this sentencing guideline, the punishment was significantly lower than it would have been if the conduct had been charged or sentenced under the appropriate sexual abuse guideline. Cases like this demonstrate why stronger enhancements and a clear cross-reference to sexual abuse guidelines under U.S.S.G. Chapter Two, Part A, Subpart 3 are vital.

Conclusion

Human smuggling is already a serious offense, but when sexual violence occurs during these crimes, the harm inflicted on victims becomes far more severe, as sexual assault can cause lifelong trauma to victims of these types of crimes. The America First Policy Institute commends the United States Sentencing Commission for recognizing the need to strengthen the sentencing framework for such cases.

To ensure that federal sentencing policy appropriately reflects the seriousness of sexual abuse during smuggling offenses, AFPI respectfully recommends that the Commission:

1. Adopt stronger sentencing enhancements for criminal sexual contact and sexual abuse occurring during smuggling offenses.
2. Implement the proposed cross-reference directing courts to apply the sexual abuse guideline at U.S.S.G. Chapter Two, Part A, Subpart 3 when conduct described in 18 U.S.C. §§ 2241–2244 occurs.
3. Adopt the broader cross-reference language applying when “the offense involved such conduct.”

These changes would ensure that federal sentencing guidelines better reflect the gravity of sexual violence that is committed in the process of human smuggling.

¹⁰ United States Attorney’s Office, District of Arizona. (2024). U.S. Department of Justice. <https://www.justice.gov/usao-az/pr/smuggler-sentenced-72-months>



AFPI appreciates the Commission's consideration of these comments and its continued work to improve the effectiveness of the federal sentencing system.

Respectfully submitted,

America First Policy Institute





March 18, 2026

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002
Submitted via <https://comment.ussc.gov>

Dear Judge Reeves,

The American Civil Liberties Union welcomes the opportunity to comment on the U.S. Sentencing Commission's Proposed Amendments for the current cycle. In response, the ACLU respectfully submits the following comment. The ACLU opposes the application of **USSC §2L1.1, sentencing enhancements under (b)(6) and (b)(7)** where injuries or deaths are caused by law enforcement conduct and advocate for the creation of causation guardrails. U.S. Border Patrol (USBP) officers routinely engage in acts of violence against migrants and they rarely face accountability. If adopted this rule would increase penalties for individuals accused of smuggling offenses where the individuals allegedly brought to the U.S. were injured by federal immigration agents. This baffling strategy, layered on top of existing penalties for human smuggling, will not improve public safety or reduce unauthorized immigration. To the contrary, increasing these penalties without addressing the lack of accountability for abuses by federal immigration agents only undermines protections for vulnerable immigrants. Rather than increasing these sentencing enhancements, we urge the Commission to collect data and conduct a study of these offenses prior to issuing any increases that will unjustly enhance sentences for noncitizens without protecting vulnerable migrants.

The ACLU has, for many years, raised concerns with both the excessive use of force by U.S. border patrol agents and the lack of accountability for injuries—including fatal ones—perpetrated by federal agents against arriving non-citizens. In the last 15 years, nearly 200 people have died as a result of encounters with Border Patrol: that includes 70 use-of-force cases, six people killed in cross-border shootings with no impunity, and more than 100 fatalities from Border Patrol-led car chases.¹ According to the Southern Border Community Coalition, the two

¹ CBP fatal encounters tracker ACLU of Texas, <https://www.aclutx.org/cbp-fatal-encounters-tracker/> (last visited Mar 16, 2026)



most common causes of the reported deaths were fatal car chases and fatal shootings, which together accounted for 52% of the deaths.²

According to a tracker maintained by the ACLU of Texas, since 2010, Customs and Border Protection (CBP) agents have been responsible for the deaths of over 360 individuals, with 119 fatalities stemming from vehicular pursuits.³ These deadly pursuits, until now, were concentrated along the southern U.S. border where border patrol chased individuals suspected of human smuggling or being unlawfully in the United States. In 2023, after pressure from advocacy groups, including the ACLU, CBP adopted policy guidance limiting these vehicular pursuits and improving oversight of these operations by, among other things, requiring officers to use an objective reasonableness standard, and to consider, among other factors, other available means to apprehend the suspects.⁴ The updated policy also prohibited agents from starting or continuing a pursuit of a vehicle that was exceeding the speed limit and appeared to be overloaded. That guidance was rescinded when President Trump returned to office in January 2025.⁵

CBP agents are rarely ever convicted of criminal wrongdoing while on duty, despite documented deaths, excessive use of force⁶ during arrests, inadequate medical care, and deaths in Border Patrol custody due to neglect. Earlier this year, two U.S. citizens were shot and killed in Minneapolis—one apparently by a border patrol agent—for engaging in First Amendment protected conduct. No federal charges have been brought against any of the agents involved. These shootings do not occur in a vacuum. A decade ago, CBP’s former internal affairs chief warned that the agency “goes out of its way to evade legal restraints” and is “clearly engineered to interfere with our efforts to hold the Border Patrol accountable.”⁷

Border Patrol’s aggressive tactics have put arriving immigrants in danger for years, and again with limited accountability. Researchers who studied migrant autopsy reports and missing persons reports in southern Arizona found three types of deadly tactics that USBP routinely uses to apprehend migrants: high-speed vehicle chases; aggressive tactics against migrants who are on foot (such as using helicopters to “dust” migrants), leading to heat exhaustion, sprains, falls, and

² See Southern Borders Community Coalition, *Abuse of Power and its Consequences* (Feb. 3, 2026) (reporting data collected by monitoring media reports and CBP press releases).

³ CBP fatal encounters tracker ACLU of Texas, <https://www.aclutx.org/cbp-fatal-encounters-tracker/> (last visited Mar 16, 2026)

⁴ Reineke and Martinez, *Excessive Use of Force* at 248.

⁵ Emergency driving including vehicular pursuits by U.S. Customs and Border Protection Personnel: Directive 4510-026 | U.S. Customs and Border Protection Emergency Driving Including Vehicular Pursuits by U.S. Customs and Border Protection Personnel: Directive 4510-026, <https://www.cbp.gov/document/directives/cbp-directive-4510-026> (last visited Mar 16, 2026)

⁶ “They treat you like you are worthless” Human Rights Watch, <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials> (last visited Mar 16, 2026)

⁷ Former border protection insider alleges corruption, distortion in agency NPR, <https://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency> (last visited Mar 16, 2026)



jumps, or migrants getting lost and dying alone in the desert⁸; and the use of lethal force, including fatal shootings, asphyxiation, tasers, and beatings.⁹ Thus, while it is undoubtedly true that some of the criminal organizations involved in transporting noncitizens to the U.S. put migrants in dangerous conditions and circumstances, it is also true that Border Patrol knowingly exposes migrants to harm through its aggressive enforcement and policing actions.

Many vulnerable and desperate people turn to human smugglers, and/or friends or relatives, to help them reach the United States in light of the U.S.'s increasingly restrictive immigration system that offers few ways for individuals to lawfully come to reunite with their families or seek employment in the United States. Many of those arriving at the southern border have been seeking asylum and other protection from persecution, torture, and other violence and once turned back or deported from the U.S. border, have been preyed upon by organized criminal groups who take advantage of them and U.S. policy. Adding sentencing enhancements to those accused of human smuggling—who may be low-level participants in any human smuggling scheme or may in fact be family members of those they transport—does not address harm to migrants or unauthorized immigration. Only increasing lawful routes to the U.S. can undermine illegal smuggling networks, and the criminal legal system already has sufficient tools to prosecute abuses against victims of smuggling and trafficking.

For these reasons, the Commission should decline to expand or apply enhancements under U.S.S.G. §2L1.1(b)(6) and (b)(7) where injuries or deaths are caused by law enforcement conduct and create causation guardrails. Imposing additional punishment on migrants for harms resulting from dangerous enforcement tactics would be both unjust and inconsistent with principles of proportional sentencing. At a minimum, the Commission should first collect comprehensive data and conduct a thorough study of these incidents before considering any guideline changes that could further increase sentences in these cases.

Thank you for the opportunity to provide comments. If you have any questions, please contact Nina Patel, Senior Policy Counsel, Justice Division, at [REDACTED].

⁸ See Robin C. Reineke and Daniel E. Martinez, [Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona](#), 12 J. on Migration and Hum. Sec. 249 (2024)

⁹ *Id.* at 247-250.



March 18, 2026

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

Re: Proposed Amendments for the 2026 Amendment Cycle (Jan. 30, 2026)

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless individuals and families, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the proposed amendments announced by the Commission in January 2026.

I. *Proposed Amendment 1 – Sentencing Options*

FAMM is thrilled to support the proposed amendment for sentencing options which recognizes the statutory obligation to consider *all* sentencing types, not just prison. In so doing, the Commission helps counter the presumption of prison that has long dominated federal sentencing.

The Proposed Amendments Advance the Law

The proposed amendments would create a new introductory commentary to Chapter 5, Part A describing the Commission’s obligation to promulgate guidance regarding the type of sentence to be imposed, to emphasize that the Sentencing Reform Act does not include a presumption of incarceration, and to acknowledge that the Supreme Court consistently finds probations and fines to be punitive in nature. In addition, Part A creates a new guideline at §5A1.1, establishing steps that, for the first time, direct a court to determine the *type* of sentence

before deciding the *terms* of the sentence. Part B of the proposed amendment would expand the Sentencing Table zones such that more individuals with a low criminal history category would be eligible for probation or a split sentence. For people with higher criminal history (II-VI), the probation and split sentence opportunities are more limited.

As an organization that, for nearly 35 years, has advanced the idea of individualized sentencing, the language proposed in the introductory comment and the new guideline is deeply meaningful and vindicating for the family members and people we represent; people who, for too long, have felt like just another cog in the machine of the federal criminal justice system. As the Commission acknowledged, Congress itself “decided against establishing a presumption in favor of any particular sentence type, wary that ‘[a] congressional statement of a preferred type of sentence might serve only to undermine the flexibility that the criminal justice system requires in order to determine the appropriate sentence in a particular case in light of increased knowledge of human behavior.’”¹ Words matter, and enshrining this language in the guidelines is an important acknowledgment for impacted people who have been burdened by what often feels like a presumption *in favor* of prison.

FAMM Supports the Proposed Language in Part A – These proposals advance Congress’ vision for sentencing. As the Commission acknowledged in its proposed introduction to Chapter 5, Part A,² Congress did not want to impose a presumption in favor of one sentence type over another; flexibility is key to the purposes of punishment. In fact, in the Commission’s enabling statute, sentencing options are front and center. Congress directed the Commission to promulgate guidelines that would determine the sentence imposed in a criminal case, which includes “a determination whether to impose a sentence to probation, a fine, or a term of imprisonment.”³ Separately, Congress directed that these guidelines determine the “amount of a fine or the appropriate length of a term of probation or a term of imprisonment.”⁴

This emphasis on flexibility is seen not just in Congress’ instructions to the Commission, but in Congress’ instructions to judges as well. Congress made clear that judges, in imposing a “sentence sufficient but not greater than necessary, [. . .] shall consider [. . .] *the kinds of sentences available*[. . .].”⁵ Taken together, these Congressional commands evidence the importance of the work the Commission is presently undertaking – adjusting the framework from the beginning so that all available sentencing options are considered, rather than presuming a term of imprisonment.

For too long, imprisonment has felt like the only option. Probation and other sentencing options are exceedingly rare. In FY 2024, 89.1% of sentenced individuals were sentenced to a

¹ U.S. Sent’g Comm’n (USSC), Sent’g Guidelines for U.S. Ct.’s, 91 Fed. Reg. 5556, 5559 (proposed Jan. 6, 2026) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 92 (1983)).

² *See id.* at 5558–59.

³ *Id.* at 5559. *See also* 28 U.S.C. § 994(a)(1)(A).

⁴ 28 U.S.C. § 994(a)(1)(B).

⁵ 18 U.S.C. § 3553(a)(3).

prison term only.⁶ In comparison, 6.9% of people received probation only.⁷ Even more striking is the Commission’s data showing that of the over 27,000 people eligible for probation, 81% received a sentence of prison only.⁸ Thus, the presumption in favor of prison is felt throughout the system, and the Commission’s steps to recalibrate are much needed. Doing so also helps align the Guidelines with Congressional intent.

Accordingly, FAMM supports the Commission in adding the introductory language to Chapter 5 and also supports the new guideline at §5A1.1. We also urge the Commission to make the language modifications suggested by the Federal Defenders in their submitted comment.⁹

FAMM Supports the Proposed Part B – One of the most impactful tools used by the Commission that reinforces its misguided presumption of prison is the Sentencing Table. In its current form, the Sentencing Table does not even mention the possibility of probation and instead explicitly calls out that the Sentencing Table’s value is measured “in months of imprisonment.”¹⁰ In fact, the possibility of a sentence to probation does not even appear until Part B in Chapter 5. And even when mentioned, probation is labeled as an “alternative” to incarceration.¹¹ But probation is a meaningful punishment option, and the availability of that option should be clear. The possibility of probation and split sentences should also be expanded to more groups of people who may be well suited to a term of probation rather than a term of imprisonment. With this in mind, we support the proposed expansion of zones B and C in Part B, which will hopefully, in conjunction with the language changes above, encourage judges to sentence eligible individuals to options other than just prison, where appropriate. We would also welcome the Commission’s addition of including probation eligibility explicitly on the sentencing table.

⁶ See USSC., *Figure 6: Sentence Type for Individuals*, U.S. Sent’g Comm’n Datafile (2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Figure06.pdf>.

⁷ *Id.* A very small number of people received split sentences.

⁸ USSC., *Proposed Amend. on Sentencing Options Pub. Data Briefing* at 7, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026-Sentencing-Options.pdf> (last visited Mar. 18, 2026).

⁹ Federal Public and Community Defenders, *Comment on Sent’g Options* at 15–18 (Mar. 2, 2026), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/woehr.pdf>.

¹⁰ USSC, GUIDELINES MANUAL, Ch. 5, Pt. A (Nov. 2025).

¹¹ Other commentators have also noted that the very structure of the Guidelines Manual contributes to imprisonment becoming the default sentencing option. See Federal Defender Sentencing Guidelines Committee, *Proposed Priorities for the 2025-2026 Amend. Cycle*, Comment to 2025-2026 Amend. Cycle, U.S. SENT’G COMM’N at 4 (July 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=118 (discussing the many ways the structure of Chapter Five solidifies prison as the norm and creates “a powerful cognitive effect anchored toward prison time.”). The proposed amendment’s changes to the structure of Chapter Five are a laudable first step toward changing this default presumption of incarceration.

We also want to be clear that probation is punishment.¹² Nothing in the revised table assures that any individual will receive probation as opposed to a term of imprisonment. Imprisonment will always be an option. However, together, these proposals can help make the possibility of probation more of a reality than the near guarantee of prison.¹³ Doing so not only comports to Congress’ vision but also promotes public safety.

The Proposed Amendments Advance Public Safety

By expanding opportunities for people to receive probation and stay in the community, the Commission is not just ensuring the Guidelines are in accord with the spirit of the law but is also advancing public safety.

Spending time in prison is harmful. This is particularly true in the current BOP. People are subjected to physical abuse, sexual abuse, and persistent lockdowns where programming and other services are unavailable. Medical care is regularly withheld while individuals are forced to live in environments that have crumbling infrastructure and are infested with mold. People also incur harm from being forced to leave their communities. They are alienated from family members and cut off from social service programs that help ensure their wellbeing.¹⁴ Some data has shown that even *one day* in custody can have lasting impact, let alone years in prison.¹⁵

¹² Probation is rigorous. People under supervision are expected to follow a set of rules, such as keeping appointments with probation or parole officers, maintaining employment, not using alcohol or other drugs, and paying required fees. Failure to follow the rules—referred to as technical violations—may result in revocation of the supervision and in some cases a term of incarceration. Jake Horowitz, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, PEW RSCH. CTR. (July 16, 2019), <https://www.pew.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations>. See also Dr. Shaneva D. McReynolds, Testimony at Pub. Hearing on Proposed Amend.’s to Fed. Sent’g Guidelines, U.S. SENT’G COMM’N (Mar. 9, 2026), <https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-9-2026> (discussing the onerous terms of supervision both her daughter and her husband were given for their respective federal offenses that Dr. McReynolds witnessed and experienced firsthand, for example, probation officers coming to their home and compliance checks during family gatherings).

¹³ See source cited *supra* note 6.

¹⁴ See Marta Nelson et al., *A New Paradigm for Sent’g in the U.S.*, VERA INST. OF JUST. (Feb. 2023) at 28–29, <https://vera-institute.files.svdcdn.com/production/downloads/publications/Vera-Sentencing-Report-2023.pdf?dm=1676058378> (explaining that incarceration breeds disruption and trauma that make communities less safe because “the loss of so many men in the prime of their lives destabilizes the neighborhoods they leave behind” and “[f]amilies lose providers, children lose parents, and people lose current and potential intimate partners” while “employers also lose employees, churches lose members, and neighborhood groups lose contributors”).

¹⁵ Brian Nam-Sonenstein, *Research roundup: Evidence that a single day in jail causes immediate and long-lasting harms*, PRISON POL’Y INITIATIVE (Aug. 6, 2024),

In her testimony to the Commission, Dr. Shaneva D. McReynolds courageously shared the experience of her own daughter who was facing time in prison for a federal criminal case but was instead sentenced to probation.¹⁶ According to Dr. McReynolds, the judge’s sentencing decision – probation, and not prison – actually helped her daughter heal. She was able to get a steady job, escape an abusive and manipulative partner, and strengthen her relationship with her family and her community. None of this would have been available to her had she been sentenced to prison. And worse yet, she likely would have suffered more had she been sentenced to prison time.¹⁷

It is no surprise then, that if people are sentenced to non-prison sentences, they tend to do better and so do their communities. This idea is not just supported by stories like that shared by Dr. McReynolds, but by quantitative data as well.

The Commission released data as part of this amendment cycle showing that the rearrest rates for individuals with non-imprisonment sentences were significantly lower as compared to individuals who were released from prison but were eligible for a sentence to probation.¹⁸ This dramatic difference in rearrest rates, 19% for people with non-imprisonment sentences compared to 42% for people with prison sentences who were probation eligible, underscores the reality that prison creates harm. People whose low criminal history categories and offense levels made them probation-eligible, but who were nonetheless sentenced to prison, recidivated at a rate of more than twice of that compared to those sentenced to non-imprisonment sentences. Why? As one researcher put it, “prison is painful, and incarcerated persons often suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others.”¹⁹ These conditions often lead to time in prison being “criminogenic” itself.²⁰

https://www.prisonpolicy.org/blog/2024/08/06/short_jail_stays/. We acknowledge that this discusses the impact of jail, not prison, but many of the issues raised about employment, health, housing, and government benefits apply to people in prison with equal force as to those in jail).

¹⁶ See McReynolds, *supra* note 12.

¹⁷ *Id.*

¹⁸ *Proposed Amend. on Sent’g Options Pub. Data Briefing*, *supra* note 8, at 8.

¹⁹ Katie Rose Quandt & Alexi Jones, *Rsch. Roundup: Incarceration can cause lasting damage to mental health*, PRISON POL’Y INITIATIVE (May 13, 2021),

<https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> (quoting professor Craig Haney, an expert on the psychological effects of imprisonment).

²⁰ “Prison itself can be a crime-creating environment” where “custodial sentences not only do not prevent reoffending, but they can actually increase it.” Marta Nelson et. al., *supra* note 14, at 29. Moreover, “[a]s data from the fallout of mass incarceration has accumulated, researchers have increasingly concluded that incarceration itself can be ‘criminogenic’—that the prison environment, separation from community, or even the process of returning to the community is so destabilizing that it increases the likelihood of continued encounters with the criminal legal system.” *Id.*

In oral testimony before the Commission on March 9, 2026, the Department of Justice and the Probation Officers Advisory Group (POAG) took the Commission's data²¹ and spun it on its head. According to the witness for the Department of Justice, Mr. Linder, this data shows that judges are succeeding and thoughtfully selecting cases appropriate for probation.²² But that is a twisted interpretation of the data. The data published by the Commission demonstrates that people who are probation eligible and sentenced to probation are far less likely to recidivate than people who are probation eligible and sentenced to prison, revealing that prison is the problem that dramatically impacts recidivism rates. Thus, are judges truly discerning those who can succeed on probation from similarly situated defendants, as DOJ asserts, or is judicial overreliance on prison causing more harm to people who could otherwise fare far better in the community than in custody? The data supports the latter.

And yet, the witness from POAG went as far as to say that the Commission's proposals could actually *increase* recidivism rates.²³ Mr. Luria, POAG's witness, testified that expanding home confinement for low-risk defendants will increase their contact with supervision and make it more likely that they will recidivate.²⁴ He also noted that "lengthy periods of home detention appear to have diminishing returns after six months, and more so past twelve months."²⁵ POAG and DOJ's comments are not supported by the Commission's data, and they are not even supported by the studies that they cite to in their own comments.²⁶ Their comments are also not

²¹ See source cited *supra* note 18.

²² Joshua Luria, Testimony at Pub. Hearing on Proposed Amend.'s to Fed. Sent'g Guidelines, U.S. SENT'G COMM'N (Mar. 9, 2026), <https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-9-2026>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 3:52:53.

²⁶ POAG relies on studies that encourage low-intensity supervision instead of high-intensity supervision to reduce recidivism, but never encourage incarceration. See, e.g., Thomas H. Cohen et al., *The Supervision of Low-Risk Fed. Offenders: How the Low-risk Pol'y Has Changed Fed. Supervision Practices without Compromising Comty. Safety*, FED. PROB. J. at 9 (vol. 80, no. 1, June 2019), https://www.uscourts.gov/sites/default/files/80_1_1_0.pdf. (explaining that "[l]ow risk [individuals] should be provided with minimal supervision services, because . . . correctional interventions aimed at reducing recidivism . . . can actually produce higher recidivism rates for this risk group." (citations omitted)); Haci Duru et al., *Does Reducing Supervision for Low-risk Probationers Jeopardize Comty. Safety?*, FED. PROB. J. at 21 (vol. 84, no.1, June 2020), https://www.uscourts.gov/sites/default/files/84_1_2_0.pdf ("The following study examines the relationship between supervision intensity and supervision outcomes . . . among low-risk [individuals]."). In their witness statement for the Sentencing Commission Hearing on March 9, 2026, the DOJ cites to a study with approval that actually opposes mass incarceration. See Nick Linder, *Sentencing Options* at 7, <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/linder.pdf>. The cited study calls for further study of "the problem of probation's impact on jail populations" so that jurisdictions may take "more targeted steps to reduce the use of jail for probation violations," which is "essential not only to reduce the number of people in jail, but also to reverse the trend of probation being used

supported by a recent real life “large-scale experiment.”²⁷

The clearest demonstration that probation rather than incarceration benefits society is the success of the individuals on CARES Act. In 2020, at the height of the pandemic, the CARES Act allowed the BOP to expand the eligible population for extended home confinement. Some people served terms of home confinement under CARES that were four or even five years long.²⁸ Of the over 12,000 people placed on home confinement during this time period, the recidivism rate was **less than 1%**.²⁹ It is impossible to square Mr. Luria’s and Mr. Linder’s statements with this recent data, which shows that people who are given more autonomy through non-custodial sentences like probation and home confinement actually succeed in the community.³⁰

It is clear from the stories and the data that more time in the community benefits public safety and the people who are impacted by the criminal justice system.

II. Proposed Amendment 2 – Career Offender

Last year, when the Commission was considering amendments to the career offender guideline, we wrote about Paul Fields. His story remains useful this year because it belies the image conjured by the label “career offender” and demonstrates the value of excluding prior state drug offenses from the career offender guideline.

Paul Fields illegally sold marijuana while he was traveling around the country following bands as a “deadhead.” Mr. Fields received a 15 ½ year sentence for growing 256 marijuana plants. He had zero history of violence. But, Mr. Fields was a “career offender” because he had two prior convictions for nonviolent drug offenses sustained in state courts. One of the convictions involved merely 34 grams of marijuana.³¹

as an [. . .] auxiliary of mass incarceration.” Alex Roth et al., *The Perils of Probation: How Supervision Contributes to Jail Populations*, VERA INST. OF JUST. (Oct. 2021) at 31 (calling for
²⁷ See Senator Corey A. Booker, *CARES Act Home Confinement: Three Years Later* (June 2023), https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf.

²⁸ *Id.* at 8. Many people who were released via CARES Act home confinement had lengthy prison sentences remaining on home confinement. But those sentences were commuted by President Biden at the end of his time in office. Walter Pavlo, *Biden To Commute Sentences Of Those On CARES Act Home Confinement*, FORBES (Dec. 12, 2024), <https://www.forbes.com/sites/walterpavlo/2024/12/12/biden-to-commute-sentences-of-those-on-cares-act-home-confinement/>.

²⁹ Booker, *supra* note 27, at 4.

³⁰ The contact with supervision that someone has on home confinement or probation is not to be understated – it is burdensome and significant. *See Gall v. United States*, 552 U.S. 38, 48 (2007) (explaining that people “on probation are nonetheless subject to several standard conditions that substantially restrict their liberty”) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)). However, this level of supervision is still far less burdensome and oppressive than the constant supervision that someone is subject to in prison.

³¹ *U.S. v. Paul S. Fields*, No. 2:10cr17, *Sentencing Memorandum* 2, ECF 12 (July 22, 2010).

At the time of sentencing, his defense counsel argued that “there has been no effort by the Sentencing Commission to grade [. . .] the felony offenses that will trigger the career offender status.”³² Counsel explained that as to Mr. Fields’ case:

a defendant previously convicted of possessing with the intent to distribute 34 grams of marijuana as one of two predicate offenses is punished for manufacturing over 100 marijuana plants just as severely as the defendant previously convicted of possessing with the intent to distribute 500 grams of cocaine as one of two predicate offenses.³³

This was particularly acute in a case like Mr. Fields’, whose two predicate convictions were in state court for possession of nominal amounts of marijuana. Those marijuana offenses “increase[d] by a factor of eight what he would otherwise be looking at with the current offense.”³⁴ Had Mr. Fields not been a “career offender” he would be serving no more than two years in prison; the “career offender” guideline added 13 years to his sentence.

Mr. Fields knew that he broke the law. He understood what he did was wrong. But the punishment did not fit the crime. President Obama agreed and commuted Mr. Fields’ sentence in January 2017.

Mr. Fields’ story is unfortunately quite common. A 2016 report from the Sentencing Commission reveals that many people convicted of drug offenses with nonviolent criminal records are punished under the career offender guideline, serving lengthy prison sentences that carry huge costs for taxpayers and do not serve the purposes of punishment.³⁵

The career offender directive has been around for a long time. What was originally conceptualized as a congressional amendment directing sentencing courts to impose a stiff penalty for “career criminals”³⁶ ultimately became a congressional directive to the Commission.³⁷ Thus, the Commission is obliged to provide for a guideline range “at or near” the statutory maximum for recidivists.³⁸ For some time now, the Commission has been wrestling with how to comply with this directive while also creating a fairer career offender guideline.³⁹ The Commission has observed that “in practice, determining which prior convictions should result in substantially increased sentences raises complex policy issues.”⁴⁰

³² *Id.* at *Sentencing Transcript*, ECF 21.

³³ *Id.* at *Sentencing Memorandum*, ECF 12 at 2.

³⁴ *Id.* at *Sentencing Transcript*, ECF 21.

³⁵ USSC, Report to the Congress: Career Offender Sentencing Enhancements (2016) (“2016 Career Offender Report”), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

³⁶ *See S. Rep. No. 98–225, at 175 (1983) reprinted in 1984 U.S.C.C.A.N. 3182; see also U.S. Sentencing Commission, Report on Career Offender 2016.*

³⁷ 28 U.S.C. § 994(h).

³⁸ 28 U.S.C. § 994(h).

³⁹ *See generally* 2016 Career Offender Report.

⁴⁰ *Id.* at 7.

The Commission's 2016 report demonstrated that the current career offender guideline misses the mark:

- Nearly 75% of all career offenders in 2014 were convicted of drug offenses;
- Because they spend so long in prison, career offenders make up 11% of the federal prison population;
- While they receive very long sentences, these sentences are often below those called for by the career offender guideline – only 27.5% of career offenders today receive the recommended career offender sentence; these reductions are often sought by the government;
- Career offenders who committed an instant or prior crime of violence have more serious and extensive criminal histories and commit crimes at a higher rate than career offenders with only drug trafficking offenses; and
- Federal law and the sentencing guidelines currently contain a variety of definitions of what constitutes a crime of violence or a violent felony, including for offender purposes. These different approaches lead to confusion in the application of laws that depend on the definitions.⁴¹

In the proposed amendments, the Commission advances several changes to the career offender guideline to address some of the underlying issues highlighted by this data, while remaining faithful to its statutory obligation.

Reform is necessary. Reform must begin from the understanding that the BOP is in crisis and making changes to the career offender guideline is critical as part of the Commission's statutory obligation, not just under section 994(h) but also under section 994(g). To this end, we urge the Commission to adopt changes to the career offender guideline only if those changes are likely to reduce the overall number of people who are subject to the stiff penalties that follow. Any proposal that increases the number of people who will receive a sentencing range under the career offender guideline should be rejected.

A. Crime of Violence definition

The Commission once again strives to find a workable solution to define “crime of violence” that responds to stakeholder feedback criticizing the complex categorical approach, while remaining dutiful to the Congressional directive. To this end, the Commission has proposed two options.

Option 1 would eliminate the use of the categorical approach in exchange for an approach based on how the offense is “labeled.” A list of offense labels is provided, with the understanding that this approach is overbroad but that the overbreadth will be addressed with exclusions and various limitations. Option 2 would use definitions to identify predicate state offenses by focusing on statutory offenses. The focus would be on whether the state statute of conviction meets the elements of an offense in the proposed definition, regardless of whether the state statute includes additional elements broader than the definition.

⁴¹ *Id.*

In both options proposed this year, the acknowledged concern is overbreadth – capturing more crimes than would otherwise be captured in the approach we currently have.⁴² Neither solution proposed is perfect, and both are perplexing. In some ways, we prefer to use the categorical approach, as it is a complexity that many system actors have taken time to understand. But in considering the two approaches and their potential consequences, we believe that the best path forward is Option 2 with meaningful prior-sentence exclusions.

The Federal Defenders have written to the Commission in its most recent submission dated March 18, 2026, asking for a significantly higher prior-sentence exclusion of five years. As the Federal Defenders argue, this exclusion will help ensure that non-violent conduct is excluded as a predicate offense. It will also help address some of the racial injustices that have plagued the career offender guideline.

The Federal Defenders are in the trenches fighting these cases every single day and are far better equipped than we are to know the intricacies of how predicate offenses align or misalign with the proposed statutory definitions. To that end, we support their comment and their approach to find a workable solution that addresses the concerns with the crime of violence definition, while not sweeping in far more people than necessary.

B. Changes to definition of “controlled substance offense” – eliminating prior state drug offenses

For some time now, the Commission has aimed to reduce the impact of the career offender guideline on drug offenses. In 2016, the Commission concluded that “drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.”⁴³ The Commission called on Congress to restructure the career offender directive, but Congress did not do so. That does not, however, mean the Commission is without options to narrow the impact of the career offender guideline on drug trafficking offenses.⁴⁴

Last year, the Commission proposed eliminating state drug offenses as a predicate for the career offender guideline, and this year it does so again in Option 1. We believe, as we said last year, that this is a smart proposal that achieves multiple goals. First, it reduces the reliance on state convictions that are not always a good proxy for culpability. Second, it responds to stakeholder concerns about complex application of the career offender guideline. Lastly, it resolves a circuit split.

⁴² *Supra* note 1.

⁴³ 2016 Career Offender Report at 27.

⁴⁴ *Id.*

- i. State drug offenses are not a good proxy for defining a “career offender”

In our experience, and as evidenced by Mr. Fields’ story, state drug convictions likely involve less serious drug offenses than those prosecuted at the federal level.⁴⁵ These state and local drug prosecutions often criminalize very small quantities of a controlled substance. As such, prior convictions for controlled substance offenses are not a good proxy for the people Congress intended to punish with the career offender directive.⁴⁶

Moreover, Congress did not direct that predicate offenses include state drug convictions. The directive refers to a drug predicate as “an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959), and Chapter 705 of Title 46.”⁴⁷ The Commission adopted state drug offenses although they are not referenced in the statutory directive.⁴⁸ Thus, the Commission has no obligation to include state drug offenses in the federal career offender guideline. This should be enough for the Commission to eliminate state drug priors. But there are also good policy reasons for doing so.

State drug convictions likely involve smaller quantities of drugs, and these offenses are more likely to sweep in people with a history of substance abuse. People with a history of substance abuse may find themselves repeatedly impacted by the criminal justice system because of a mental health condition, rather than an economic aim to traffic large quantities of drugs.⁴⁹

⁴⁵ See Alexi Jones & Wendy Sayers, *Arrest, Release, Repeat*, PRISON POL’Y INST. (Aug. 2019) (“Ultimately, our analysis confirms that people who are repeatedly arrested and jailed are arrested for lower-level offenses, have unmet medical and mental health needs, and are economically marginalized. Arrest and incarceration of these individuals neither enhances public safety nor addresses their underlying needs. Our findings underscore the need to redirect dollars wasted on repeatedly jailing people toward public services that prevent justice involvement in the first place: education, employment assistance, public health, medical and mental health services.”), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

⁴⁶ See USSC, *Fifteen Years of Guideline Sentencing, An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) (“The career offender guideline thus makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses”), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

⁴⁷ 28 U.S.C. § 994(h).

⁴⁸ For more detailed information on the Commission’s authority to exclude state drug offenses see Federal Defenders Comment to USSC, Controlled Substance Offense and Career Offender at 23 (March 2023).

⁴⁹ See *supra* note 40 (observing that over half of people arrested multiple times reported a substance use disorder compared to 36% of people arrested just once and 7% of people who were not arrested but reported a substance use disorder in the past year).

According to the 2016 Bureau of Justice Statistics, 49% of people in state prisons have a diagnosed substance use disorder, as compared to 31.8% in federal prisons.⁵⁰

Relying on state drug offenses also exacerbates the racial disparities that result from the career offender guideline. Surveys have demonstrated that drug use between black and white communities is roughly the same.⁵¹ People who use drugs often purchase drugs from people of their own race.⁵² And yet, 62% of people in state prisons for drug offenses are people of color.⁵³ Thus, when the federal guidelines incorporates state drug offenses, it is incorporating this “baked-in” racial disparity in state drug offenses.

Finally, augmenting a federal sentence based on a crime that was not punished at the federal level defies basic principles of federalism.⁵⁴ Surely Congress wanted the Guidelines to assure near-maximum sentences only for those with federal convictions where Congress has control over the federal legislative priorities. Moreover, relying on only federal drug convictions assures that federal prosecutorial standards were met for these convictions. State and local prosecution standards and practices vary by jurisdiction and incorporate unwarranted variance into a federal system that strives to be uniform.

- ii. Excluding state drug offenses would simplify application of the career offender guideline pertaining to controlled substance offenses and resolve a circuit split

Today, in a case with two predicate state controlled substance offenses and an instant offense that meets the career offender definition under §4A1.2, a court must undergo the categorical approach to determine whether the state controlled substance offenses can be used to increase the federal sentence.⁵⁵ Determining which state drug offenses can serve as a predicate for the career offender enhancement has taken a lot of time and resources away from all actors in the relevant cases. The Commission has received feedback about how complex the application of the career offender guideline has been.⁵⁶ Excluding state drug offenses directly responds to stakeholder concerns and eases the application of this guideline.

Finally, it has the benefit of resolving the circuit split. In recent years, an intractable circuit split has emerged over the question of whether the definition of “controlled substance

⁵⁰ Emily Widra, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More than they Treat It* (Jan 30, 2024), <https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use/>.

⁵¹ Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing* (Nov. 2023), <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *United States v. Townsend*, 897 F. 3d 66 at 71 (2d Cir. 2018) (discussing the *Jerome* presumption).

⁵⁵ See, e.g., *United States v. Descamps*, 570 U.S. 254 (2013).

⁵⁶ USSC, *Proposed Amendments to the Sentencing Guidelines* (2026).

offense” looks to federal law or to relevant state law.⁵⁷ Most recently, the Supreme Court denied certiorari in a case that could have resolved the split, because “[i]t is the responsibility of the Sentencing Commission to address this division.”⁵⁸ The Court recognized that “the resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants’ sentences.”⁵⁹ We agree. The split also results in conflicting sentencing guideline ranges across the country, something the Commission is instructed to avoid.⁶⁰

The Commission is well within its authority to exclude prior state drug offenses in the career offender enhancement. There are wise policy reasons for doing so. Moreover, eliminating the use of state controlled substance offenses has the benefit of resolving the circuit split. Finally, excluding state prior drug offenses simplifies the process and helps “ensure fair and uniform application of the Guidelines.”⁶¹ We supported this proposal last year and we support it once again. We hope that this is the year the Commission adopts this proposal, set out in Option 1.

III. Conclusion

FAMM thanks the Commission for considering our input on issues critical to federal sentencing.

Sincerely,



Shanna Rifkin
General Counsel

⁵⁷ Compare *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018), with *United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Henderson*, 11 F. 4th 713, 718-719 (CA8 2021); *United States v. Ward*, 972 F. 3d 364, 371-374 (CA4 2020); *United States v. Ruth*, 966 F. 3d 642, 651-654 (CA7 2020).

⁵⁸ See *Guerrant v. United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., along with Barrett, J., respecting the denial of certiorari).

⁵⁹ *Id.*

⁶⁰ 28 U.S.C. §994(f).

⁶¹ *Guerrant*, 142 S. Ct. 640.

March 18, 2026

Honorable Carlton W. Reeves,
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-800

Submitted Electronically

RE: January 2026 U.S. Sentencing Commission Proposed Amendment, LDF Comment on Proposal 2 Career Offender

Dear Judge Reeves:

This comment is submitted on behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”),¹ in response to the United States Sentencing Commission’s (“the Commission”) proposed January 2026 amendment to the career offender guideline specifically with respect to the definitions for “crimes of violence” and “controlled substance offenses”.

Founded in 1940 by Thurgood Marshall, LDF is the nation’s first and foremost civil rights law organization. LDF has a long history of challenging the arbitrary and pernicious influence of racial discrimination in the criminal legal system—as both counsel of record and amicus curiae—urging courts to acknowledge and combat convictions and sentences plagued by such discrimination.² LDF has focused on reducing the overrepresentation of Black communities in the criminal legal system and mitigating the subsequent harm that continued contact with this system causes.³ LDF has addressed specific concerns on the impacts of the federal criminalization of drug-related offenses⁴ and focused on increasing protections for vulnerable populations in criminal proceedings and at sentencing, particularly for youth. LDF has joined as amici in many of the landmark juvenile justice cases over the last few

¹ LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

² See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Buck v. Davis*, 580 U.S. 100 (2017); *Reed v. Goertz*, 598 U.S. 230 (2023) (as amicus); *United States v. Flores-González*, 86 F. 4th 399 (1st Cir. 2023) (same); *Commonwealth v. Dew*, 492 Mass. 254 (2023) (same); *Commonwealth v. Gelin*, No. SJC-13433 (Mass., argued Dec. 4, 2023) (same); *People v. Paredes*, No. SC-166129 (Mich., filed Dec. 12, 2023) (same).

³ *Id.*

⁴ See, e.g., Public Comment from LDF Re: 89 FR 44597, Docket No. DEA—1362, Proposed Rule on Marijuana Rescheduling Under the Controlled Substances Act to U.S. Drug Enforcement Admin. (July 22, 2024) (on file with LDF); Nigel Roberts, *Justice Department Adjusts Longstanding Drug Policy On Crack, Powder Cocaine To End Racial Disparities*, BET NEWS (Dec. 19, 2022), <https://www.bet.com/article/n77qwu/justice-department-adjusts-drug-policy-crack-powder-cocaine-sentencing-disparity> (quoting LDF President and Director-Counsel Janai Nelson on the harmful effects of disparate sentencing for cocaine offenses).

decades, including *Roper v. Simmons*,⁵ *Graham v. Florida*,⁶ *Miller v. Alabama*,⁷ and *Jones v. Mississippi*.⁸ Additionally, LDF continues to seek parole for individuals who were previously sentenced to juvenile life without parole sentences. Since its founding LDF, has always sought to achieve racial justice, equality, and an inclusive society.

Under the current *U.S. Sentencing Guidelines* (“the Guidelines”) Black individuals too often receive disproportionately severe punishment due to persistent anti-Black bias in the criminal legal system. Within the career offender guideline, even the Department of Justice has acknowledged a clear racial disparity in application of relevant punishment.⁹ Thus, it is crucial that any revisions to the Guidelines address how federal sentencing policies have long entrenched the deep-seated issues of racial disparity and contributed to mass incarceration in the United States, especially for individuals with career offender status.

LDF is encouraged by the Commission’s continued commitment to amend its Guidelines and include policy considerations that better reflect the principles of fairness, justice, and its core mission of ensuring uniformity in sentencing. The career offender guideline carries sentencing enhancements for defendants who: (1) are facing an instant offense that involves either a controlled substance or violent felony, and (2) have at least two prior felony convictions of a crime of violence or a controlled substance offense.¹⁰ The terms “crime of violence” and “controlled substance offense” are defined in Section 4B1.2 of the Guidelines.¹¹ Courts use the categorical approach to determine whether a prior conviction maintained a finding of guilt with respect to the required elements of the offense.¹² Below, we reflect on what opportunities the proposed amendments to the career offender guideline present in remedying the deep-seated systemic inequalities of racially disparate law enforcement and criminalization practices that have long plagued federal sentencing policy.

I. LDF Declines to Endorse Either Proposal for Crimes of Violence Amendment

LDF applauds the Commission’s goal of supplanting the categorical approach with alternative frameworks. However, echoing the concerns of stakeholders like the Federal Public and Community Defenders,¹³ LDF declines to endorse either amendment option for crimes of violence. At this time

⁵ 543 U.S. 551 (2005).

⁶ 560 U.S. 48 (2010).

⁷ 567 U.S. 460 (2012).

⁸ 593 U.S. 98 (2021).

⁹ DEPT. OF JUSTICE, Comment on the USSC’s 2023 Proposed Amendments at 27 (Feb. 27, 2023)

<https://www.justice.gov/criminal/media/1369096/dl?inline>

¹⁰ U.S. Sent’g Guidelines Manual §4B1.1(a). U.S. Sentencing Commission data from fiscal years 2020-2024 suggest that 40 percent of career offender defendants are sentenced below the guideline range, showing a consensus among judges that the guideline is overly punitive. U.S. Sent’g Comm’n, *Quick Facts: Career Offenders* 1 (2024), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career Offenders FY24.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career%20Offenders%20FY24.pdf) [hereinafter *Quick Facts*].

¹¹ §4B1.2(a), (b).

¹² *United States v. Taylor*, 496 U.S. 575 (1990).

¹³ *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines*, U.S. Sentencing Comm’n (Mar. 9, 2026) (testimony from Ms. Shelley Fite, Dep. Dir., Sent’g Res. Couns.) (at 1:06:30)

<https://www.youtube.com/watch?v=e3R3Fa5GA1w>.

because of the lack of uniformity with respect to how offenses are defined under state specific laws and federal statute, additional analysis on the options presented is needed to best understand the feasibility and avoid causing undue harm. Moving away from the categorical approach to the Commission's proposed amendments without enacting parallel reforms, or carefully examining the potential impact of changes, risks expanding the reach of the career offender guideline. While flawed, the categorical approach serves as a critical safeguard that limits the reach of the career offender guideline by excluding many state-level violent convictions, from being automatically classified as "crimes of violence" under the federal guidelines.¹⁴

II. Controlled Substance Offense Option One Creates Meaningful Reform

Amendment Option One would narrow the definition of controlled substance offenses by striking state drug offenses from the scope of its application. LDF's July 2026 comment urged the commission to explicitly exclude state-level offenses in consideration of this federal sentencing enhancement, thus are pleased to see this option. The criminalization of drugs in the United States has a long and racialized history. From the disproportionate policing of primarily Black and Latino communities, to the institution of mandatory minimums for drug offenses, and the establishment of the 100-to-1 sentencing disparity between crack and powder cocaine,¹⁵ state and federal drug laws have created a pipeline that funnels people of color into the prison system in mass.¹⁶ The career offender guideline for controlled substance offenses compounds this injustice by treating prior state-level drug convictions as predicates for enhanced federal sentences—despite the Commission's own research showing that people labelled as drug-only career offenders obtain future convictions at essentially the same rate as those without career offender status.¹⁷ In 2024, 59 percent of people designated as career offenders were Black and 16 percent were Hispanic.¹⁸ Today, the Commission has the opportunity to prune unwarranted sentencing enhancements that disproportionately impact people of color by adopting Option One for controlled substance offenses.

A. Counting State-Level Drug Offenses is Inconsistent with the Objectives of the Career Offender Guideline

¹⁴ See *Mathis v. United States*, 579 U.S. 500, 513 (2016) (holding that the "categorical approach" requires that a sentencing court look only to the elements of the statute of conviction, and therefore that courts may not decide whether to count a conviction by determining which of multiple alternative "means of commission" a defendant used to commit an offense, even if those means are listed explicitly in the statute of conviction); see also *Descamps v. United States*, 570 U.S. 254, 263 (2013) ("[T]he categorical approach's central feature [is] a focus on the elements, rather than the facts, of a crime.").

¹⁵ See, e.g., Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs>.

¹⁶ Alana Rosenberg, Allison K. Groves & Kim M. Blankenship, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. Drug Issues 132, 132–142 (2017) (demonstrating how practices in policing and sentencing drug-related offenses causes the disproportionate incarceration of Black people).

¹⁷ U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 40, (2016) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

¹⁸ U.S. Sent'g Comm'n, *Quick Facts: Career Offenders, Fiscal Year 2024*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY24.pdf; see also The Sent'g Project, Comment on "Career Offender" Guideline, U.S. Sent'g Comm'n (Feb. 3, 2025),

State-level drug offenses constitute the majority of predicate offenses for those designated as drug trafficking-only career offenders.¹⁹ Excluding these offenses, as Option One directs, would protect a large class of people from unwarranted sentence enhancements. The Commission recommends enhanced sentences for people designated as career offenders because they purportedly pose an elevated risk of future statutory violations.²⁰ However, this rationale does not apply to individuals who only have drug trafficking-related priors. Reports from the Commission find that people designated as career offenders based solely on drug trafficking-related offenses “are not meaningfully different from [non-career offender] drug-traffickers” in their rates of future convictions and therefore “do not categorically warrant” career offender status.²¹

Non-career offenders sentenced in federal prison have a 49 percent recidivism rate. 54 percent of people designated as career offenders based solely on drug trafficking-convictions pathway are rearrested. Comparatively, the recidivism rate for career offenders under the mixed-predicate-pathway and violent-only pathway is 69 percent.²² This lower rate of repeat convictions is particularly noteworthy because those designated under the drug-only pathway are the youngest among all three groups.²³ It is well established that youth is a strong predictor of an individual’s likelihood to reoffend upon release, and the age-crime curve suggests that people in the drug-only pathway should have the highest occurrence of future convictions. Yet, they have the lowest.²⁴ Those on the drug trafficking-only pathway also take the longest amount of time to reoffend among all groups designated as career offenders.²⁵ Further, the most common repeat offenses for people labeled as drug trafficking-only offenders are non-violent drug offenses.²⁶ By way of contrast, people designated as violent-only and mixed-predicate career offenders are most often rearrested for violent offenses.²⁷ Drug-related offenses are not meaningfully correlated with an individual’s likelihood to be arrested multiple times and do not predict future violent convictions. Considering that state-level drug convictions are the most common predicate offense for people designated as career offenders under the drug-only pathway, LDF strongly encourages the Commission to exclude state-level drug offenses in determining career offender status.

B. State-Level Drug Offenses are Marred with Racial Bias

The USSC’s own data confirms that compared to white people, Black people are also more likely

¹⁹ See *U.S. Sent’g Comm’n*, *supra* note 17, at 20 (showing that state drug offenses represent the vast majority of predicate offenses and their exclusion—grouped with other, less significant changes—would be the primary driver of a substantial reduction in the number of people designated as drug-only career offenders); see also Fed. Defender Comment on the U.S. Sent’g Comm’n’s 2023 Proposed Amendments on Circuit Conflict re: Controlled Substance Offense (Proposal 4B) and Proposals to Amend Career Offender Guideline (Proposal 6), at 22–25 (Mar. 14, 2023) (noting that most prior convictions are state convictions and that “eliminating state level drug convictions would go a long way toward the Commission’s larger goal of eliminating drug offenses entirely from the career-offender guideline”).

²⁰ See, 18 U.S.C. § 3553(a) (explaining that sentence length is determined, in part, due to a utilitarian desire to “protect the public from further crimes.” Adding that length should also scale according to the severity of an offense).

²¹ *U.S. Sent’g Comm’n*, *supra* note 17, at 26.

²² *Id.* at 40.

²³ *Id.* at 41.

²⁴ *Id.*

²⁵ *Id.* at 42. (Finding a median of 26 months to rearrest for individuals on the drug trafficking-only pathway, versus 20 months for those on the mixed predicate pathway, and 14 months for the violent-only pathway.)

²⁶ *U.S. Sent’g Comm’n*, *supra* note 17, at 42.

²⁷ *Id.*

to be arrested for identical drug conduct, charged with a felony rather than receiving diversion, and more likely to be convicted. Despite Black and white people selling drugs at similar rates, Black people are 360 percent more likely to be imprisoned for drug-related offenses. In some states, this disparity can climb to between 500 and 700 percent for marijuana related offenses.²⁸ In Montana, Kentucky, Illinois, West Virginia, and Iowa Black people were more than 700 percent more likely to be arrested for marijuana related offenses than white people.²⁹ For these offenses, Black people serve sentences 50 percent longer than white people.³⁰ Although Black and white people use drugs at similar rates, the disproportionate allocation of drug enforcement resources in communities of color—means that Black people are more likely to be arrested for drug-related offenses.³¹ Black people are 19 times more likely to be wrongfully convicted of drug-related offenses than white people.³²

In 2014, 60 percent of people designated as career offenders through the drug trafficking-only pathway were Black.³³ And yet, the career offender sentencing guidelines are required to “avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”³⁴ Considering the severe racial bias at play in the policing, enforcement, and conviction of state-level drug offenses, if the USSC retains career offender status for state-level drug offenses it will be seemingly impossible to uphold this goal. As such, LDF urges the Commission to consider eliminating career offender status for state-level drug convictions.

C. Eliminating State-Level Drug Offenses is Consistent with the Committee’s Current Concerns and Objectives

Stakeholders and members of the Criminal Law Committee hesitate to support Option One for crimes of violence because they fear that state-level discrepancies in classifying statutory offenses may lead to the unequal application of career offender status across the fifty states.³⁵ Importing that same logic to controlled substance offenses supports removing state-level drug convictions from consideration

²⁸ ACLU of Wis., *The State of Cannabis in Wisconsin* (2025), <https://www.aclu-wi.org/publications/cannabis/>; see also ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

²⁹ *Id.*

³⁰ This is relevant when considering the differences between controlled substance offense options 1 and 2. If the Commission enacts a variant of option 2, the sentence-length-based exclusions for drug offenses will disproportionately benefit white defendants.

³¹ See, e.g., German Lopez, *Black and White Americans Use drugs at similar rates. One group is punished more for it.*, VOX (Oct. 1, 2015), <https://www.vox.com/2015/3/17/8227569/war-on-drugs-racism>; The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT’G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> (finding that low-level drug offenses and misdemeanors stemming from overpoliced Black neighborhoods result in prior convictions that “accumulate disproportionately in communities of color.”).

³² Samuel R. Gross et al., Nat’l Registry of Exonerations, *Race and Wrongful Convictions in the United States 2022*, at 5 (Sept. 2022), <https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Updated%20CP%20-%20Race%20Report%20Preview.pdf>.

³³ *U.S. Sent’g Comm’n*, *supra* note 17, at 19.

³⁴ 28 U.S.C. § 991(b)(1)(B).

³⁵ *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines*, U.S. Sentencing Comm’n (Mar. 9, 2026) (testimony from Mr. Robert Zauzmer, Chief of Appeals, E.D. Pa.) (at 1:31:14) <https://www.youtube.com/watch?v=e3R3Fa5GA1w>.

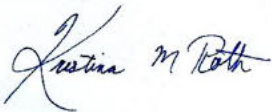
in career offender status. What counts as a felony drug conviction varies widely from state to state. What may be a predicate offense in one state may be a misdemeanor in another, or even entirely legal. The legality of cannabis illustrates this.

Although cannabis is a controlled substance under federal law, adult use of marijuana is either decriminalized or legalized, to some extent, in 38 states and the District of Columbia. Yet—despite its changing legal status—even simple state-level possession offenses can result in heightened federal sentencing. In 2021, prior marijuana possession sentences negatively impacted the criminal histories of 1,765 individuals. 42 percent of them were Black.³⁶ Practically all of their prior marijuana sentences (97 percent) were state-level convictions, with about 40 percent coming from states that had since changed their laws to either decriminalize or legalize cannabis possession.³⁷ Prior sentences for marijuana possession from these states resulted in higher criminal history calculations under the federal sentencing guidelines for 695 individuals.³⁸ These statistics reveal a concerning truth. People in federal trials are being designated as career offenders based on state-level convictions that the states themselves may no longer enforce or stand behind. Even two individuals of the same sex, race, and age facing identical federal charges may receive radically different sentences depending on where they have previously been convicted of offenses for drug-related activities. This is the exact scenario the sentencing guidelines were designed to prevent.³⁹

III. Conclusion

LDF commends the Commission for seeking to update definitions under the career offender guideline. Given persistent racial disparities people designated as career offenders and ever-changing state law moving in the direction of legalization of certain substances, LDF enthusiastically supports the Commission's proposal to narrow the definition of controlled substance offenses, eliminating state drug offenses which would make a meaningful reduction in people labeled as "career offenders". The opportunity to comment to the Commission on the January 2026 Proposed Amendments is greatly appreciated. Should you have any questions, do not hesitate to contact Senior Policy Associate Kristina Roth, at [REDACTED]

Sincerely,



Kristina Roth, Senior Policy Associate
Demetria McCain, Director of Policy

³⁶ U.S. Sent'g Comm'n, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System 3* (Jan. 2023), https://www.ussc.gov/sites/default/files/20230509_Marijuana-Possession.pdf.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Carly Knight, *High Time to Revisit Federal Drug Sentencing: The Confusing Interplay Between Controlled Substances and Career Offender Sentence Enhancements*, 39 GA. ST. UNIV. L. REV. 895 (2023).



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ANDREW S. BIRRELL
President

March 18, 2026

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

Re: Comments to the US Sentencing Commission on Proposed 2025-2026 Amendments

Dear Judge Reeves:

Thank you for the opportunity to present NACDL's comments on these important proposed amendments. This submission addresses the Sentencing Commission's proposed amendments regarding sentencing options and the career offender guideline. On the other proposed amendments and issues for comment not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

1. Proposed Amendment: Sentencing Options

NACDL is pleased to see the Sentencing Commission's consideration of sentencing options that are alternatives to incarceration.

Proposed Chapter Five Amendments Continue to Recognize that the Continuum of Punishment for Federal Offenders Does Not Begin and End with Incarceration

In January of this year, the Supreme Court recognized that imposing restitution upon an offender under the Mandatory Victim's Restitution Act of 1996 amounted to a "plainly criminal punishment, *Ellingburg v. United States*, 607 U.S. ___, 146 S.Ct. 564, 567 (2026) (since a criminal punishment, it is subject to *ex post facto* challenge). Today's proposed amendments to Chapter Five of the Sentencing Guidelines do not so much recognize probation and other non-incarceration alternatives as criminal punishments as they offer a reminder of the role non-incarceration played prior to the creation of the Sentencing Guidelines and the role they were intended to continue to play under them following the enactment of the Sentencing Reform Act of 1984 ("SRA").

That is, a probationary or other non-incarceration sentence once was a common—if not predominant—method of punishment in federal cases in the years leading up to the SRA and the implementation of the Guidelines in 1987:

<u>Year</u>	<u>Percentage of Defendants Receiving Probation/Other Non-Incarceration Sentences</u> ¹
1945	52.2%
1950	56.9%
1960	51.8%
1970	55.9%
1980	53.8%
1987	46.9%

Yet, in the years that followed, there was a significant drop-off:

<u>Year</u>	<u>Percentage of Defendants Receiving Probation/Other Non-Incarceration Sentences</u> ²
1996	19.2%
1999	16.4%
2002	14.1%
2005	12.1%
2015	9.8%

Indeed, some commentators have observed that even in the era of *Booker* (rendering the Guidelines “advisory”³) and *Gall* (which “reject[ed] an appellate rule that” circumstances had to “be ‘extraordinary’ ... to justify a sentence outside the Guidelines range” -- in this case, moving by variance from Zone D to probation⁴), “federal judges have imposed fewer probationary sentences in those cases where they have had wide discretion to do so.”⁵ Another found in 2015:

During the past ten years, rates of alternative sentences declined among U.S. citizen federal offenders who were eligible for such sentences despite 1) a steady overall increase in sentences below the guideline range due to downward departures or variances and 2) overall consistency in offense severity and criminal history among those offenders.⁶

These trends have taken place notwithstanding that, *on paper*, the Supreme Court continues to recognize the vitality of probation as a punishment alternative, on paper, remained in both the state and federal criminal justice systems.⁷ The Supreme Court has also reminded judges that probation

¹ See Brent E. Newton, *The Story of Federal Probation*, 53 Am.Crim.L.Rev. 311, 314-15 (2016) (summarizing data from respective years of the Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts).

² See *id.* (summarizing data from respective years’ United States Sentencing Commission Sourcebook).

³ *United States v. Booker*, 543 U.S. 220 (2005).

⁴ *Gall v. United States*, 552 U.S. 38, 47 (2007).

⁵ Newton, *supra*, at 342-43.

⁶ Courtney R. Semisch, U.S. Sentencing Comm’n, *Alternative Sentencing in the Federal Criminal Justice System* (2015).

⁷ See, respectively, *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (“Probation, like incarceration, is “a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.” ... [It] is simply one point (or, more accurately, one set of points) on a continuum of possible

is a real punishment and a substantial restriction on a person's liberty.⁸

And more importantly, these trends have continued despite requirements by Congress in the SRA that non-incarceration alternatives—especially for first-time offenders—remain viable under the Guidelines, per 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[.]⁹

Hence NACDL, as an organization representing the interests of over 10,000 criminal defense lawyers, on the one hand applauds the Commission for proposing to take a step in the right direction to enforce Section 994(j), to accomplish the goal of the Guidelines more broadly, to provide “a full range of sentencing options from which to select the most appropriate sentence in a particular case,”¹⁰ and to fulfill Congress's mandate of “the parsimony principle”¹¹—*i.e.*, that a the sentence reached is “sufficient but not greater than necessary ... to comply with the purposes set forth” in 18 USC § 3553(a)(2). Our collective experience at NACDL, however, leads us to conclude that an amendment of this sort is only going to be as effective as the buy-in—be it compulsory or otherwise -- from the actors assigned the responsibility to carry it out. Therefore, on the other hand, we ask whether Chapter Five requires a little bit more of an impetus or “nudge” to all the parties than how the amendment appears in its current form in order to make it happen.

This Proposal has the Potential to Level the Sentencing & Punishment Playing Fields

The proposed amendments to Chapter Five expand from 58 to 83 the number of sentencing range combinations (“cells”) that present the possibility of at least a split sentence by expanding the reaches of Zones B and C (along with maintaining the scope of Zone A).

That notwithstanding, the Guidelines as applied currently retain the structure (and therefore impact) of Chapter Five being a somewhat passive recipient of a “points-based” system—driven by Chapters Two through Four of the Guidelines—that serves as the starting point for determining the sentence for a convicted offender. *See* Chapter Five, *Introductory Comment* (“Chapter Five sets forth the steps used to determine the applicable sentencing range based upon

punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.)(internal citations omitted) *and Gall, supra* 552 U.S. at 48-49 (“We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.”).

⁸ *Gall*, 552 U.S. at 48-49.

⁹ 28 U.S.C. § 994(j) (2012).

¹⁰ S. Rep. No. 98-223, at 35 (1983).

¹¹ *See, e.g., United States v. Rossignol*, 780 F.3d 475, 479 n.5 (1st Cir. 2015) (stating that the parsimony principle is “the ‘statutory directive that sentences should be no higher than necessary to achieve the statutory goals of sentencing’”); *United States v. Lacy*, 99 F. Supp. 2d 108, 119 (D. Mass. 2000) (“The Sentencing Guidelines mandate the parsimony principle: I am obliged to assign a sentence ‘sufficient, but not greater than necessary’ to comply with the purposes of sentencing.”).

the guideline calculations made in Chapters Two through Four.”) These figures—especially when stacked by, for example, upwards of twenty-plus Specific Offense Characteristics (*see* §2B1.1(b))—can quickly send this starting point soaring into a Zone D, incarceration-only starting (and likely ending) point. Too commonly, therefore, the burden is shifted first and foremost to the defense attorney to employ persuasion to attempt to reduce the sentence

The potential benefit of the proposed amendments to Chapter Five in their current form is a renewed recognition that incarceration is a point *along* the continuum of punishment rather than as a presumptive starting point. In turn, these amendments have the potential to make it *both* the defense’s *and* the government’s job to follow the aforementioned “parsimony principal.” In other words, the proposed amendments can help create a healthier environment for advocacy and more just sentencing outcomes by making it *as much incumbent upon the government* to make the argument as to why incarceration is the appropriate/only appropriate sentence, *as it is upon the defense* to make the argument why a non-incarceration or “split” sentence makes more sense.

Sentences within Zones A through C should begin with a presumption of a non-carceral or split sentence

To make this a reality, however, NACDL posits that further changes in Chapter Five should be made. It is a good starting point in the proposed § 5A1.1(b) language that “courts should consider which [sentencing] option(s) will best meet the purposes of sentencing and the needs of the individual defendant.” This should be combined with the *statutory* requirements of finding the setting that is “sufficient but not greater than necessary” to do so. Therefore, NACDL proposes Chapter Five further require that the least restrictive punishment option (be it probation, a split sentence, *etc.*) be the starting point for sentences with Guidelines scores that fall within Zones A through C. Moreover, the burden should be upon the government to establish that something more restrictive than a non-incarceration or split-sentence is necessary. (The exclusions to probation set forth in § 5B1.1(b) would, for such cases, carry the government’s burden.) The defense, of course, would then have the opportunity to rebut.

While ultimately it is the job of the district court to reach the “sufficient, but not greater than necessary” sentence, by dint of the structure of the Guidelines, it has *de facto* become the job primarily of the defense counsel to convince the court to take the step of (not reviewable) downward departure¹² or (reviewable) variance to go from a sentence of incarceration to a less restrictive punishment. And it is defense counsel who must, from the start, battle back against what should be considered “relevant conduct” which, in turn, can affect offense level and specific offense characteristics determinations alike. (Even if the defense is successful in doing so, the taint of now-deemed “irrelevant” conduct continues to reverberate in the sentencing atmosphere.)

It is within the purview of the Commission to introduce such a structural change, not just as part of its mission is to “promulgate ... guidelines ... for use of a sentencing court in determining [among other things] ... whether to impose a sentence to probation, a fine, or a term of

¹² *E.g., United States v. Angeles-Moctezuma*, 927 F.3d 1033, 1037 (8th Cir. 2019) (denial of a departure is not reviewable unless the trial court incorrectly believed that it lacked the authority to depart or the district court had an unconstitutional motive).

imprisonment -- 28 U.S.C. § 994(a)(1)(A) -- but also to make “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in” 18 U.S.C. 3553(a)(2) and 28 U.S.C. § 994(a)(2). In other words, the Commission has the authority to provide a structure within which judges don’t just make the sentencing decision, but also to provide a pathway suggesting (albeit advisory) how to get there. *See* 28 U.S.C. § 991(b)(1) (it is the Commission’s job to “establish sentencing policies *and practices* for the Federal criminal justice system that (A) assure the meeting of the purposes of sentencing ... [and] (2) develop means of measuring the degree to which the sentencing ... practices are effective in meeting the purposes of sentencing[.] ”)

Moving Toward Increased Access to Non-Incarceration Sentence Also May Improve Services and Conditions *Inside* the Bureau of Prisons

Finally, reducing the federal prison population, where appropriate, may assist in broader goals of improved sentence and post-sentence outcomes. Last year, the Justice Department Office of the Inspector General reported that it has “long identified management issues affecting the federal corrections system as a major challenge” facing the Department.¹³ The “most critical” of the challenges at BOP are staffing shortages, deteriorating infrastructure and the introduction of contraband, followed by deficiencies in the provision of healthcare to inmates and sexual abuse of inmates¹⁴. These problems do not make for a recipe of improving rehabilitation chances or post-incarceration outcomes, including reduced recidivism rates -- for those offenders whose punishments are entirely accomplished by/in federal detention.

2. Proposed Amendment: Career Offender

Introduction

NACDL appreciates that the Commission remains focused on improving the career offender guideline.¹⁵ As detailed below, the career offender guideline drives overincarceration and inequities in federal sentencing; it is very worthy of reform.

The Sentencing Commission’s own data consistently shows that, although only one-fifth to one-quarter of federal defendants are Black, they constitute more than half of defendants designated as career offenders.¹⁶ And defendants sentenced under the career offender guideline—again, the

¹³ U.S. Department of Justice Office of the Inspector General, *Top Management Challenges Facing the Department of Justice 2025*, at 2-3.

¹⁴ *Id.*

¹⁵ *See, e.g.*, U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf.

¹⁶ *See, e.g.*, Paul J. Hofer et al., U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [hereinafter, *Fifteen Years*]

majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.¹⁷

These disparities are unsurprising, given that the career offender guideline effectively bakes in systemic inequities that resulted in those prior convictions, particularly at the state level. Black communities and other communities of color face systematic and ongoing discrimination at every level. For example, Black people are more likely to have prior qualifying convictions in part because of overpolicing in their communities: “Police officers are more likely to stop [B]lack and Hispanic drivers for investigative reasons,” and “[o]nce pulled over, people of color are more likely than whites to be searched, and blacks are more likely than whites to be arrested.”¹⁸ In some jurisdictions, like Ferguson, Missouri, “these patterns hold even though police have a higher ‘contraband hit rate’ when searching white versus black drivers.”¹⁹ As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.²⁰

(showing that, in fiscal year 2000, Black people constituted 26% of defendants sentenced under the federal guidelines, but 58% of those subject to the career offender guideline); compare U.S. Sentencing Commission, *Quick Facts: Career Offenders 1* (2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2012] (showing that, in fiscal year 2012, Black people constituted 61.9% of those subject to the career offender guideline), with U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tbl. 4 (2013), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table04.pdf> (showing that, in fiscal year 2013, only 20.6% of federal defendants were Black); compare U.S. Sentencing Commission, *Quick Facts: Career Offenders 1* (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY24.pdf [hereinafter, *Quick Facts* 2024] (showing that, in fiscal year 2024, Black people constituted 59.1% of those subject to the career offender guideline), with U.S. Sentencing Commission, *Interactive Data Analyzer*, <https://ida.ussc.gov/analytics/saw.dll?Dashboard> (showing that in fiscal year 2024, only 24.5% of federal defendants were Black); U.S. Sentencing Commission, *Proposed Amendment on Individuals Sentenced under §4B1.1 Career Offender: Public Data Briefing* (Feb. 2026), <https://www.ussc.gov/education/videos/2026-career-offender-data-briefing> (59% of individuals sentenced under §4B1.1 in Fiscal Year 2024 were Black).

¹⁷ U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements 2* (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (noting that people sentenced under the career offender guideline were “sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months)”). “As a result of these lengthy sentences, career offenders [at the time of the report] account[ed] for more than 11 percent of the total BOP population,” *id.*, even though people sentenced under the career offender guideline “have consistently accounted for about three percent of the total federal offender population sentenced each year,” *id.* at 18 fig. 1; see also *id.* at 24. Due in part to these lengthy sentences, Black people constitute 38.9% of people incarcerated in federal prison right now. Federal Bureau of Prisons, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Jan. 18, 2025).

¹⁸ See, e.g. Nazgol Ghandnoosh, The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 4 (2015), <https://www.sentencingproject.org/app/uploads/2022/08/Black-Lives-Matter.pdf> [hereinafter, *Black Lives Matter*]; see also *Fifteen Years*, *supra* n.16, at 134.

¹⁹ *Black Lives Matter*, *supra* n.18, at 4.

²⁰ In 2005, Black people “represented 14 percent of current drug users, yet they constituted 33.9 percent

Moreover, Black and poor people are more likely to have pleaded guilty to a prior charge because of the coercive aspects of many state-level bail systems, and the difficulties in securing competent counsel in states with significantly overburdened public defender systems.²¹ These two features of many state-court systems reinforce one another. As the United States Commission on Civil Rights reported, 96% of all felony defendants who are held pretrial would be released if they had the means to post monetary bail—but 90% were unable to post it.²² The Commission further explained: “Research consistently shows Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants.”²³ One study has concluded that “pretrial detention resulted in a 40 percent difference in the Black-white sentencing gap and 28 percent in the Latinx-white sentencing gap,”²⁴ perhaps due in part to the fact that “similar felony pretrial detainees were more likely to plead guilty by 10 percentage points.”²⁵

During these long periods of pre-trial incarceration, defendants may face several collateral consequences, including the loss of a job, loss of housing, or loss of custody of their children.²⁶ In such circumstances, a defendant may plead guilty to an offense pursuant to a deal that would let them out with time served—not realizing that even though they did not serve an additional sentence, the offense itself could have imposed a punishment of more than a year, and thus qualify as a predicate felony conviction later on.

Because these inequities become baked into the career offender guideline, the result is significant overincarceration that in turn falls most heavily on Black defendants. As of fiscal year 2012, nearly 63% of career offenders would have had a criminal history category below VI

of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense.” Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, American Bar Ass’n (Oct. 1, 2010), <https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/have-we-overcome-obstacles-to-racial-equality.pdf>. This discrepancy is particularly salient to the career offender context, as the overwhelming majority—78.2% in fiscal year 2023—of defendants receiving the guideline enhancement are being sentenced for drug trafficking offenses. U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, tbl. 26 (2023), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table26.pdf>.

²¹ See, e.g., Radley Balko, *The states of indigent defense: part one*, THE WATCH (Oct. 30, 2023), <https://radleybalko.substack.com/p/the-states-of-indigent-defense-part>; Radley Balko, *The states of indigent defense: part two*, THE WATCH (Apr. 17, 2024), <https://radleybalko.substack.com/p/the-states-of-public-defense-part>. Mr. Balko has released the first two parts of an intended report on the state of indigent defense in all 50 states.

²² U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail 3* (Jan. 2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf>.

²³ *Id.* at 33–34.

²⁴ *Id.* at 52.

²⁵ *Id.* at 51.

²⁶ See, e.g., Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>; Emily Yoffe, *Innocence is Irrelevant*, The Atlantic (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>; see also U.S. Commission on Civil Rights, *supra* n.22, at 53–54.

had the career offender provision not applied;²⁷ that remains true in fiscal year 2024.²⁸ Moreover, “[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores.”²⁹ Among defendants who would have been placed in criminal history categories II or III absent their career offender designation, the average guideline minimum was increased by 84 months after the career offender provisions were applied.³⁰

The long-standing pattern³¹ of federal judges choosing to sentence defendants with career offender sentencing enhancements below the guidelines range demonstrates the widespread recognition that the augmented penalties are too severe. In its December 2020 report, the Commission noted a “steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases,” which “demonstrates a continuing decline in the guideline’s influence.”³² Section 4B1.1 therefore “has among the lowest within-guideline rates each year.”³³

The Sentencing Commission’s data also confirms that there is no public safety reason to impose these career offender enhancements. One analysis, for instance, found that a model predicting days until recidivism showed a statistically significant difference between each criminal history category to which the defendants would have been assigned, absent the career offender enhancement.³⁴ The Commission therefore concluded that “assigning offenders to criminal history category VI, under the career criminal or armed career criminal guidelines, is for reasons other than their recidivism risk.”³⁵

²⁷ *Quick Facts* 2012, *supra* n.16, at 1.

²⁸ *Quick Facts* 2024, *supra* n.16, at 1 (59.2% of career offenders would have had a criminal history category below VI had the career offender provision not applied).

²⁹ *Report to the Congress*, *supra* n.17, at 21.

³⁰ *Id.* One study that worked to quantify the degree of overincarceration resulting from the career offender guideline analyzed cases in which defendants who had been sentenced under the residual clause of the career offender guideline were resentenced after the court of appeals governing their jurisdiction held (or assumed) that the guideline’s residual clause was invalid. A review of eight defendants (across eight different circuits) showed their sentences were collectively reduced by 288 months (or more than twenty-four years)—an average of three fewer years imprisonment for each. *See* Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in Beckles v. United States*, 165 U. Pa. L. Rev. Online 33, 35, 38 (2016).

³¹ *See, e.g.*, *Quick Facts* 2012, *supra* n.16, at 2 (chart); *Quick Facts* 2024, *supra* n.16, at 2 (chart); *see also Report to the Congress*, *supra* n.17, at 23 (“[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.”).

³² U.S. Sentencing Commission, *The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes, 2005-2017*, at 54 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf. For example, “the proportion of career offenders receiving a sentence within the applicable guideline range decreased from 43.3 percent in 2005 to 27.5 percent in 2014.” *Id.* at 55.

³³ *Id.* at 55.

³⁴ U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

³⁵ *Id.*

The disconnect between the career offender enhancement and recidivism risk is particularly pronounced for people whose prior qualifying convictions were for controlled substance offenses. In one Commission study, a “preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI”: indeed, the Commission concluded, “[t]he recidivism rate for career offenders [based on prior drug offenses] more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules.”³⁶

The Commission has therefore previously recommended that Congress amend its directive to “no longer includ[e] those who currently qualify as career offenders based solely on drug trafficking offenses,”³⁷ recognizing that the “normal operation of Chapter Four’s criminal history provisions adequately accounts for likelihood of recidivism and future criminal behavior of those [defendants] who are currently deemed to be career offenders, but who have not committed an instant or prior offense that is a ‘crime of violence.’”³⁸

NACDL is ready and willing to further contribute to this discussion as the Commission considers how to change the career offender guideline. Should this comment not touch on any of the Commission’s Issues for Comment, NACDL agrees with and incorporates the Federal Defenders’ comments.

Advantages and Disadvantages of Current Approach and Proposed Approaches

While imperfect and sometimes odd in its application,³⁹ the categorical and modified categorical approach has a major benefit: it is “under-inclusive by design,” and helps prevent some of the worst excesses of the career offender guideline.⁴⁰ NACDL remains fearful that some changes moving away from the categorical and modified categorical approach will increase the use of the career offender guideline.⁴¹ The racial disparities detailed above, taken together with the lack of evidence that the imposition of the career offender enhancement reduces recidivism or improves public safety, strongly caution against any action that would expand its reach. In addition, certain changes may create significant administrative difficulties in implementation, including mini-trials or other time-intensive stages, to prove that the career offender guideline applies.

³⁶ *Fifteen Years*, *supra* n.16, at 134 (emphasis in original).

³⁷ *Report to the Congress*, *supra* n.17, at 3.

³⁸ *Id.* at 44.

³⁹ See U.S. Sentencing Commission, 2026 Proposed Amendments: Career Offender at 1, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202601_prelim-RF.pdf (“Synopsis of Proposed Amendment,” referencing some opinions discussing odd results).

⁴⁰ *Borden v. United States*, 593 U.S. 420, 442 (2021).

⁴¹ See NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf; NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.

Other thoughts on the advantages and disadvantages of the current proposals as compared to the categorial and modified categorial approach are included below.

Crime of Violence

In light of the above, NACDL is uneasy with the Commission's proposal that would admittedly revise "crime of violence" "in an overbroad manner."⁴² The Commission's view is that "necessary and critical exclusions" will then be applied on the backend "[t]o counteract this overbreadth."⁴³ This is the exact opposite of the categorial and modified categorial approach which is narrow by design and at least limits some of the guideline's worst excesses.

The Commission's Data Brief bears out this concern, with several hundred additional defendants presumptively included under the revised federal definition, and over 1,000 more included under the expanded revised federal definition.⁴⁴ More concerning is the lack of available data on how the changes to state offenses would affect the number of defendants swept up into the career offender guideline. NACDL's uneasiness is especially pronounced here where data shows the career offender penalty is already applied in a racially disparate manner.

Practical concerns arise as well. The amount of time, effort, and evidence needed for the parties to prove or disprove what type of injury occurred, what was intended, and/or what *mens rea* the defendant had during the event to get out from under the new presumption could be significant.⁴⁵ Doing so could turn sentencing hearings into mini-trials, with concerns about unproven or acquitted conduct being utilized, the defendant needing to testify, and/or the standard of proof only being a preponderance standard.

Defense attorneys would consistently attest that criminal penalties that begin as overly punitive are not later ratcheted down. Flipping the presumption from the narrow categorial and modified-categorial approach to an overbroad presumption is not a welcome shift. If the Commission is intent on flipping the presumption, the single best limit it could add is a time served limitation, but with a time served of 13 months, matching §4A1.1(a), instead of either 30 or 60 days as proposed. Such a change would provide a meaningful limit on the seriousness of prior conduct swept in, better mirroring Congress's intent for the law to only capture the most serious offenders.

⁴² U.S. Sentencing Commission, 2026 Proposed Amendments: Career Offender at 17, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202601_prelim-RF.pdf.

⁴³ *Id.*

⁴⁴ Quick Facts 2024, *supra* n.16, at 1 (1,280 in FY 2024); U.S. Sentencing Commission, *Proposed Amendment on Individuals Sentenced under §4B1.1 Career Offender: Public Data Briefing* (Feb. 2026), <https://www.ussc.gov/education/videos/2026-career-offender-data-briefing> (1,650 in proposed definition and 2,342 in expanded definition).

⁴⁵ U.S. Sentencing Commission, 2026 Proposed Amendments: Career Offender at 25, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202601_prelim-RF.pdf.

Controlled Substance Offense

Fears regarding the overapplication of the guideline detailed above are particularly pronounced in drug cases where the defendant may have old predicates that render their current non-violent offense deserving of an extremely long penalty. Option 1 is therefore encouraging because it finally limits the guideline to the Congressionally-required boundary.⁴⁶ That respects Congress' requirements regarding which drug offenders should be included without unnecessarily risking overinclusion and the racially disparate impact that follows. Removing state predicates would be an especially important step towards limiting these perverse outcomes given the unfair structure and outcomes state defendants face in drug cases.

If the Commission is inclined to choose Option 2, then Suboption 2C, which limits prior convictions to time served, is best, with Suboption 2A still an improvement. Regardless of the Suboption chosen, a five-year limit helps raise the floor substantially and avoids sweeping in the types of convictions that drive the current expansiveness of the guideline.

3 and 4. Proposed Amendments on §4B1.2(b) and Human Smuggling

NACDL has no specific comments on these proposed amendments but agrees with the comments submitted by the Federal Defenders.

Conclusion

NACDL once again thanks the Commission for this opportunity to present our comments on the proposed amendments in this cycle.

Respectfully Submitted,

Andrew S. Birrell
President, NACDL

Ramon "Ray" de la Cabada
Treasurer, NACDL

Lisa M. Wayne
Executive Director, NACDL

Joel D. Schwartz
Member, NACDL White Collar Committee

JaneAnne Murray
Co-Chair, NACDL Sentencing Committee

Trevor Parkes
Counsel & Project Director, NACDL First
Step Act Resource Center

Nathan Pysno
Director, NACDL Economic Crime &
Procedural Justice

⁴⁶ 28 U.S.C. § 994.



March 18, 2026

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

RE: Expansion of Zones B and C of the Sentencing Table

Dear Judge Reeves and Fellow Commissioners:

On behalf of REFORM Alliance, a national organization that focuses exclusively on community supervision policies and practices around the country, we respectfully submit the following comment in response to the U.S. Sentencing Commission's proposed amendment regarding the Expansion of Zones B and C of the Sentencing Table.

Introduction

At REFORM Alliance, we aim to transform community supervision by changing laws, systems, and culture to create real pathways to meaningful second chances. We believe that a justice system that holds people accountable and redirects them back to work and wellbeing leads to safer communities. Instead of watching people cycle in and out of prison through a revolving door of supervision and incarceration – which costs taxpayers millions of dollars – we are working to move people from correctional control to freedom and stability.

We work at all levels of the system, from county departments to state and federal government, and even internationally. We partner with local coalitions and public safety stakeholders, including law enforcement, employers, survivors of crime, directly impacted advocates, and thought leaders in all arenas to champion evidence-based policy solutions that make communities stronger and safer. REFORM's policies consistently prioritize common-sense supervision solutions that hold people accountable, incentivize pro-social behavior, and encourage success and rehabilitation, all while strengthening families and making communities safer. A core function of REFORM's mission is our commitment to bipartisanship: every policy that we advance is supported by a bipartisan coalition. Even at the height of political polarization, we have found bipartisan consensus on probation and parole reforms by centering our solutions on public safety and community stability.

Since our founding in 2019, REFORM has built and led community coalitions to pass 22 bills in 12 states, including: California, Michigan, Louisiana, Virginia, Florida, Georgia, Mississippi, New York, New Jersey, Illinois, and Pennsylvania. These 22 bipartisan bills in 12 states have created pathways for more than 850,000 people to exit the system, marking a measurable step forward to safely transition people out of the criminal legal system and set them up for lasting success in their communities.

Supervision's Role in the Current System

Over the last century, the use of community supervision has expanded significantly throughout the United States. Today, supervision represents the largest portion of the country's correctional system.

Approximately 3.7 million individuals are under some form of community supervision, such as probation or parole, compared to about 1.8 million individuals who are incarcerated in prisons and jails. This shift reflects a growing recognition among policymakers and researchers that well-designed supervision in the community can hold individuals accountable while avoiding many of the economic, social, and public safety costs associated with incarceration. As jurisdictions have increasingly relied on probation and other community-based sanctions, supervision has become a central mechanism through which courts promote rehabilitation, manage risk, and support successful reintegration.

Unlike many state systems, however, federal courts rely relatively sparingly on probation as a stand-alone sentence. Instead, federal sentencing practices frequently emphasize incarceration followed by a term of

supervised release. As a result, probation plays a more limited role in the federal system than in many state systems. In FY 2024, only 7% of prosecuted cases in the federal system received a “probation only” sentence. Another 1.2% of cases received probation in addition to other alternatives.¹ Statutory and guideline limitations have historically constrained federal courts’ ability to use probation in certain circumstances. As a threshold matter, federal law categorically bars probation for defendants convicted of Class A or Class B felonies, eliminating judicial discretion regardless of the defendant’s individual circumstances.² The U.S. Sentencing Guidelines reinforce these constraints by limiting probation to cases falling within the lowest sentencing ranges. Under U.S.S.G. §§ 5B1.1 and 5C1.1, probation is generally available only in Zones A and B of the sentencing table, while defendants in Zones C and D must receive at least some term of imprisonment.³ These structural limitations make the Commission’s proposed amendments, particularly those expanding Zones B and C, an important opportunity to broaden the range of sentencing options available to federal judges and better align federal sentencing practices with contemporary evidence about effective alternatives to incarceration.

Commission’s Proposed Amendments

At the end of January 2026, the United States Sentencing Commission proposed amendments to the United States Sentencing Guidelines that would expand Zones B and C of the sentencing table. The proposed changes would increase the range of sentencing options available to judges for defendants whose guideline ranges fall within these zones. By expanding Zones B and C, the amendments would allow courts to impose alternatives to incarceration in a broader set of cases.

Under the current guidelines, Zone B includes sentencing ranges from 1–7 months to 9–15 months of imprisonment. In this zone, courts may substitute probation for imprisonment if the probation sentence includes a condition of confinement such as home detention, community confinement, or intermittent confinement. Courts may also impose a “split sentence,” where a short term of imprisonment (at least one month) is followed by supervised release with a confinement condition, or they may impose imprisonment alone. Under the proposed amendments, an expanded Zone B would authorize these sentencing options for guideline ranges from four to 57 months for defendants in Criminal History Category I, and from one to 18 months for defendants in all other criminal history categories.

Zone C currently includes sentencing ranges from 10–16 months to 12–18 months of imprisonment and allows courts to impose a split sentence requiring imprisonment for at least half of the minimum guideline range, with the remaining portion served on supervised release with conditions such as home detention or community confinement. Courts may also impose imprisonment alone. Under the proposed amendments, an expanded Zone C would allow these sentencing options for significantly longer sentencing ranges. Specifically, Zone C would apply to ranges from 51 to 108 months for defendants in Criminal History Category I, from 15 to 24 months for defendants in Criminal History Categories II through IV, and from 15 to 21 months for defendants in Criminal History Categories V and VI.

Expansion of Probation and Other Alternatives to Incarceration

REFORM Alliance supports the proposed expansion of Zones B and C, as it would meaningfully increase access to alternatives to incarceration for federal defendants. Expanding Zone B to cover sentencing ranges from four to 57 months for Criminal History Category I, and from one to 18 months for other criminal history categories, along with expanding Zone C to the proposed ranges for various criminal history categories, aligns with the principles of risk- and needs-based sentencing. Research consistently demonstrates that lower-risk defendants benefit most from structured community supervision rather than incarceration. Studies comparing prison sentences with non-prison sanctions have found that incarceration often produces no better, and in some cases worse, recidivism outcomes than community-based alternatives such as probation.⁴

¹ [2024 Annual Report](#)

² [18 U.S. Code § 3561 - Sentence of probation](#)

³ [Guidelines | United States Sentencing Commission](#)

⁴ [Recidivism Outcomes Under a Shifting Continuum of Control | American Journal of Criminal Justice | Springer Nature Link](#)

Moreover, a comprehensive report by the National Academy of Sciences concluded that incarceration has little deterrent effect on crime rates and that excessive reliance on imprisonment can produce destabilizing consequences for individuals and communities that undermine long-term public safety.⁵ Similarly, research conducted by the National Institute of Justice reviewing multiple empirical studies found that incarceration generally does not reduce recidivism more effectively than community-based sanctions and may increase the likelihood of reoffending for some individuals.⁶

Evidence from the United States Sentencing Commission further reinforces these findings within the federal system. In its study examining the relationship between incarceration length and recidivism among federal offenders, the Commission found no statistically significant deterrent effect for incarceration terms of 60 months or less, suggesting that longer prison sentences within this range do not meaningfully reduce reoffending.⁷ These findings are particularly relevant to the sentencing ranges implicated by Zones B and C. Taken together, this body of research demonstrates that structured community supervision can provide accountability while avoiding many of the destabilizing effects of incarceration.

Guidance for Newly Eligible Defendants

The proposed expansion introduces new sentencing options for defendants who previously were limited by zone restrictions. If adopted, current Zone C defendants would, for the first time, be eligible for probation with conditions of confinement, while current Zone D defendants would be eligible for split sentences. REFORM Alliance recommends that the Commission provide clear guidance to courts on how to implement these new options safely and consistently, with an emphasis on holistic, evidence-based supervision.

Effective community supervision requires a focus on the individual's overall rehabilitation and stability. Guidance should encourage courts to consider factors including the defendant's criminal history, assessed risk and criminogenic needs, and ties to employment and family among other factors. Sentencing decisions, including those around confinement conditions, should prioritize interventions and conditions that promote accountability while supporting reintegration, such as employment support, educational opportunities, and access to treatment programs, rather than imposing a number of conditions that do not serve the rehabilitative needs of the person under supervision, bear little to no nexus to public safety, and ultimately increase the risk of violation. Onerous supervision conditions undermine success and result in unnecessary, expensive incarceration for technical violations. Research shows that supervision conditions bring little benefit when they are focused on rote compliance rather than promoting individual growth and development.⁸ Indeed, a recent study on federal supervision conditions estimated that each additional condition decreased the chances of successful supervision compliance by 19%.⁹

Courts should also ensure that the length of supervision is in line with best practices and is not needlessly long. Evidence suggests that supervision terms longer than two years yield diminished returns and supervision terms longer than five years can actually be *harmful*, with non-criminal technical violations causing significant disruptions to community and familial stability.¹⁰

By embedding these principles into guidance for newly eligible defendants, the Commission can ensure that the expanded sentencing options in Zones B and C promote accountability and public safety without undermining long-term reintegration and rehabilitation outcomes.

⁵ [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#)

⁶ [FIVE THINGS ABOUT DETERRENCE](#)

⁷ [Length of Incarceration and Recidivism | United States Sentencing Commission](#)

⁸ Arthur Rizer et al., "Realigning Probation with Our Values," *National Affairs*, 47 (Spring 2020). <https://nationalaffairs.com/publications/detail/realigning-probation-with-our-values>.

⁹ DeLisi, M., Drury, A., & Elbert, M. (2021). Who are the compliant correctional clients? New evidence on protective factors among federal supervised releases. *International Journal of Offender Therapy and Comparative Criminology*, 65, 1536-1553. The total number of conditions in this study ranged from 0-18, with an average overall of 5.98. When split into groups, those who were compliant on supervised release had an average of 5.49 conditions and those who were non-compliant had 6.93.

¹⁰ [To Safely Cut Incarceration, States Rethink Responses to Supervision Violations | The Pew Charitable Trusts](#)



Consistency Across Criminal History Categories

The expansion of Zones B and C may result in situations where defendants with identical guideline ranges are subject to different sentencing options depending on their criminal history category. REFORM Alliance supports this approach because it aligns sentencing options with the rehabilitative potential and risk profile associated with different criminal history categories. Community supervision and split sentences are most effective when tailored to the individual, rather than applied uniformly solely based on guideline range. Concerns about fairness or policy inconsistencies can be mitigated through evidence-based risk and needs assessments, structured supervision plans, and carefully calibrated confinement conditions. This flexibility allows judges to impose sentences that are proportionate, individualized, and aligned with public safety objectives. By linking sentencing options to criminal history categories, the Commission can preserve judicial discretion, support rehabilitation, and maintain accountability while ensuring that supervision-based sentences are used effectively.

Conclusion

Probation, when guided by evidence-based practices, provides both accountability and opportunity for rehabilitation. It allows individuals to remain in the community, maintain employment, support their families, and participate in treatment or programming – all at a fraction of the cost of incarceration. Expanding Zones B and C under the Sentencing Guidelines would make these alternatives available to more defendants, giving judges greater flexibility to impose supervision-based sentences where appropriate, reduce unnecessary imprisonment, and promote long-term stability and public safety.

We are grateful to the U.S. Sentencing Commission for its thoughtful consideration of these issues through engagement of advocacy organizations, academics, judges, and supervision officers. REFORM Alliance welcomes the opportunity for continued engagement with the Commission on the topic of supervision so that we may advance our shared goals in the rehabilitation of individuals on supervision and the improvement of public safety outcomes.

Sincerely,

A handwritten signature in black ink that reads "Sha Sanders". The script is fluid and cursive, with a stylized "S" and "A".

Shá Sanders
Legislative Manager
REFORM Alliance



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

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

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

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



March 18, 2026

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

Re: The Sentencing Project Comment on Proposed Amendments to the Sentencing Guidelines (Sentencing Options, Career Offender, and Human Smuggling)

Dear Chairman Reeves:

The Sentencing Project appreciates this opportunity to comment on the Commission's proposed amendments for the amendment cycle ending May 1, 2026. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just, equitable sentencing policies.

The Commission's proposed amendments for comment period span some of the most consequential and frequently applied provisions of the Guidelines. Across all three, we urge the Commission to be guided by the evidence: that incarceration is overused, that the Guidelines have long reflected a structural bias toward prison sentences that Congress did not intend, and that the individuals most burdened by unnecessarily punitive guidelines are disproportionately Black and Latino. We support the proposed Sentencing Options amendments and urge the Commission to extend them further. We urge the Commission to narrow the career offender guideline's predicate offenses and resist expanding its reach. And we encourage the Commission to decline to expand the human smuggling guideline. This amendment cycle offers the Commission a meaningful opportunity to bring the Guidelines closer to what Congress intended, and justice demands — a sentencing system that is proportionate, equitable, and not reflexively punitive.

I. Sentencing Options: The Commission Should Adopt Part A and Part B and Go Further

The Sentencing Project supports the proposed amendment on Sentencing Options and we urge the Commission to go further to guide judges toward more proportionate and evidence-based sentences. Part A would add new introductory commentary to Chapter Five, emphasizing the court's ability to choose between sentence types and the role of non-imprisonment sentences. It would also create a new guideline at §5A1.1, providing courts with guidance on how to select the sentence type before selecting length and conditions. Part B would significantly expand Zones B and C of the Sentencing Table, which cover non-imprisonment and split sentences. The proposed expansion of these zones is a welcome development, though one that should extend further than the proposal currently reaches.

Part A

Part A's new introductory commentary and the creation of §5A1.1 are necessary to guide courts toward more parsimonious sentencing, to align the Guidelines with the Sentencing Reform Act (SRA)'s intent, and reduce the burden on the federal Bureau of Prisons.

Before the Guidelines took effect in 1987, roughly half of all sentenced federal defendants received non-prison sentences; by 2015, that figure had fallen to about one in ten, where it remains today.¹ One factor that shaped the Guidelines' emphasis on prison sentences was the Commission's decision when developing the guidelines to only study cases that resulted in imprisonment and went to trial, according to Melissa Hamilton, professor of law and criminal justice at the University of Surrey. In turn, the Guidelines did not reflect sentencing norms, only prison sentencing norms — creating a structural bias in the Guidelines towards incarceration.² The result was far more prison sentences than necessary for public safety at significant cost to individuals, families, communities, and taxpayers. Part A's amendments are a necessary corrective.

Part A's new introductory commentary and §5A1.1 better align the Guidelines with the SRA by reminding courts that Congress explicitly declined to establish a presumption in favor of imprisonment. Rather, the Sentencing Reform Act makes clear that probation is a significant sanction capable of serving the purposes of sentencing in many cases.³ Congress instructed the Commission to “insure [sic] 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.”⁴

Part A's amendments are also a small step toward addressing the dangerous and deteriorating conditions within federal prisons. For several years the Bureau of Prisons has faced a seemingly intractable and worsening crisis of staffing and infrastructure that has compromised its ability to safely house the individuals already in its custody.⁵ Conditions are so poor in some facilities that some federal judges have already taken the step of reducing sentences and, in some cases, refusing to designate defendants to federal facilities at all. As Judge Jesse Furman of the Southern District of New York observed in January 2024, it had become “routine” for judges to “give reduced sentences to defendants based on the conditions of confinement” at the Metropolitan Detention Center in Brooklyn — with prosecutors no longer even contesting that “the state of affairs is

¹ Newton, B. E., & Sidhu, D. S. (2017). The history of the original United States Sentencing Commission, 1985–1987. *Hofstra Law Review*, 45, 1167; U.S. Sentencing Commission. (2024). *2024 sourcebook of federal sentencing statistics* (Figure 6). <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Figure06.pdf> (89.1% received an imprisonment-only sentence; 2.4% received a sentence of imprisonment and alternatives).

² Hamilton, M. (2014). Prison-by-default: Challenging the federal sentencing policy's presumption of incarceration. *Houston Law Review*, 51, 1271, 1290.

³ 28 U.S.C. § 994 (stating that the duties of the Commission include creating guidelines for “a determination whether to impose a sentence to probation, a fine, or a term of imprisonment”).

⁴ 28 U.S.C. § 994 (1984).

⁵ U.S. Department of Justice, Office of the Inspector General. (2025). *Top management and performance challenges facing the Department of Justice — 2025*. <https://oig.justice.gov/sites/default/files/2026-01/TMPC-2025.pdf>

unacceptable.”⁶ The Commission cannot fix the Bureau of Prisons, but it can help reduce the number of people unnecessarily sent there.

Finally, we suggest a minor language change to better align both Part A and Part B with post-*Booker* sentencing.⁷ *Booker* makes clear that only federal statutes can “authorize” sentence ranges. As such, we suggest that throughout the Guidelines the text make explicit that it “recommends,” rather than does or does not “authorize” sentence ranges. After decades of reflexively treating incarceration as the default, courts need as much explicit prompting as possible to recall that they have a wealth of discretion to sentence more holistically, proportionately, and justly.

Part B

We applaud Part B's proposed expansion of Zones B and C, but urge the Commission to extend that expansion further into higher Criminal History Categories. Under the current guidelines, Zone B recommends a minimum sentence of probation, provided that the minimum term of imprisonment specified in the guideline range is “satisfied by a period of intermittent confinement, community confinement, or home detention.” Zone C recommends a minimum sentence of a “split sentence” of imprisonment, in which at least one-half of the minimum term specified in the guideline range is satisfied by a term of supervised release, community confinement, or home detention. The proposed expansion of the zones would significantly expand Zones B and C for individuals who have no or minimal criminal history — extending the upper limit of Zone B from offense level 11 to offense level 23 and extending the upper limit of Zone C from offense level 13 to offense level 29. For individuals with more criminal history, it would more modestly expand the zones upwards by one or two offense levels in each criminal history category.⁸

Criminal history is a limited predictor of risk, and reflects racial disparities in which communities are most policed, how cases are charged, and which pleas are offered. As such, criminal history enhancements reinforce and deepen racial disparities.⁹

Scholars have critiqued the significant role that criminal history plays in sentencing in the United States compared to other western democracies.¹⁰ Among other recommendations, Richard Frase, emeritus professor of law at the University of Minnesota, and Julian Roberts, emeritus professor of criminology at the University of Oxford, suggest dramatically reducing the magnitude of enhancements — compressing sentence ranges for offenses between the lowest and highest

⁶ Weiser, B. (2024, January 4). Judge refuses to send defendant in drug case to troubled Brooklyn jail. *The New York Times*. <https://www.nytimes.com/2024/01/04/nyregion/brooklyn-judge-mdc-jail.html>.

⁷ *United States v. Booker*, 543 U.S. 220 (2005).

⁸ U.S. Sentencing Commission. (2026, January 30). *Proposed amendments to the sentencing guidelines* [Reader-friendly version]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

⁹ Hester, R., Frase, R. S., Roberts, J. V., & Mitchell, K. L. (2018). Prior record enhancements at sentencing: Unsettled justifications and unsettling consequences. *Crime and Justice*, 47(1), 209–254. <https://doi.org/10.1086/695400>.

¹⁰ Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46(1), 441–504. <https://doi.org/10.1086/688456>; Roberts, J. V. (2013). Punishing persistence: Explaining the enduring appeal of the recidivist sentencing premium. *Punishment & Society*, 15(4), 384–401. <https://www.jstor.org/stable/23639532>; Vega, C., Solter, A., Kwon, S., & Isaac, D. M. (2012). *Cruel and unusual: U.S. sentencing practices in a global context*. University of San Francisco School of Law, Center for Law and Global Justice.

criminal history categories.¹¹ Michael Tonry, emeritus professor of law at the University of Minnesota and past advisor to several sentencing commissions, recommends that criminal histories not account for more than one-third of sentence lengths overall.¹² And for sentences 10 years or longer, The Sentencing Project recommends that criminal records should account for no more than 10% of sentence lengths.¹³

Without a more robust expansion into higher Criminal History Categories, the Commission's proposed zone changes risk amplifying rather than moderating the role that criminal history plays in federal sentencing. The disparity is stark: at offense level 23, a defendant with minimal criminal history could receive a non-prison sentence, while a defendant with 13 or more criminal history points could face a recommended sentence of over nine years — a gap driven substantially by prior record rather than the nature of the offense itself.¹⁴ The Commission should seize this opportunity to ensure that the expansion of Zones B and C promotes more parsimonious sentencing across the full range of criminal history categories, rather than reserving its benefits primarily for those with the most limited records.

II. Career Offender Guideline: The Commission Should Eliminate State Drug Offenses and Limit the “Crimes of Violence”

We appreciate the Commission's repeated efforts to revisit the career offender guideline and find an approach which addresses stakeholder concerns regarding overincarceration and racial disparities, as well as the challenges of the categorical approach. The career offender guideline's harm can only be reduced, not remedied, because it is the product of a directive from Congress to impose a term of imprisonment at or near the maximum term for individuals who are convicted of a crime of violence or a controlled substance offense after two prior felony convictions for those crimes. The career offender guideline has been widely criticized by practitioners, judges, and by those who must serve the lengthy, disproportionate, and racially disparate sentences that it can yield — particularly given that it applies more broadly than the directive requires.¹⁵ As discussed above, criminal history is a limited and racially skewed predictor of risk. The career offender guideline effectively compounds the inequities embedded in prior convictions; convictions that disproportionately reflect overpolicing of Black and Latino communities, coercive plea practices, and overburdened public defender systems rather than the relative culpability or dangerousness of

¹¹ Frase, R. S., & Roberts, J. V. (2019). *Paying for the past: The case against prior record sentence enhancements*. Oxford University Press.

¹² Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46(1), 441–504. <https://doi.org/10.1086/688456>; Reitz, K. R. (2025). Tonry's blueprint for the comparative study of sentencing law and policy. *Criminal Law Forum*, 36, 233–250. <https://doi.org/10.1007/s10609-025-09502-9>.

¹³ Ghandnoosh, N., Boxerman, B., & Barry, C. (2026). *Re-punished for the past: How criminal records increase prison terms and racial injustice*. The Sentencing Project. <https://www.sentencingproject.org/reports/re-punished-for-the-past-how-criminal-records-increase-prison-terms-and-racial-injustice/>.

¹⁴ U.S. Sentencing Commission. (2026, January 30). *Proposed amendments to the sentencing guidelines* [Reader-friendly version]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

¹⁵ See U.S. Sentencing Commission. (2016). [Report to Congress: Career Offender Sentencing Enhancements](#); U.S. Sentencing Commission. (2023). *Sample of public comment on proposed amendments* [Public comment compilation on proposed amendments, 88 Fed. Reg. 7180 (Feb. 2, 2023)]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

the individual before the court. While roughly one quarter of all federally sentenced individuals in FY24 were Black,¹⁶ nearly 60% of those subject to the career offender guideline were Black.¹⁷

In our February 3, 2025 letter we urged the Commission to prioritize two principles: that given the career offender guideline’s draconian penalties and racially disparate impact, the Commission should not expand the impact of the guideline and the guideline should be revised in a manner to reduce racial disparities as much as possible.¹⁸ Accordingly, we recommended that the definition of “controlled substance offense” in the federal career offender guideline be revised to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The Commission now again proposes eliminating the categorical approach and various means of defining “crime of violence” and “controlled substance offense.”

4B1.2(a) - “Crimes of violence” should be defined as narrowly as possible

The Commission’s first option for a definition of a crime of violence would eliminate the categorical approach for state offenses by listing presumptive violent offenses. This approach avoids the complexity of matching statutory elements but is likely to be both over- and under-inclusive of offenses given the enormous variation in how states define crimes.

The Commission’s second option for a definition of a crime of violence involves matching the elements of state offenses with federal offenses, but without some of the limits of the categorical approach and the Commission offers multiple language options. Given the severity of the career offender guideline, however, the narrowness and at times under-inclusiveness of the categorical approach serves a protective function — its limiting effect is a strength, not a shortcoming.

Additionally, for either definition, the Commission proposes failsafes to rebut the presumption that an offense qualifies as a crime of violence, with options in bracket: “(i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison; (ii) the acts for which the defendant is criminally liable [did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant’s conduct during the commission of the offense was limited to reckless or negligent conduct.”

The complexity of these approaches makes it difficult to assess the likely impact of each option on incarceration. And critically, the Commission’s data briefing offers no racial impact estimate.¹⁹

¹⁶ U.S. Sentencing Commission. (2024). *2024 annual report*. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024-Annual-Report.pdf>.

¹⁷ U.S. Sentencing Commission. (2025). *Quick facts: Career offenders*. <https://www.ussc.gov/research/quick-facts/career-offenders>.

¹⁸ The Sentencing Project. (2025, February 3). *Comment on the “career offender” guideline* [Public comment submitted to the U.S. Sentencing Commission]. <https://www.sentencingproject.org/app/uploads/2025/03/TSP-Career-Offender-Comment-Final.pdf>.

¹⁹ U.S. Sentencing Commission. (2026). *Proposed amendment on individuals sentenced under §4B1.1 career offender: Public data briefing*. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026_Career-Offender.pdf.

The career offender guideline is already one of the most draconian components of the Guidelines; we urge the Commission to not widen its reach. As such, The Sentencing Project opposes ending the categorical approach to “crimes of violence,” absent more evidence that alternatives will not increase the application of the guideline.

Should the Commission nonetheless move forward with one of these approaches, we urge it to include a robust failsafe that imposes meaningful limitations on which state offenses qualify as “crimes of violence.” Those limitations should include a minimum *mens rea* of at least recklessness and prior sentence consistent with a felony-level offense: at minimum, more than a year served in prison. Incorporating actual, intended, or risk of serious bodily injury into the failsafe is likewise essential to ensure that the guideline captures only conduct serious enough to warrant punishment at the upper end of the sentencing range.

Furthermore, the Commission should provide specific guidance regarding state offenses that may encompass low-level conduct with minimal risk to public safety. Robbery may include conduct as minor as shoving someone and taking their backpack.²⁰ Arson can include minor fires causing property damage without injury — fires that research indicates are often set by individuals experiencing psychosis or acute homelessness, acting out of psychiatric compulsion rather than predatory intent.²¹ Requiring use of a dangerous weapon or serious bodily injury as a prerequisite would screen out many state robbery offenses that do not reflect the kind of serious, dangerous conduct the career offender guideline was designed to reach. Similarly, for arson offenses, requiring culpable *mens rea* would reduce the risk of overbroad application. The severity of the career offender guideline demands that its predicate offenses be defined with precision and that precision requires considering more than a statutory label to determine whether it is a “crime of violence.”

4B1.2(b) - “Controlled substance offenses” should exclude state drug offenses

As discussed in our prior comment, we urge the Commission to narrow “controlled substance offenses” to exclude state drug offenses.²² When state drug offenses serve as predicate offenses under the career offender guideline, substantial arbitrariness follows. The reasons are numerous: state-controlled substance laws diverge from federal law, sometimes sweeping in substances that federal law does not reach and, in the case of marijuana, producing stark inconsistencies from state to state.²³ Statutory felony quantity thresholds are not uniform across states.²⁴ Even within a single state, charging decisions and plea bargaining practices can vary dramatically. The result is a

²⁰ See, e.g., N.Y. Penal Law § 160.05 (McKinney 2024).

²¹ Anwar, S., Långström, N., Grann, M., & Fazel, S. (2011). Is arson the crime most strongly associated with psychosis? A national case-control study of arson risk in schizophrenia and other psychoses. *Schizophrenia Bulletin*, 37(3), 580–586. <https://doi.org/10.1093/schbul/sbp098>; Geller, J. L., McDermeit, M., & Brown, J. M. (1997). Psychiatric aspects of arsonists. *Journal of Forensic Sciences*, 42(3), 477–480. <https://pubmed.ncbi.nlm.nih.gov/10432607/>.

²² The Sentencing Project. (2025, February 3). *Comment on the “career offender” guideline* [Public comment submitted to the U.S. Sentencing Commission]. <https://www.sentencingproject.org/app/uploads/2025/03/TSP-Career-Offender-Comment-Final.pdf>.

²³ Knight, Carly. (2023). [High time to revisit federal drug sentencing: The confusing interplay between controlled substances and career offender sentence enhancements](#). 39 *Georgia St. Univ. L. Rev.* 895.

²⁴ See Ohio Criminal Sentencing Commission. (2018). [50 state low-level drug possession review](#).

guideline whose application turns less on the nature of the conduct than on the fortuity of where a defendant was prosecuted.

Excluding state drug offenses would address both of these problems. Uniformity in the guideline's application would improve significantly, including the resolution of “controlled substance offense” circuit split.²⁵ And the population subject to the career offender designation solely on the basis of drug trafficking offenses would downsize; an appropriate outcome given that this group presents a considerably lower risk of reoffending than the guideline's severity implies. The Commission has recognized as much, previously calling on Congress to amend its directive to exclude those who qualify as career offenders based solely on drug trafficking offenses, noting that the guidelines' existing criminal history rules are sufficient to capture their recidivism risk.²⁶

We also encourage the Commission to narrow the definition of a “controlled substance offense” to only the federal drug offenses listed in the statutory directive, limiting the application of the career offender guideline further. Were the Commission to maintain the current definition of a “controlled substance offense,” we urge the Commission to limit its application to convictions for which the defendant served a minimum of five years in prison,²⁷ not including revocation sentences.

The career offender guideline has exacted an enormous cost — on individuals, on families, and on the credibility of a sentencing system that aspires to proportionality. The Commission should meet that record with narrower predicates, meaningful failsafes, and a commitment to ensuring that the guideline's reach is commensurate with its severity.

IV. Human Smuggling: The Commission Should Not Increase the Severity of §2L1.1

The proposed amendment to §2L1.1, the human smuggling guideline, would create additional enhancement tiers based on the number of individuals smuggled, add a new enhancement for especially dangerous transportation methods such as concealment in trunks or engine compartments, and introduce or expand enhancements for cases involving bodily injury, sexual assault, and transnational criminal organizations. Human smuggling guideline pertains to offenses under 8 U.S.C. §1324(a) and §1327 related to “bringing in and harboring certain aliens” and “aiding or assisting certain aliens to enter” the United States.²⁸ The human smuggling guideline is

²⁵ The Commission requests comment on how to resolve the circuit splits over two questions related to “controlled substance offenses” under §4B1.2(b): (1) whether a “controlled substance offense” under §4B1.2(b) is limited to substances controlled under the federal Controlled Substances Act or extends to substances controlled only under state law; and (2) which temporal version of the applicable drug schedule — federal or state, and as of what date — governs whether a prior conviction qualifies as a predicate offense. The result is that defendants with identical criminal histories may or may not qualify as career offenders depending solely on the circuit in which they were sentenced. Eliminating state drug offenses will fully resolve both circuit splits. U.S. Sentencing Commission. (2026, January 30). *Proposed amendments to the sentencing guidelines* [Reader-friendly version]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

²⁶ U.S. Sentencing Commission. (2016). *Report to Congress: Career offender sentencing enhancements*.

²⁷ The Sentencing Project. (2025, February 3). *Comment on the “career offender” guideline* [Public comment submitted to the U.S. Sentencing Commission]. <https://www.sentencingproject.org/app/uploads/2025/03/TSP-Career-Offender-Comment-Final.pdf>.

²⁸ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1. <https://www.ussc.gov/guidelines/2025-guidelines-manual>.

among the most frequently applied in the federal system: in fiscal year 2024, approximately 4,350 individuals were sentenced under §2L1.1, accounting for roughly one in four federal immigration-related criminal cases.²⁹ The Department of Justice requested that the Commission revisit this guideline based in part on smuggling data from 2021 through 2023, a period of historically elevated border crossings that does not reflect current conditions.³⁰ Unauthorized border crossings have since dropped sharply, reaching their lowest levels in decades.³¹ The data also suggest that courts already regard the guideline as sufficiently severe. In FY2024, the average sentence imposed, 15 months, fell below the average guideline minimum of 17 months, and downward variances outnumbered upward variances by more than four to one (13.2% versus 3.0%).³² There is no need to make §2L1.1 more severe.

The Department of Justice cited the deadliest migrant smuggling case in U.S. history – the tragic 2022 tractor trailer smuggling conspiracy in San Antonio which claimed the lives of 53 migrants — as an illustration of the need for more severe penalties under §2L1.1.³³ Lengthy sentences, however, are already recommended by the guidelines for the most egregious human smuggling cases and applied by the courts. The maximum penalty in a human smuggling case that results in death is the death penalty.³⁴ For example, of the defendants sentenced for the 2022 San Antonio case to date, both were convicted of three counts related to the transportation of aliens within the United States resulting in death, causing serious bodily injury, and placing lives in jeopardy and one received a life sentence and the other a term of 83 years.³⁵ The guidelines can adequately address the most extreme cases already.

The guidelines fail, however, to mete out proportional punishment in more routine cases. The Commission should reform rather than expand §2L1.1(b)(7), the specific offense category (SOC) that imposes tiered level increases when bodily injury or death occurs. The (b)(7) SOC grew out of a far narrower Congressional directive, which instructed the Commission to enhance punishment for a defendant who “murders or otherwise causes death, bodily injury, or serious bodily injury to an individual.” Instead, today, like felony murder liability — itself a widely

²⁹ U.S. Sentencing Commission. (2024). *Quick facts: Alien smuggling*. <https://www.ussc.gov/research/quick-facts/alien-smuggling>.

³⁰ U.S. Department of Justice. (2025). *[Comment on proposed priorities for the amendment cycle ending May 1, 2026]* [Public comment submitted to the U.S. Sentencing Commission]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=93.

³¹ U.S. Customs and Border Protection. (n.d.). *Southwest land border encounters* [Data set]. Retrieved March 13, 2026, from <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; U.S. Customs and Border Protection. (2025, November 5). *DHS delivers historic start to border crossings for FY 2026*. <https://www.cbp.gov/newsroom/national-media-release/dhs-delivers-historic-start-border-crossings-fy-2026>.

³² U.S. Sentencing Commission. (2024). *Quick facts: Alien smuggling*. <https://www.ussc.gov/research/quick-facts/alien-smuggling>

³³ U.S. Department of Justice. (2025). *[Comment on proposed priorities for the amendment cycle ending May 1, 2026]* [Public comment submitted to the U.S. Sentencing Commission]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=93.

³⁴ U.S. Department of Justice. (n.d.). *1907. Title 8, U.S.C. 1324(a) offenses* [Justice Manual, Criminal Resource Manual]. <https://www.justice.gov/archives/jm/criminal-resource-manual-1907-title-8-usc-1324a-offenses>.

³⁵ U.S. Department of Justice, Office of Public Affairs. (2025, June 27). *Smuggling leader and top coordinator will spend remainder of their lives in prison following their sentencing on third anniversary of deadly tractor-trailer smuggling conspiracy* [Press release]. <https://www.justice.gov/opa/pr/smuggling-leader-and-top-coordinator-will-spend-remainder-their-lives-prison-following-their>.

criticized doctrine³⁶ — (b)(7) contains no *mens rea* requirement and no requirement that the defendant's own conduct caused the harm.

A defendant may even face a ten-level increase for a death to another migrant caused by a responding officer or for injuries that result from a law enforcement vehicular pursuit.³⁷ For example, Esteban Gaspar-Felipe led a group of 13 fellow migrants on foot for nine nights through the Rio Grande into Texas. After crossing the border, the migrants split into two vehicles, neither of which Mr. Gaspar-Felipe was driving. A high-speed vehicular pursuit by Border Patrol ensued and Border Patrol fired on one of the vehicles, resulting in the death of one of the migrants. Mr. Gaspar-Felipe was convicted by a jury of illegally reentering the United States and for “transportation of illegal aliens,” but acquitted of an enhancement for criminal conduct resulting in death. Mr. Gaspar-Felipe was 50 miles away at the time of the fatal shooting. The judge, however, found him responsible for the death, and increased Mr. Gaspar-Felipe’s sentence under the guidelines accordingly, more than doubling Mr. Gaspar-Felipe’s time in prison.³⁸ Expanding an enhancement that already operates without regard to intent or proximate causation would compound an existing injustice rather than address it. The Commission should instead use this opportunity to add a meaningful culpability requirement to (b)(7), one that ties the enhancement to what the defendant actually did and could have reasonably foreseen.

Likewise, the proposed two-level enhancement for concealing a person in a trunk, engine compartment, or similar space is overbroad and should not be adopted. The enhancement is drafted broadly enough to capture a wide range of conduct that differs substantially in its actual dangerousness — from individuals briefly concealed to avoid detection at a checkpoint to those confined in genuinely life-threatening conditions for extended periods. Treating these situations identically with a flat two-level increase does not advance proportionality. More importantly, the genuine harms the Commission is attempting to address through this enhancement — risk of serious injury, exposure to extreme heat or cold, deprivation of air — are already captured by the existing injury-related specific offense characteristics. We urge the Commission to decline to adopt this enhancement, and instead rely on the injury and endangerment SOC’s to address dangerous transportation conditions.

The Commission should also decline to adopt the proposed enhancement for offenses where the defendant committed the offense knowing or with reckless disregard of the fact that the organization was a transnational criminal organization (TCO) as defined in 21 U.S.C. § 2341(5). The proposed enhancement is redundant. Defendants with meaningful organizational involvement are already subject to substantially higher sentences under the existing guideline. The number of individuals smuggled, a proxy for organizational capacity, drives the (b)(2) enhancement, which can add up to nine levels.³⁹ Cases involving serious harm trigger (b)(7).⁴⁰ And §2L1.1(b)(9) already provides a two-level enhancement where the offense was committed as part of an ongoing

³⁶ Ghandnoosh, N., Stammen, E., & Budaci, C. (2022, updated May 2024). *Felony murder: An on-ramp for extreme sentencing*. The Sentencing Project. <https://www.sentencingproject.org/reports/felony-murder-an-on-ramp-for-extreme-sentencing/>.

³⁷ See *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

³⁸ *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

³⁹ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1(b)(2). <https://www.ussc.gov/guidelines/2025-guidelines-manual>.

⁴⁰ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1(b)(7). <https://www.ussc.gov/guidelines/2025-guidelines-manual>.

commercial organization or enterprise — language that encompasses the kinds of structured operations the TCO enhancement purports to target.⁴¹ Indeed, the Commission has been here before: in 2016, it proposed and then declined to adopt an alternative base offense level structure that would have turned on commercial organization membership, concluding that the existing guideline adequately captured organizational culpability through specific offense characteristics and role adjustments.⁴² Nothing in the Commission's data or the record of this proceeding provides a basis to revisit that judgment.

The proposed expansions to §2L1.1 are unsupported by current conditions and unnecessary given existing sentencing patterns. The Commission's energy is better spent reforming the guideline's existing deficiencies, particularly the lack of any culpability or causation requirement in (b)(7), than adding enhancements unlikely to improve public safety.

Conclusion

The Sentencing Project thanks the Commission for this opportunity to provide comment. The amendments under consideration this cycle present the Commission with a genuine opportunity to make the Guidelines more proportionate, more racially equitable, and more consistent with the purposes Congress articulated in the Sentencing Reform Act. The Sentencing Project urges the Commission to seize that opportunity — by expanding sentencing options, narrowing the career offender guideline's reach, and resisting pressure to increase penalties under §2L1.1 that courts are already declining to apply in full. We are grateful for the Commission's continued openness to evidence-based reform and look forward to remaining a resource as this work continues.

Please reach out with any questions to Liz Komar, Senior Policy Counsel, at [REDACTED].

Many thanks,



Kara Gotsch
Executive Director
The Sentencing Project

⁴¹ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1(b)(9).

<https://www.ussc.gov/guidelines/2025-guidelines-manual>.

⁴² Sentencing Guidelines for United States Courts, 81 Fed. Reg. 2295 (Jan. 15, 2016) (proposed amend.)

https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108_RFP.pdf;

U.S. Sentencing Commission. (2016). *Amendment 802* (eff. Nov. 1, 2016).

<https://www.ussc.gov/guidelines/amendment/802>; U.S. Department of Justice. (2016, March 16). *[Public comment on proposed amendments to §2L1.2]* [Public comment submitted to the U.S. Sentencing Commission].

https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_DOJ.pdf.

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



March 17, 2026

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

Re: Tzedek Association Comments on the Commission's Proposed 2026 Amendments Posted on January 20, 2026

Dear Judge Reeves and Members of the Commission,

Tzedek Association again welcomes the opportunity to comment on the Commission's latest Proposed Amendments for the current cycle.

Tzedek is a nonprofit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian cases around the globe. Since Tzedek has regularly provided written comments (most recently, earlier this year by providing input on the proposed amendments posted in December), as well as oral testimony during the past several amendment cycles, this submission omits the full description of Tzedek's efforts to promote compassion and fairness in the nation's sentencing policies. One of Tzedek's most consistent and paramount concerns is overreliance on incarceration as a punishment of choice in our justice systems. For this reason, Tzedek commends the Commission for its willingness to consider sentencing options and broaden alternatives to incarceration in the latest round of proposed amendments. These comments will focus exclusively on that subject.

Context:
The Need for Greater Use of Alternatives to Incarceration

Tzedek has previously provided the Commission with extensive testimony urging amendments to enable and ensure the Guidelines’ sentencing instructions place far greater emphasis on alternatives to incarceration.¹ The landscape has not materially changed since 2023 when Tzedek most comprehensively addressed this issue, although significant clemency grants since that time by both President Joseph Biden and President Donald Trump document that the leaders of both major political parties recognize our system relies unnecessarily and excessively on incarceration. The fact that so many non-violent, first-time offenders receive prison sentences is disturbing and fundamentally at odds with the clear intent of the legislation that created the Commission and provided priorities for the development of a guidelines system. Congress, in the Sentencing Reform Act of 1984, stated clearly that 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 also provided that the guidelines should direct that imprisonment is generally appropriate when persons are “convicted of a crime of violence that results in serious bodily injury.” 28 U.S.C. § 994(j) (emphasis added).

Despite Congress’s clear directive that first-time, non-violent offenders should generally receive sentences other than imprisonment, the structure of the Guidelines has produced precisely the opposite result: prison became the default sentence even for first offenders where the law contemplates alternatives. The congressional directive favoring sentences other than imprisonment is not only sound policy, it reflects what experience has shown—non-custodial sanctions frequently better promote rehabilitation, preserve employment and family stability, and advance other key sentencing goals. They are also dramatically less costly to taxpayers than imprisonment.

Given the § 994(j) directive from Congress, it is difficult to justify the Guidelines’ Zone framework. In the pre-*Booker* environment, the Zones effectively foreclosed non-imprisonment sentences for most eligible offenders despite the congressional

¹ www.ussc.gov/policymaking/public-comment/public-comment-august-1-2023 at pages 195, 203-214

directive. Even after *Booker*, the Zones operate as a categorical, grid-driven constraint that discourages courts from imposing probationary and other non-custodial sentences based largely on offense level and criminal history category—rather than on individualized circumstances bearing directly on rehabilitation, risk, family impact, employment stability, and the purposes of sentencing. Whatever the original rationale for Zones may have been, in practice they function as an arbitrary “thumb on the scale” that systematically narrows sentencing options for defendants who Congress expected would often be appropriate candidates for non-imprisonment sentences.

Further, given that the various alternatives to incarceration—including probation, community confinement, home confinement, and fines—all impose real punishment (to say nothing of the stigma of a criminal conviction and the cascade of collateral consequences that result from it), resort to imprisonment should, as Congress clearly intended, be reserved principally for those repeated offenders who present an ongoing danger to society.

More specifically, a substantial body of research indicates that imprisonment itself can be criminogenic—disrupting employment, housing, family/community ties and increasing the likelihood of recidivism.² Indeed, individuals, families, and communities are better served when an offender’s punishment is fashioned to facilitate rehabilitation and enable the offender to maintain or resume productive behavior. The Commission’s own recent data is consistent with that concern, showing that of those United States citizens who were statutorily eligible for probation and were either placed on probation or released from prison in 2015 only 19% were rearrested, versus 42% of those who received a prison sentence—more than double.³

² Imprisonment is widely described in the criminological literature as criminogenic—that is, increasing the likelihood of future offending—through mechanisms such as socialization into criminal networks, psychological deterioration, weakened community ties, and post-release stigma. See, e.g., Olga Cunha et al., *The Impact Of Imprisonment On Individuals’ Mental Health And Society Reintegration: Study Protocol*, 11 BMC Psychol 215 (2023) (“research suggests that prison sentences have a null or a criminogenic effect on recidivism and a critical impact on inmates’ mental health, negatively interfering with their successful reintegration into society and recidivism”); William D. Bales & Alex R. Piquero, *Assessing The Impact Of Imprisonment On Recidivism*, 8 J Exp Criminology 71 (2012) (“various methods yield results that are at least in a similar direction and support overall conclusions of prior literature that imprisonment has a criminogenic effect on reoffending compared to non-incarcerative sanctions”).

³ [2026 Sentencing Options Data Briefing | United States Sentencing Commission](#) p. 8, “Rearrest Rates for Individuals with Non-Imprisonment Sentences or Released from Federal Prison in 2015”

Even more importantly, the data show that rearrest rates among those individuals who were statutorily eligible for probation, those with Criminal History Category I who were in Zone D offense levels 16, 17, 20, 21, 27 and 29 (and hence per the Guidelines did not qualify for a non-jail sentence), had substantially lower rearrest rates than those whose offense levels put them in Zones A through C.⁴

If nothing else, these data points underscore that the Zone framework is at best hit or miss—establishing no sound empirical basis for Guideline recommendations that, if followed, would foreclose a non-imprisonment sentence even for those not posing a serious threat to public safety. Further, while these data fail to show a demonstrable correlation between offense levels and recidivism, they also cannot begin to capture the profound real-world impacts and implications of even a relatively short prison sentence on an individual with a network of responsibilities and relationships.

For example, imposing a prison sentence upon anyone with care-giving responsibility for minor children or an ill or elderly family member imposes cascading negative consequences on families and communities. A substantial body of research shows that parental incarceration is associated with significant adverse outcomes for children, including educational disruption, economic instability, behavioral challenges, and an increased likelihood of later justice system involvement.⁵ And if a defendant has secured gainful employment or taken meaningful steps to address a precipitating cause of their criminal conduct, such as mental health or substance-use disorder treatment, even a limited term of imprisonment can disrupt the path to a law-abiding life creating profoundly negative consequences for the defendant and the community.

Case in point: One of the contributors to these comments recently represented a first-time offender convicted of a misdemeanor, economic offense. Although the offense level was 15, which would have carried a Zone D sentencing range of 15 –

⁴ *Id.* at p. 9, “Rearrest Rates for Individuals with Non-Imprisonment Sentences by Cell on the Sentencing Table.”

⁵ See National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 260–268 (2014) (finding strong evidence that parental incarceration negatively affects children’s educational attainment, behavioral health, and economic stability); Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 95 J. Health & Soc. Behavior (2014); Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 Crime & Justice 133 (2008).

18 months, the statutory maximum reduced the Guideline to 12 months, a Zone C sentence. The Presentence Investigation Report (PSR), as is typical in such circumstances, included the statement that the defendant was ineligible for probation, citing USSG § 5B1.1, comment (n.2). The government requested and the court imposed a sentence that included 30 days incarceration. As a result of his arrest and indictment, the individual had lost his job, which was a management level position at an agency for which he had worked for three decades starting as a youth intern and working his way up the ladder. He was supporting his wife and two school-age children in a modest home. Notwithstanding the devastating impact of the arrest and loss of employment, within weeks this defendant procured a job as a delivery person for a shipping company, earning just enough along with this wife's income to keep the family together in their home.

Fortunately, and it turns out, quite unusually, the judge granted the defense request to impose the sentence intermittently, enabling this defendant to serve the sentence on weekends and thereby keep his job and his home. Had the court not done so, incarceration would have cost this defendant his new job, very likely leading to the loss of his home and the ensuing disruption of his children's schooling.

This result was unusual—perhaps because the Zone framework has so stringently limited the application of non-imprisonment and intermittent sentences that federal judges all too rarely impose such sentences. Indeed, in fiscal year 2024, 85% of individuals statutorily eligible for probation received some term of imprisonment and 88% were given sentences that included some form of confinement.⁶

With respect to intermittent sentences, a recent study by the Drug Enforcement and Policy Center at The Ohio State University underscores how rarely that option is used in our courts nationwide, despite survey results that indicate that a majority of respondent probation officers agreed that intermittent confinement can serve as just punishment, can be an adequate deterrent, can adequately protect public safety, can allow for effective rehabilitation and, most importantly, can help people keep their jobs, maintain familial relationships, and maintain optimal care for serious medical issues.⁷

⁶ 2026 Sentencing Options Data Briefing, *supra.*, at p. 6, “Types of Sentence Imposed for Individuals Eligible for Probation, Fiscal Year 2024”

⁷ Peter Leasure, Douglas A. Berman & Jana Hrdinova, *An Overview of Intermittent Confinement and Weekend Incarceration in the U.S.* (February 12, 2024). Ohio State Legal Studies Research Paper No. 824, Drug Enforcement and Policy Center, February 2024, Available at SSRN: <https://ssrn.com/abstract=4723504> or <http://dx.doi.org/10.2139/ssrn.4723504> pp. 29-30,33.

That same study shows how rarely federal courts impose intermittent sentences. Based on Commission data for the eleven fiscal years culminating with 2021–2022, the total number of defendants sentenced yearly to intermittent confinement ranged from 81 to 163, representing 0.13% to 0.24% of all sentencing cases.⁸ Significantly, data on state sentencing shows considerable higher rates, with a range of 0.7 to 1.8% of cases during the period of 2005–2019.⁹ Finally, that study concludes that the principal explanation for the lack of such sentences, at least with respect to federal sentencing, is logistical difficulties in accommodating intermittent sentences.¹⁰ Indeed, in the anecdote described above, it took weeks and tremendous persistence to overcome the logistical challenges to arrange for the intermittent sentence.

It is a curious state of affairs when opportunities to promote rehabilitation, preserve families, and more generally achieve the objectives of sentencing are frustrated by systemic inability to accommodate lawful sentences. By making clear that all alternatives to imprisonment are to be broadly considered, the Commission can create the environment in which the various agencies, including the Probation Department, the United States Marshals Service, and the Bureau of Prisons will ensure that these logistical obstacles are resolved.

Indeed, many persons subject to federal prosecution fit the category that Congress stated should generally receive a “sentence other than imprisonment” (and should be subject to guidelines that “reflect the general appropriateness of imposing a sentence other than imprisonment”). Nevertheless, as the Commission data referenced above shows, the overwhelming majority of defendants who are statutorily eligible for probation are instead sentenced to prison.

Thus, as a general matter, Tzedek urges the Commission to reconfigure the Guidelines, as was called for by the Sentencing Reform Act, to affirmatively encourage judges to utilize the important option of alternatives to incarceration when sentencing offenders deserving of such consideration, regardless of the base offense level, and with a flexible approach irrespective of criminal history.

⁸ *Id.* at 3. It should also be noted that this data is somewhat skewed by the fact that at least in the 2020-21 period, the overwhelming majority of intermittent sentences were imposed in the Southern and Western Districts of Texas, where 15 and 53 defendants received such sentences out of a total nationally of 106. *Id.* at pp. 9-10.

⁹ *Id.* at 22-23.

¹⁰ *Id.* at 32.

Comments on Sentencing Options Proposals

With the above context, Tzedek urges the Commission to eliminate the Zone framework. The Zones are neither compelled by statute nor justified by the available empirical data. They operate as a categorical constraint that steer courts away from non-custodial sentences for probation-eligible defendants, even where such sentences would satisfy § 3553(a) and § 994(j)'s direction. The Commission's cell-level rearrest data discussed above underscores that Zone-based eligibility rules are inconsistent with known evidence regarding recidivism risk.

Additionally, Tzedek notes that at the recent public hearing on this proposed amendment, testimony on behalf of the judiciary's Criminal Law Committee (CJC) underscores the importance of amending the Guidelines to ensure that non-incarceration and alternative sentencing must be considered. In his testimony, the Chair of that Committee, Hon. Edmond E-Min Chang noted that "many judges come to the bench with no experience in the federal criminal justice system whatsoever," and further observed that "even those of us who are steeped in the criminal law, before you all [the Sentencing Commission] pointed out 994(j) and the general guidance on the general inappropriateness of prison for someone who has just committed their first offense and has not otherwise committed a serious crime or a crime of violence, I would not have been able to tell you that that the language was in 994(j)..."¹¹

Indeed, although the CJC opposes the proposed expansion of Zones B and C, in Tzedek's view Judge Chang's acknowledgement that the congressional directive in § 994(j) is not widely known and understood further supports the view that the Zones should be eliminated. When you couple the lack of recognition of that directive with the standard language in PSRs, as referenced in the case above, which advises judges about the unavailability of probation based upon the Zone designation, the deleterious impact of the current Zone approach is clear. Indeed, it suggests that the Zones operate in contravention of the statutory directive of § 994(j).

Contextualized by those preliminary observations, Tzedek commends the Commission for its proposal to add new Introductory Commentary to Part A of Chapter Five. Tzedek supports adding a new guideline § 5A1.1 (Determination of Type of Sentence), but with substantial revisions to the proposed § 5A1.1(a).

¹¹ <https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-march-9-2026> at 16:01-16:32.

Notwithstanding Tzedek's position that the Zones should be eliminated, if Zones are retained, Tzedek supports expansion of Zones B and C, and also believes that Zone A should be significantly expanded as well. There is simply no rational basis to exclude all Criminal History I offenders above Offense Level 8 from Zone A.

Part A (*Changes to Part A of Chapter Five*).

Proposed New Commentary

- With one important caveat, Tzedek wholeheartedly endorses the addition of the proposed new commentary. As drafted, the commentary provides important new context, highlighting that Congress did not establish a general presumption in favor of any particular sentence type and that a court may consider and weigh various sentencing purposes as they relate to each individual case. Additionally, the proposed commentary's recognition that non-imprisonment sentences "undoubtedly serve a punitive function" (together with appropriate supporting citations for that proposition) should appropriately encourage judges to exercise their authority to seriously and meaningfully consider alternatives to incarceration in more cases. Finally, Tzedek especially lauds the inclusion of the final proposed sentence, which specifically supports and provides authority for courts to fully exercise their discretion to tailor a sentence to the circumstances of the individual case.

One caveat: Tzedek strongly encourages the Commission to include within the commentary reference to 28 U.S.C. § 994(j) to highlight that Congress has long indicated that the guidelines system is to reflect the appropriateness of sentencing non-violent first offenders to a sentence other than imprisonment. This clear statutory instruction to the Commission can and should serve as a powerful reminder to judges that Congress intended expansive use of alternatives to incarceration, particularly for first-time offenders. Tzedek would similarly support including the reference to the second section of § 994(j), which expresses Congress's perspective as to when imprisonment is generally appropriate.

- Because Tzedek agrees in principle with the promulgation of a new guideline § 5A1.1, the commentary should include the bracketed references to the new guideline.
- Tzedek expresses concerns as to the inclusion of the bracketed language concerning the employment of "more advanced tools to assess and respond to

individual defendants’ unique risks and needs.” Without knowing more about what those tools may be and whether and to what extent such tools have been validated or may perpetuate various systemic biases, it might be prudent to omit that sentence. It should be axiomatic that when courts assess the circumstances relevant to any defendant upon whom sentence is imposed and fully consider all the factors that must be considered pursuant to 18 U.S.C. § 3553(a), they will be sensitive to devising a sentencing option that considers the resources necessary to address that individual’s needs.

Proposed New Guideline § 5A1.1

- With the caveat noted below as to § 5A1.1(a), Tzedek endorses the inclusion of the new guideline. The steps outlined in subsections (a) – (d) provide a clear and concise roadmap to guide courts in the appropriate application of the Guidelines in formulating a sentence.
- Consistent with the position expressed above, Tzedek urges the Commission to amend proposed guideline § 5A1.1(a) to read as follows:

DETERMINING THE AVAILABLE SENTENCING
OPTIONS – Determine
the guideline ~~and zone~~ applicable to the defendant’s offense
level and criminal history category in accordance with the
Sentencing Table set forth in § 5A1.2 (Sentencing Table).

Tzedek urges deletion of the reference to “and zone” in the above provision as well as omission of subsections (1) – (3) referencing Zones A, B and C. Without fully restating the basis for this position, it must be stressed that the artificial limitations imposed by the various Zones are at odds with the thrust of the new commentary and the otherwise laudable recognition of the fact that alternatives to imprisonment are punitive and the need for sentences to be tailored to fit the needs of the individual.

- Tzedek does see the need for the Commission to delineate specific factors under new guideline § 5A1.1(b). (Responding to Issues for Comment 2 and 3). However, the Commission should consider adding the phrase “and applicable statutes.” Thus, the subsection would read as follows:

(b) DETERMINING THE APPROPRIATE SENTENCE OPTION-
In determining the appropriate sentencing option(s) from among those

authorized under the Guidelines and applicable statutes, courts should consider which option(s) will best meet the purposes of sentencing and the needs of the individual defendant

The addition of the reference to “applicable statutes” obviates the need to delineate specific factors as raised in Issues for Comment 2 and 3 and also makes clear that courts are in no way bound by any suggested limitation in the Guidelines that circumscribe statutory discretion, such as the Zone designations if they are preserved.

If, however, the Commission opts to specify factors, Tzedek strongly urges the Commission to include an additional factor in sum and substance as follows: “Any relevant factor the ensures that a sentence is sufficient, but not greater than necessary, to comply with the purposes of sentencing.”

- Tzedek strongly endorses the inclusion of the bracketed language in proposed § 5A1.1(d) explicitly advising courts that any sentence authorized by statute may be appropriate even if not authorized by the Guidelines. This sentence is especially important if the Zone distinctions are maintained to underscore that such distinctions are in no way binding upon the court.

Part B (Expansion of Zones B and C of the Sentencing Table)

Tzedek lauds the maximum extension of Zones B and C to provide greater opportunities for decreased incarceration for a greater number of defendants who are eligible for non-imprisonment sentences. For the reasons stated above, however, Tzedek does not understand why, at a minimum, there is no comparable expansion of Zone A sentences. As previously discussed, the data shows lower recidivism at several higher Zone D base offense levels than at lower Zone A offense levels for Criminal History I offenders. The data strongly support the abolition of the Zones altogether. But if they are maintained, Zone A should be commensurately expanded.

To the specific Issues for Comment, two of which relate to where the Zone B and C lines are drawn (Issues 1 and 3) and one of which seeks input on whether the Commission should provide additional guidance as to when Zone B sentences of probation with conditions of confinement or Zone C sentences authorizing split sentences should be imposed, Tzedek responds as follows: The line drawing remains fundamentally arbitrary, is untethered from empirical data, and detracts from the courts’ authority to tailor an

appropriate sentence that respects the Congressional mandates to impose a sentence that is “sufficient, but not greater than necessary” and to prioritize non-imprisonment sentences for first-time, non-violent offenders. As to whether additional guidance is necessary, Tzedek asserts that the revised commentary, as amended in accordance with the above suggestions, provides ample guidance for courts to determine when to impose probation with conditions of confinement, split sentences, or intermittent sentences.

Conclusion

The Sentencing Reform Act envisioned a system in which imprisonment would be reserved primarily for those who pose a genuine danger to the public. Yet today, incarceration too often remains the default outcome even for individuals who Congress expressly intended should generally receive non-custodial sentences. The Commission has an opportunity in this cycle to realign the Guidelines with congressional intent and modern empirical evidence by ensuring that courts fully consider alternatives to incarceration—and by removing, or at minimum substantially revising, the Zone framework that has too often operated as a categorical barrier to those alternatives. Doing so would promote rehabilitation, preserve family stability, reduce unnecessary costs, and advance public safety.

As always, Tzedek enormously appreciates the opportunity to share its perspective on the proposed amendments for the 2026 cycle and looks forward to continuing to provide input and support for the Commission’s critical work.

Sincerely,



Rabbi Moshe Margaretten¹²
President

¹² Tzedek wishes to express enormous gratitude to Norman L. Reimer and Professor Douglas A. Berman for their instrumental assistance and counsel to formulate this letter.

Proposed Amendments to the Sentencing Guidelines (January 30, 2026)

PROPOSED AMENDMENT 2: CAREER OFFENDER

Synopsis of Proposed Amendment: This amendment addresses criticism of the categorical approach and modified categorical approach in the context of §4B1.1 (Career Offender). It sets forth options that would eliminate the use of the categorical approach for purposes of determining whether a federal offense is a “crime of violence” or “controlled substance offense” by listing federal offenses that qualify as a “crime of violence” or a “controlled substance offense.” The proposed amendment also provides options that would set forth an approach for purposes of determining whether a state offense is a “crime of violence” or “controlled substance offense” that does not impose some of the limitations of the “categorical approach” and “modified categorical approach.” The proposed amendment also sets forth options to limit the scope of the “controlled substance offense” definition. The Commission anticipates that the revised “crime of violence” definition set forth in the proposed amendment will identify offenses as presumptively violent in an overbroad manner. To counteract this overbreadth, each option provides necessary and critical exclusions and limitations to ensure that §4B1.2 is properly tailored to capture offenses that are actually violent.

The Commission provided two options to consider relating to “Crime of Violence.”

Option 1 would eliminate the use of the categorical approach for purposes of state offenses by providing a definition that is based on how an offense is designated (i.e., labeled) under federal or state law. It sets forth a list of violent offenses. A conviction for an offense that is labeled as one of the listed offenses is presumptively a qualifying “crime of violence.” This approach is intended to avoid an analysis requiring a categorical matching between statutory elements, instead capturing convictions for certain types of offenses based on how they are labeled. This option brackets a preliminary list of offense labels, highlighting the Commission’s interest in appropriately tailoring the scope of the offenses included in the list. The Commission also recognizes that jurisdictions name each of these offenses in various ways that may be appropriate to include in the list of qualifying labels.

Option 2 would set forth an approach for purposes of determining whether a state offense is a “crime of violence” that does not impose some of the limitations of the “categorical approach” and “modified categorical approach.” It would provide that a state offense is presumptively a “crime of violence” if the statute of conviction [meets each of the elements (other than federal jurisdictional requirements)] [proscribes [conduct][an act or omission] that [is described by][satisfies][meets] the elements (other than federal jurisdictional requirements)] of an offense set forth in the proposed definition, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense. It sets forth a list of violent offenses

and defines most of these enumerated offenses by referring to a federal statute. Many of the listed offenses qualify as a “serious violent felony” under 18 U.S.C. § 3559(c). Crime of Violence Option 2 also brackets the possibility of including additional offenses. It would define some of these additional offenses, either by referring to a statutory provision or providing a guidelines definition of such an offense. These changes are intended to eliminate the categorical approach’s requirement that courts compare only the elements of the predicate offense as described in the statute of conviction to the elements of a generic. Instead, courts would be allowed to look to any part of a statute of conviction—the elements of any offense, and the means of committing any element of such offense, as described in the statute—and determine whether any part of the statute of conviction includes an offense that constitutes one of the enumerated offenses as defined in §4B1.2.

The Commission provided two options to consider relating to “Controlled Substance Offense”

Option 1 would revise the definition of “controlled substance offense” to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. It lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes. The list includes the federal drug trafficking statutes that are specifically referenced in the career offender directive at 28 U.S.C. § 994(h).

Option 2 would maintain the current definition of “controlled substance offense” but would limit its scope by setting a minimum sentence length requirement for a prior conviction to qualify as a “controlled substance offense.” It provides three suboptions for limiting prior convictions. Controlled Substance Offense Suboption 2A would limit qualifying prior “controlled substance offense” convictions to only those convictions that are counted separately under §4A1.1(a). Controlled Substance Offense Suboption 2B would limit qualifying prior convictions to only convictions of a controlled substance offense that resulted in a sentence imposed of [five years][three years][one year] or more that are counted separately under §4A1.1(a) [or (b)]. Both Controlled Substance Offense Suboptions 2A and 2B bracket the possibility of including a provision that provides that a conviction for a controlled substance offense shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison. Controlled Substance Offense Suboption 2C would limit qualifying prior convictions to only convictions of a controlled substance offense that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted separately under §4A1.1(a) [or (b)].

Issues for Comment:

1. As explained in the synopsis of the proposed amendment, courts use the “categorical approach” and the “modified categorical approach,” as set forth in Supreme Court jurisprudence, to determine whether a conviction is a “crime of violence” or a “controlled substance offense” for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Supreme Court cases, however, involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guideline provisions. The Commission seeks input on whether determinations under the career offender guideline should use a different approach, such as the approaches provided above. What are the advantages and disadvantages of the “categorical approach” as opposed to the approaches set forth in the proposed amendment above?
2. The proposed amendment would amend §4B1.2(a) to eliminate the use of the categorical approach, for purposes of federal offenses, by listing specific federal statutes that qualify as a “crime of violence.” Are there federal offenses that are covered by the proposed “crime of violence” definition but should not be? Are there federal offenses that are not covered by the proposed definition but should be?
3. The proposed amendment sets forth two options for amending the definition of “crime of violence” for purposes of state offenses. The Commission seeks comment generally on each option and whether either of the approaches provided for purposes of the “crime of violence” definition is appropriate and would cover most violent offenses under state law. Which of the options, if either, should the Commission adopt? Should the Commission consider a different approach to revise the “crime of violence” definition? Are there specific state offenses that would be included in the definition of “crime of violence” set forth in these options that should not be considered crimes of violence? Are there specific state offenses that would not be included in the definition set forth in these options, but should be? For example, should the Commission include offenses such as terroristic threats and resisting arrest in the list of offenses that should qualify as a “crime of violence”?

The Commission also seeks input on whether the list of offenses included for purposes of federal offenses and state offenses should generally capture the same offenses. Should the Commission differentiate between the types of federal offenses and state offenses that should qualify as crimes of violence by providing different list of offenses? Finally, the Commission seeks comment on the proposed definitions for the enumerated offenses listed in Crime of Violence Option 2. Are these definitions appropriate? Should the Commission provide different definitions? If so, what definitions should the Commission provide?

4. Crime of Violence Option 1 for amending the definition of “crime of violence” for purposes of state offenses would eliminate the use of the categorical approach by providing a definition that is based on how an offense is designated (i.e., labeled) under state law. This option brackets a preliminary list of offense labels. The Commission recognizes that jurisdictions name each of these offenses in various ways that may be appropriate to include in the definition of crime of violence. For example, the Commission has identified that jurisdictions use different labels for the highest degree of murder, including such labels as First Degree Murder, Murder in the First Degree, Deliberate Homicide, First Degree Intentional Homicide, Aggravated Murder, and Capital Murder. Similarly, the Commission has identified the same issue with robbery; states and United States territories use different labels such as Robbery in the First Degree, Robbery in the Second Degree, Robbery in the Third Degree, Aggravated Robbery, First Degree Aggravated Robbery, Armed Robbery, Carjacking, Armed Carjacking, Robbery Involving Occupied Motor Vehicle, Aggravated Vehicular Hijacking, Vehicular Hijacking, Robbery by Intimidation, Robbery with a Dangerous Weapon, Assault with Intent to Rob, and Robbery with Firearms or Other Dangerous Weapons. The Commission anticipates identifying similar issues with the other offenses listed in Crime of Violence Option 1. For purposes of Crime of Violence Option 1, the Commission intends that violent offenses, such as aggravated assault, arson, extortion, kidnapping, murder, rape, robbery, sexual assault, and voluntary manslaughter, by whatever name they are known under state law, are included in the crime of violence definition. The Commission seeks comment on whether the list of offenses provided as part of the “crime of violence” definition should include the different ways in which these offenses are labeled by different jurisdictions. If so, to what level of specificity should the Commission include any such offense labels? The Commission also seeks comment on how each of the states and United States territories name each of these offenses. Finally, the Commission seeks comment on whether other labels should be included in the definition to adequately capture these offenses in Crime of Violence Option 1. Are there states that do not include names, labels, or titles in their criminal code that would need to be addressed in another way? As an alternative, instead of listing offense labels, should the Commission provide a list of the specific state statutes that should qualify as “crime of violence”? Would an approach that Proposed Amendment: Career Offender lists specific state statutes as crimes of violence be more easily administered? If so, which state statutes should be included?
5. The proposed amendment provides an exclusion to limit the scope of the definition of “crime of violence” by adopting a sentence length criteria similar to the one relating to petty and minor offenses from subsection (c)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and sets limitations if the defendant can establish that: (i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison; (ii) the acts for which the defendant is criminally liable

[did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. The Commission seeks input on whether these limitations are appropriate. Do these limitations appropriately exclude prior convictions that should not qualify as crimes of violence under §4B1.2? Are there additional or different limitations that the Commission should include? For example, should the Commission exclude prior convictions for robbery and extortion offenses if the defendant can establish that no firearm or other dangerous weapon was used in the offense, no threat of use of a firearm or other dangerous weapon was involved in the offense, and the offense did not result in death or serious bodily injury to any person? Should the Commission exclude prior convictions for arson offenses if the defendant can establish that the offense posed, and the defendant reasonably believed the offense posed, no threat to human life? One of the limitations provides that an offense of conviction shall not qualify as a "crime of violence" if the defendant can establish that the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. With this limitation, the Commission intends to require a mens rea more culpable than recklessness or negligence for the offense to qualify as a crime of violence. The Commission seeks comment on whether the language of this limitation accomplishes this goal or whether there is a better way to do so.

6. The proposed amendment sets forth two options for limiting the scope of the "controlled substance offense" definition. Controlled Substance Offense Option 1 would revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The list includes the federal drug trafficking statutes that are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The federal drug trafficking statutes that appear in brackets are not cited in the directive. The Commission seeks comment generally on whether the approach set forth in this option is appropriate. Are there federal drug offenses that are covered by the proposed amendment but should not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?
7. Controlled Substance Offense Option 2 for limiting the scope of the "controlled substance offense" definition would maintain the current definition but would limit its scope by setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense." It provides three suboptions for such limitation. The Commission seeks comment on whether it should adopt Controlled Substance Offense Option 2 by keeping the current definition of "controlled substance offense" and limiting

qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served. If so, how should the Commission set that limit and on what basis? The Commission also seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a “controlled substance offense” is consistent with the Commission’s authority under 28 U.S.C. § 994(h). Should the Commission differentiate between “crimes of violence” and “controlled substance offenses” in setting a minimum sentence length requirement? The Commission also seeks comment on each of the suboptions. Which suboption, if any, should the Commission adopt?

8. Controlled Substance Offense Suboptions 2A and 2B for setting a minimum sentence length requirement for a prior conviction to qualify as a “controlled substance offense” bracket the possibility of including a provision that states that a conviction of a controlled substance offense shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison. The Commission seeks comment on what types of sentences should be counted for purposes of this provision. For example, should revocation sentences count to determine whether the defendant served less than [five years][three years][one year] in prison?
9. The Commission seeks comment on whether the definitions of “crime of violence” and “controlled substance offense” should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?
10. As indicated above, several guidelines use the terms “crime of violence” and “controlled substance offense” and define these terms by making specific reference to §4B1.2. See the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

The proposed amendment effectively sets forth three alternatives for addressing the references to “crime of violence” and “controlled substance offense” in §2K2.1. First, absent additional changes to §2K2.1, any revisions to the definitions in §4B1.2 would be incorporated by reference to §2K2.1. In addition to the approach of maintaining the current

operation of §2K2.1 by incorporating the definitions from §4B1.2, two options are presented. Firearms Option 1 would maintain the status quo by amending the Commentary to §2K2.1 to incorporate the relevant part or parts of the current definitions from §4B1.2. Firearms Option 2 would amend the Commentary to §2K2.1 to provide that “controlled substance offense” has the meaning given the term “serious drug offense” in 18 U.S.C. § 924(e) and “crime of violence” has the meaning given the term “violent felony” in 18 U.S.C. § 924(e). The Commission seeks comment on each of these options, or, in the alternative, whether §2K2.1 should continue to define the terms “crime of violence” and “controlled substance offense” by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment.

Similarly, the Commission seeks comment on the approach it should take to address the references to “crime of violence” and “controlled substance offense” in the other guidelines cited above. Should the Commission maintain the status quo by amending the Commentary to any or all these guidelines to incorporate the relevant parts of §4B1.2? Should the Commission instead continue to define these terms by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the “crime of violence” and “controlled substance offense” definitions contained in §4B1.2? Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

Probation Department’s Response

Issue 1: The Eastern District of Michigan believes the advantages to the current “categorical approach” include familiarity of the process. Disadvantages to the current “categorical approach” include the difficulty using the “categorical approach” and lack of consistency of how convictions are identified between officers and districts. The advantages to the proposed amendment include an easier method to determine if a conviction is considered a crime of violence or controlled substance offense, improved consistency of scoring between officers and districts and not having to obtain Shepard documents or plea colloquies. Disadvantages to the proposed amendment include familiarizing officers with the new method, potential unknown issues not yet identified, and the lists of qualifying labels/offenses may not be all encompassing. How do you go about determining an offense (conviction) that is not on the list? Do you match them to the generic definition, elements or name similarity of a listed offense?

Issue 2: The Eastern District of Michigan did not identify any federal offenses that are covered by the proposed “crime of violence” definition but should not be nor any federal offenses that now are not covered by the proposed definition but should be.

Issue 3: The Eastern District of Michigan believes Option 1 identifies the best approach to determine the “crime of violence” definition. The Eastern District of Michigan believes offenses such as terroristic threats (which include threat of violence) should qualify as a “crime of violence.”

The Eastern District of Michigan believes any identified offenses involving threats or acts of violence should be included. However, in the Eastern District of Michigan, there are several felony statutes, including Domestic Violence Third Degree, Aggravated Stalking, Home Invasion First and Second Degree, and Assault by Strangulation or Suffocation, which are divisible. All of these offenses are precluded as a crime of violence unless a specific part of the statute is identified at the time of conviction, because the definition of battery includes offensive touching which can be committed in a non-violent way. Statutes such as these have made the current method of determining whether an offense qualifies as a crime of violence difficult. Resisting arrest may meet that requirement; however, it does not always require force to resist. Furthermore, the Eastern District of Michigan believes the list of offenses included for purposes of federal offenses and state offenses should generally capture the same offenses; however, if there are known offenses which specifically need to be addressed differently, two lists may be needed. Lastly, the proposed definitions for the enumerated offenses listed in Crime of Violence Option 2 appear appropriate.

Issue 4: The Eastern District of Michigan believes a broader list of offense labels/designations is more appropriate as there is no way to list every alternative label for an offense. The purpose of the proposed amendment is to make this simpler, not more confusing.

Issue 5: The Eastern District of Michigan believes adopting a sentence length criteria similar to one relating to petty and minor offenses in §4A1.(c)(2), and setting limits related to the length of time served, the acts which the defendant is criminally liable and lack of violence, or if the offense was limited to reckless or negligent conduct is not appropriate related to the scope of the definition of “crime of violence.” The Eastern District of Michigan believes the above proposed amendment would further complicate the process of identifying a crime of violence, when it appears the Commission’s goal with this amendment is to simplify and promote consistency. The Eastern District of Michigan believes the above criteria, specifically the lack the “violence” and “limited to reckless or negligent conduct,” would create more confusion than the current categorical approach. This is especially true for prior convictions where a police report or arrest report is not available to the probation department. There is also the issue of determining the amount of time a defendant gets. It is very difficult to obtain dates of custody. We would have to calculate the time since the wording says "served" rather than sentenced. This is in direct contradiction to USSG §4A1.2, Application Note 2. For instance, if a defendant was sentenced to 1 to 5 years in custody, it would score as a 3-pointer under USSG 4A1.1(a) but might still not be a COV after calculating the time. Also, if it is determined the defendant served less than 13 months, does this open the door for an appeal to re-score it as a 2-pointer under USSG 4A1.1(b)?

Issue 6: The Eastern District of Michigan believes the controlled substance offense definition should not be limited to exclude state drug offenses. The enhancements related to a prior controlled substance offense are meant to account for defendants who have a history of controlled substance offenses. The Eastern District of Michigan believes if the scope was limited, it would create unfair sentencing disparities amongst repeat offenders. Further, this does not appear appropriate due to

inconsistent charging decisions made between State and Federal prosecutors throughout the districts.

Issue 7: The Eastern District of Michigan does not believe the Commission should adopt a minimum sentence length requirement for a prior conviction to qualify as a controlled substance offense. The Eastern District of Michigan believes this would create disparities due to inconsistent sentencing. This proposed amendment appears to benefit defendants who may have received a lighter sentence for a previous conviction. Further, the Eastern District of Michigan believes relying on the conviction, not the sentence, is the best option for clarity and consistency purposes. The commission outlines the amount of time "served" as their basis for qualifying drug offenses. This would unduly complicate things as we would then be tasked with calculating the time served and potentially scoring complications as criminal history points are based on sentences, not time actually served. Additionally, districts with higher drug problems within their communities may impose a greater amount of community-based dispositions due to the normalization of those offenses. Whereas districts who do not have a drug issue may impose a more serious custodial sanction for a similar offense. This issue could cause disparity amongst the districts.

Issue 8: The Eastern District of Michigan relies on and incorporates its above response to Issue 7.

Issue 9: The Eastern District of Michigan believes the guidelines manual should stay as is and the definitions of crime of violence and controlled substance offense should continue to include conspiracy and attempt. The Eastern District of Michigan believes this change to the guideline manual has improved consistency and has provided clarity in identifying a crime of violence or controlled substance offense.

Issue 10: The Eastern District of Michigan believes the definition chosen by the Commission should be consistent throughout the guidelines manual. It is not necessary to provide the definitions in each section; however, there can be a directive to reference definitions as utilized in §4B1.2. Furthermore, the Commission should move these definitions from the commentary of these guidelines to the guidelines themselves to prevent future issues, such as the issues identified in *U.S. v Havis*.

PROPOSED AMENDMENT 3: CIRCUIT CONFLICTS CONCERNING §4B1.2(b)

Synopsis of Proposed Amendment: The proposed amendment addresses two circuit conflicts involving the definition of “controlled substance offense” in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1). The first circuit conflict concerns whether the definition of a “controlled substance offense” in §4B1.2(b) only includes substances controlled by the federal Controlled Substances Act (“CSA”) (21 U.S.C. § 801 et seq.), or whether the definition also includes substances controlled by applicable state law. The second circuit conflict concerns which temporal version of the applicable drug schedule (whether federal or state) should be used to decide if a prior offense qualifies as a predicate “controlled substance offense”: (1) the schedule in place

at the time of defendant's prior conviction; or (2) the schedule in place at the time of the instant offense or sentencing for the instant federal offense.

The Commission provided two options to consider relating to whether a substance involved in an offense must be controlled under federal law by the CSA to qualify as a "controlled substance offense" under §4B1.2(b).

Option 1 would set forth a definition of "controlled substance" that adopts the approach of the Second, Fifth, and Ninth Circuits. It would limit the definition of the term to substances that are specifically included in the CSA. This option would resolve the circuit conflict so as to preserve the status quo in circuits that categorically exclude violations of those state statutes that control substances not included in the CSA.

Option 2 would set forth a definition of "controlled substance" that adopts the approach of the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. It would provide that the term "controlled substance" refers to substances either included in the CSA or otherwise controlled under applicable state law.

The Commission provided two options to consider relating to which version of the applicable drug schedule determines whether a prior conviction qualifies as a "controlled substance offense" under §4B1.2(b).

Option 1 would adopt the First, Fifth, and Ninth Circuits' approach of using the schedule in place at the time of sentencing for the instant federal offense.

Option 2 would adopt the Third, Fourth, Sixth, Eighth, and Eleventh Circuits' approach of using the schedule in place at the time of defendant's original conviction.

Issues for Comment:

- 1) The proposed amendment would amend subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) to address the circuit conflicts described in the synopsis above by providing two options for each circuit conflict. The Commission seeks comment on whether it should address the circuit conflicts in a manner other than the options provided in the proposed amendment. If so, how?
- 2) Several guidelines use the term "controlled substance offense" and define the terms by making specific reference to §4B1.2. See, e.g., the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition),

§4B1.4 (Armed Career Criminal), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)). If the Commission were to promulgate any of the options set forth in the proposed amendment for each circuit conflict, should any or all these guidelines continue to define the term “controlled substance offense” by making specific references to §4B1.2? Should the Commission maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant parts of §4B1.2? Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

Probation Department’s Response

Issue 1: The Eastern District of Michigan believes the proposed amendment can appropriately address the circuit conflicts as noted below.

Option 2 would set forth a definition of “controlled substance” that adopts the approach of the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. It would provide that the term “controlled substance” refers to substances either included in the CSA or otherwise controlled under applicable state law.

Option 2 would adopt the Third, Fourth, Sixth, Eighth, and Eleventh Circuits’ approach of using the schedule in place at the time of defendant’s original conviction.

The Eastern District of Michigan does not believe it should address the circuit conflicts in any other way. New "designer" drugs are often popping up. For instance, the state of Michigan updated the laws to include fentanyl-like substances under a Markush structure in 2017; however, the federal statute did not get updated until 2018. This means various drug offenses could easily not be captured because federal law takes longer to revise. Furthermore, this seems it is likely surrounding the isomer issue. This would allow defendants to escape harsher penalties because federal law limits isomers strictly to the optical isomer and state law (in Michigan) criminalizes optical, positional, and geometric isomers - even though most standard lab tests cannot distinguish between the illegal drug as a whole and the isomer compound used to make that illegal drug.

Issue 2: The Eastern District of Michigan believes the definition chosen by the Commission should be consistent throughout the guidelines manual. It is not necessary to provide the definitions in each section; however, there can be a directive to reference definitions as utilized in §4B1.2. Furthermore, the Commission should move these definitions from the commentary of these guidelines to the guidelines themselves to prevent future issues, such as the issues identified in the Sixth Circuit case, *U.S. v Havis*.

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March 8, 2026

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle N.E.
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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

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 Izcarra 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.

Arizona⁸ 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

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.

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 crisis*.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>.

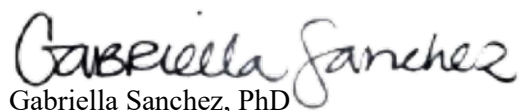
¹⁹ Zhang, S.X., 2009. Beyond the ‘Natasha’ story—a review and critique of current research on sex trafficking. *Global crime*, 10(3), pp.178-195. Doezeema, J. 2002. ‘The Ideology of Trafficking’, paper presented at the Work Conference ‘Human Trafficking’, 15 November 2002, Centre for Ethics and Value 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 (January 2026)

Submitter:

Kyle Brady, Pastor

Topics:

1. Sentencing Options
2. Career Offender

Comments:

To whom it concerns, I'd like to throw in my opinion as a pastor and preacher of the Gospel of Jesus in regards to sentencing options for career criminals. After being involved in one on one ministry for several years in and mostly out of the church, I've witnessed several people successfully commit their lives to Christ and experience a new life style while leaving behind the old life they lived in shambles. They carried the hurts and regrets and shame u til they experienced God's grace and power that transformed them. God transforms live that yield to Him. Some are willing and some are not. Which is why I'd like to say from this angle that the option for those who do want change and to abandon their old life to have a fighting chance at it. So many people make wrong choices and get trapped but don't need to be left for dead in it. Many want out and I've come to learn that many are "reformed" living in prison. Yet many who get out need those boundaries that prison and half way programs provide. My church and affiliated ministries are working to help such people learn how to hold boundaries themselves and that is like riding a bike. They need an opportunity with guidance to do so. Please consider these changes from the courts desk. These people are our neighbors and family members and friends. They need help beyond just punitive damages being assigned to them. From the church, it is our responsibility to teach that God's restorative justice is life transforming so people can live in freedom and live healthy clean and safe lives. I work along side many people who have been transformed from old reckless lives and will never return to them.

Submitted on: March 12, 2026



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March 18, 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:

I write in support of the proposed amendment on Sentencing Options. Part A would add an introductory commentary to Chapter Five of the Guidelines Manual and in particular the proposed guideline, §5A1.1. Part B would increase the number of people who qualify for a non-prison sentence, by expanding Zones B and C of the Sentencing Table.

I write from the perspective of having been a federal judge in the District of Massachusetts between 1994 and 2011, as well as a law school instructor, at Yale Law School, 1999-2011, contemporaneous with my judicial service, and at Harvard Law School, 2011-2026. I wrote hundreds of sentencing opinions and scholarly articles focused on sentencing reform. I am now writing a book about the men I sentenced, some of whom I have been meeting in my post-judge life (*Incomplete Sentences*, New Press, forthcoming). In addition, I am the Managing Director of the Massachusetts General Hospital Center for Law, Brain and Behavior. I teach sentencing and law and neuroscience at Harvard Law School.

I have three very simple points to make: First, the proposed amendments correct a wrong of the first Sentencing Commission. For various reasons, decisions made by the first Commission resulted in a dramatic increase in incarceration not consistent with the Sentencing Reform Act. Second, as I have said in my writings, “the habits of mass incarceration,” die hard. While *Booker* made the Guidelines advisory, incarceration continues to be the default option for judges across the country. Third, expanding probationary sentences will enable the courts to use evidence-based alternatives to incarceration, in the light of advances in the neuroscience of addiction and trauma, as well as the insights of adolescent neurodevelopment, advances and insights that were unknown at the time the Guideline framework was implemented.

1. Correcting Errors of the Guidelines: Professor Kate Stith and Judge Jose Cabranes in *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, 1998) describe how the first Commission determined the severity of Guideline sentences. Although the Commission indicated that it was basing sentencing guidelines on past practices, in fact, it did not. It effected “radical changes in sentencing law,” based on “incomplete and questionable

data.” Id. at pp. 59-66. See Daniel Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L. J. 1681, 1706 (1992) (“Congress said nothing in the statute about abolishing or even drastically curtailing probation. . . . The Commission, however, drafted guidelines containing a presumptive sentence of imprisonment for every felony. . . .”). The result was significant: While before the Guidelines, nearly 50 percent of federal defendants were sentenced to probation alone, today it is less than 10%. The increase in imprisonment is especially striking for women offenders since the implementation of the Guidelines; the number of incarcerated women has increased significantly without any criminological justification. Likewise, demographic differences persist in the implementation of probation, with black males receiving fewer probation-only sentences as the Sentencing Commission report, Demographic Differences in Federal Sentencing (November 2023), suggests.¹

2. The “habits of mass incarceration”: For the past four decades, the default in federal sentencing has been incarceration. Too often, the central question was not *whether* to incarcerate, but rather, *how much*. Proposed Guideline §5A1.1 encourages judges to more carefully consider the role of non-imprisonment sentences. In 1986, when 50% of sentences were probation, such a Guideline would not have been necessary. In 2026, it is.

3. Evidence based alternatives to incarceration: There have been extraordinary advances in the neuroscience of addiction, the efficacy of medication assisted treatment, the neuroscience of trauma, the treatment of PTSD, the understanding of the neurodevelopment of adolescents, and broadly speaking, science informed criminal sentencing. See clbb.mgh.harvard.edu. Likewise, problem-solving courts dealing with drug addiction and mental health can provide the Commission and judges with data about “what works,” unavailable when the Guidelines were first promulgated. Probationary sentences enable judges to take advantage of these advances and this data. Prison, most assuredly, does not.

Sincerely,

/s/

Judge Nancy Gertner (Ret.)

¹ While increasing probation-only sentences for all defendants will not eliminate these differences, it is surely a start.



March 17, 2026

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

Re: Proposed Amendment Regarding **Sentencing Options**

The Commission’s proposed amendment addressing the determination of sentence type represents a thoughtful and constructive effort to clarify an important aspect of the sentencing process. The determination whether a sentence should involve imprisonment or a non-custodial sanction, sometimes referred to as the “in/out” decision or as meeting the “custodial threshold” to justify prison, is among the most consequential judgments in sentencing. Congress recognized the significance of this determination when it directed the Commission to promulgate Sentencing Guidelines that assist courts in deciding “whether to impose a sentence to probation, a fine, or a term of imprisonment.” 28 U.S.C. § 994(a)(1)(A). By highlighting the importance of this threshold determination and providing additional guidance to courts, the proposed amendment would reinforce the statutory framework that contemplates imprisonment as one of several sentencing options rather than the presumptive outcome. Clarifying this decision point may assist courts in ensuring that the sentence imposed is carefully tailored to the purposes of sentencing and the circumstances of the individual case.

This proposed Amendment and the potential modification to Zones in the sentencing table is also a time to reflect upon the infrequent use of alternative sanctions (i.e., intermittent confinement, community confinement, and home detention). The Commission’s datasets indicate that those alternatives, whether accompanying a probation or prison sentence, occur in only 3% of cases.¹

Issue for Comment #1 for Part A.

The proposed introductory language emphasizing the importance of determining the appropriate type of sentence would be a helpful and appropriate addition to the Guidelines. The language reflects Congress’s intent in the Sentencing Reform Act and may assist courts in focusing on a decision point that is sometimes overshadowed by the structure of the guideline calculation.

The architecture of the Guidelines, particularly the Sentencing Table, organizes the sentencing process around offense levels and criminal history categories that primarily produce ranges of imprisonment. Probation appears as an option only in the lowest zones. As a result, the table functions in practice largely as a table of prison ranges, which may frame sentencing deliberations primarily around the length of a prison sentence rather than around the threshold question of whether imprisonment is the appropriate sanction in the first place. Even in the relatively few cells where probation is available, neither the

¹ This figure was calculated using the Sentencing Commission’s [Individual Datafiles](#) for Fiscal Years 2020-2024.

Guidelines nor federal sentencing practices never treat probation as the presumptive sentence type. Instead, the system appears to operate as one of “prison-by-default.”

Social science research suggests that such structural framing can influence decision-making even among experienced professionals. A substantial body of work in behavioral science shows that decision-makers often rely on anchors,² or reference points, when making judgments.³ Initial reference points, especially those embedded in the structure of a decision process, influence outcomes even when decision-makers theoretically understand that other options are available.⁴ Legal experts recognize that “sentencing may be a particularly vulnerable task” for anchoring bias to impact judicial decision-making.⁵

Related behavioral research on default,⁶ benchmark, and anchoring effects suggests that when one outcome is presented as the standard, typical, or baseline option within a decision system, decision-makers are more likely to select it, even when other options remain known and formally available.⁷ Together, these features may unintentionally reinforce imprisonment as the baseline frame for sentencing decisions.⁸ Statistics clearly show how such effects operate in federal sentencing practice with an imprisonment rate over 90%.⁹

A potential critique is that additional commentary as proposed is unnecessary because sentencing judges are already aware that non-imprisonment options may be legally available in the instant case. Behavioral research, however, suggests that awareness of alternatives does not eliminate the influence of anchors or structural defaults.¹⁰ Even highly trained decision-makers can be influenced by the way a

² “In psychology, *anchoring* is the phenomenon whereby, in estimating an unknown value, a person begins by fixing on a known value that the person perceives as diagnostic of the unknown value and then adjusts this ‘anchor’ upwards or downwards to accommodate considerations that the person perceives as relevant to estimating the unknown value.” Philip Petrov, *Proportionality in Criminal Sentencing: A Cognitive Hypothesis*, 43 OXFORD J. LEG. STUD. 124, 144 (2023) (emphasis in original).

³ See generally Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014) (citing empirical sources for anchoring effects with federal judges and contending the sentencing guidelines act as anchors).

⁴ See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

⁵ Lukas Holste & Holger Spamann, *Experimental Investigations of Judicial Decision-Making*, Harv. John M. Olin Ctr. for L., Econ. & Bus. Discussion Paper No. 1096, at *5-6 (2023).

⁶ “The default effect refers to the tendency of people to stick with the pre-selected option when given a choice.” Subramanya P. Chandrashekar & Adrien A. Fillon, *Framing the Default: Influence of Choosing Versus Rejecting Frame on Default Effects*, 71 EXPERIMENTAL PSYCHOL. 164, 164 (2024).

⁷ See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁸ Ian D. Marder & Jose Pina-Sánchez, *Nudge the Judge? Theorizing the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clustering*, 20 CRIMINOLOGY & CRIM. JUST. 399, 407 (2020) (providing empirical support that sentencing guidelines interact with the heuristic of anchoring in a way that can lead judges to default to ordering prison sentences).

⁹ The incarceration rate for Fiscal Years 2020-2024 was 92%. This figure was calculated using the Sentencing Commission’s [Individual Datafiles](#).

¹⁰ Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188 (2006) (finding experienced sentencing judges are influenced by anchors, even when they clearly are randomly generated).

decision framework presents options.¹¹ As a result, the issue is not whether judges are aware that probation exists, but whether the decision environment makes that option cognitively salient before the guideline (prison) range anchors the sentencing analysis.¹² Scholars apply salience theory to judicial sentencing decisions, indicating that judges are psychologically drawn to anchors that are salient, even when they are not the most useful or relevant to the instant sentencing calculus.¹³ Reminding judges that probation is available when engaged with every case can therefore serve as a debiasing intervention, a modest behavioral “nudge,” by introducing an alternative reference point and reducing the anchoring effect of the Guidelines.¹⁴ “The prison-centred paradigm is a retributive one, the sanction remaining the society’s favourite answer to crime. The non-custodial punishments remain in the retributive logic, them being actually a decriminalization of the punishment.”¹⁵

The proposed amendment language performs that reminder function in a balanced way. By reiterating Congress’ decision not to establish a presumption in favor of any particular sanction and by recognizing that non-imprisonment sentences can serve punitive and deterrent purposes, the commentary encourages courts to consider the full range of sentencing options authorized by law. It also aligns with Congress’ intent that sentencing courts retain flexibility to determine which type of sanction best serves the purposes of sentencing in a particular case.

Including this introductory commentary would therefore help ensure that the Guidelines reflect the conceptual sequencing contemplated by the Sentencing Reform Act: courts should first determine the appropriate type of sentence, and then determine the appropriate severity of that sanction.

Issue for Comment #2 for Part A.

The Commission’s proposal to identify factors that courts may consider in the custodial threshold decision would be a useful addition to the Guidelines. Listing such considerations may help ensure that courts explicitly evaluate the purposes of sentencing before determining whether the custodial threshold has been reached to require prison as the necessary outcome.

From a decision-making perspective, identifying relevant considerations can improve the quality and transparency of judgments. Research in behavioral science suggests that structured decision frameworks, particularly those that prompt decision-makers to consider multiple relevant factors, can reduce reliance on

¹¹ One experimental study found a reduction in sentencing severity when the judicial participants were informed of the negative consequences to imprisoning the defendant (e.g., high cost of prison, burden on defendant’s family, reducing the defendant’s employment prospects on release, and increasing the odds of future crimes). Eyal Aharoni et al., *Nudges for Judges: An Experiment on the Effect of Making Sentencing Costs Explicit*, 13 FRONTIERS IN PSYCHOL. 889933, at *4 (2022).

¹² District judges tend have to large sentencing caseloads and thus the sentencing process itself may become routinized. But, even for experienced judges, “[p]ractice alone does not necessarily make perfect.” Holste & Spamann, *supra* note 5, at *3.

¹³ Pedro Bordalo, Nicola Gennaioli, & Andrei Shleifer, *Salience Theory of Judicial Decisions*, 44 J. LEG. STUD. 57, 58-59 (2015).

¹⁴ “[A]dopting the strategy of reverse thinking can effectively reduce the impact of the anchoring effect, and providing judges with information different from the initial information can effectively reduce the impact of the anchoring effect on judges in the judgment process, so it is important for judges to get more heterogeneous and adversarial information.” Jiaxi Liu, *Research on the Anchoring Effect in the Judicial Field*, 17 LECTURE NOTES IN EDUC. PSYCHOL. & PUB. MEDIA 113, 117 (2023).

¹⁵ Antonio Sandu & Camelia Ignătescu, *Retributivity and Public Perception on the Non-Custodial Sanctions*, 9 REVISTA ROMÂNEASCĂ PENTRU EDUCAȚIE MULTIDIMENSIONALĂ 103, 105 (2017).

cognitive shortcuts and encourage more deliberate reasoning.¹⁶ Explicitly identifying the types of considerations relevant to the sentencing-option decision may therefore assist courts in conducting the careful and individualized analysis contemplated by 18 U.S.C. § 3553(a).

In general, the factors identified by the Commission appropriately reflect the statutory purposes of sentencing and the considerations Congress directed the Commission to address in promulgating the Guidelines.

Protection of the public and other purposes of sentencing.

Including a factor addressing whether probation or imprisonment best protects the public and serves the purposes of sentencing would be consistent with the statutory framework. Explicitly noting these considerations at the stage where the sentencing option is determined reinforces that the appropriate sanction should be selected with those purposes in mind rather than assumed from the outset.

Seriousness of the offense and harm caused.

The seriousness of the offense and the harm caused are also appropriate considerations in determining the type of sentence. These factors are central to the principle of proportional punishment reflected in §3553(a)(2)(A). At the same time, recognizing the relevance of offense seriousness does not necessarily imply that imprisonment is always required to achieve just punishment. Non-custodial sentences may impose substantial restrictions on liberty and may in appropriate cases adequately reflect the seriousness of the offense and qualify as punitive. A 1983 Senate report in discussing at the time the potential for sentencing reform indicated that probation with appropriate conditions may satisfy deterrent and punitive purposes.”¹⁷

[S]entencers must necessarily consider whether a community sentence could, in a given case, appropriately meet the aims of sentencing, including appropriate censure. A constructive way of addressing that issue would seem to be by considering whether the available community penalties could provide, as well as or better than a custodial sentence, the identified objectives of reparation, rehabilitation and/or incapacitation. That way of looking at the issues seems to be both more specific and less confusing than asking whether the community penalty is sufficiently ‘tough’ or ‘punitive’; and [] the answer to such a question will very often be that the stated objectives can ‘best be met by supervising and punishing the offender in the community’.¹⁸

¹⁶ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 40 (2007) (“Scripts and checklists can free judges from reliance on their memories and encourage them to proceed methodically, thereby ensuring that they touch all of the deliberative bases. A judge who must review a script or checklist at each step in the decision-making process is less likely to rely on intuition when doing so is inadvisable.”). See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (discussing structured decision-making can shift judges from heuristics to more deliberate reasoning).

¹⁷ S. Rep. No. 98-225, at 91 (1983).

¹⁸ Anthony E. Bottoms, ‘Punishment’ in *Non-Custodial Sentences: A Critical Analysis*, 28 CRIM. L. FORUM 563, 587 (2017).

The Supreme Court recently agreed, writing in *Esteras v. U.S.* in 2024 that “[f]ines, probation, and imprisonment are a court’s primary tools for ensuring that a criminal defendant receives just deserts for the original offense.”¹⁹

Rehabilitation and the defendant’s treatment needs.

Consideration of a defendant’s need for treatment, training, or other rehabilitative interventions is also appropriate when determining the sentencing option. Research on the risk-needs-responsivity framework indicates that addressing criminogenic needs through targeted interventions can promote desistance and reduce recidivism when implemented appropriately. Recognizing the presence of protective factors in the defendant’s life that deflect from new offending helps individualize the sentencing further. Sentencing courts may therefore benefit from considering not only whether a defendant has identifiable treatment needs, and also if the community is the setting in which those needs can most effectively be addressed.²⁰

Availability of resources and correctional capacity.

The Commission’s suggestion that courts consider the nature and capacity of available facilities and services, as well as the effective allocation of correctional resources, also reflects Congress’s direction in 28 U.S.C. § 994(g). Sentencing decisions inevitably occur within a broader system of limited resources. Recognizing this context may assist courts in selecting sanctions that are both effective and proportionate, while making appropriate use of available correctional and supervisory resources. Nor is such guidance unnecessary simply because judges may already understand, in the abstract, that correctional resources are finite. Research in psychology and legal decision-making indicates that information can influence outcomes not only by introducing new knowledge, but also by making a relevant consideration salient at the moment of decision.²¹ In that sense, a guideline reminder serves as a prompt: it directs attention to a lawful sentencing consideration at the time it is most consequential. Consistent with that understanding, experimental research has found that an informational message about prison capacity was associated with a reduction in decisions to incarcerate, suggesting that a contemporaneous reminder can affect sanction choice even where the underlying consideration is already generally known.²²

First offenders and violent offenders.

The factor distinguishing first offenders from individuals convicted of violent offenses likewise reflects Congress’s guidance in § 994(j). Highlighting this distinction may assist courts in identifying circumstances in which non-custodial sanctions are often appropriate, while recognizing that imprisonment may be appropriate in cases involving serious violence or substantial risk of harm.

¹⁹ 606 U.S. 185, 196 (2025).

²⁰ JAY GORMLEY, MELISSA HAMILTON, & IAN BELTON, SENTENCING COUNCIL FOR ENGLAND & WALES, [THE EFFECTIVENESS OF SENTENCING OPTIONS ON REOFFENDING](#) (2022).

²¹ Liu, *supra* note 14; Paul Troop & David Lagnado, [Case Order Effects in Legal Decision-Making](#), 15 BEHAVIORAL SCI. 1250 (2025) (presenting results from experimental research that judicial outcomes may shift based on what is made salient in the decisional sequence).

²² See Eyal Aharoni et al., [Punishment as a Scarce Resource: A Potential Policy Intervention for Managing Incarceration Rates](#), 14 FRONTIERS IN PSYCHOL. 1157460, at *2 (2023) (citing studies).

History of prior criminal conduct.

A defendant's prior criminal conduct is already a central consideration in the Guidelines through the criminal history score and the resulting criminal history category. It is therefore appropriate for courts to consider prior conduct when determining the sentencing option. At the same time, care should be taken to avoid over-reliance on criminal history beyond the significant weight already assigned in the Sentencing Table.

Relatedly, recent legal developments regarding the use of acquitted conduct in sentencing highlight the importance of ensuring that criminal history considerations remain grounded in reliable adjudicated conduct. Ensuring that criminal history is evaluated in a manner consistent with those principles may help maintain the fairness and perceived legitimacy of sentencing decisions.

Developing research and knowledge regarding sentencing effectiveness.

The Commission's proposal to include developing research and knowledge about the effectiveness of sentencing options is particularly important. Over the past several decades, criminological research has significantly advanced understanding of how different sanctions affect recidivism and public safety.²³ A growing body of scholarship suggests that the deterrent effects of punishment severity are often far more limited than traditionally assumed, while evidence-based interventions targeting criminogenic needs may have greater potential to reduce reoffending.²⁴

Recognizing the relevance of evolving research is consistent with Congress's directive that the Commission develop guidelines informed by empirical knowledge about effective crime control strategies. Explicitly encouraging courts to remain attentive to credible research may help ensure that sentencing practices continue to evolve alongside advances in the scientific understanding of crime and desistance.

At the same time, courts routinely evaluate the reliability of scientific and expert evidence in a variety of legal contexts. The proposed factor therefore need not impose any particular methodology on sentencing courts but rather encourages awareness that credible empirical research may inform judgments about which sentencing options are most likely to protect the public and reduce recidivism.

Additional Comment: The proposed Application Notes to the Sentencing Table indicates that the Criminal History Category is determined by the total criminal history points from Chapter 4 and lists two exceptions for Career Offender and Armed Career Offender. Should the note also list §4B1.5 and §3A1.4 as they can override criminal history points in terms of final Criminal History Category?

²³ See, e.g., Denis Yukhnenko, Leen Farouki & Seena Fazel, [Criminal Recidivism Rates Globally: A 6-Year Systematic Review Update](#), 89 J. CRIM. JUST. 102115 (2023); Michael Ostermann, Nathan W. Link, & Jordan M. Hyatt, *Reframing the Debate on Legal Financial Obligations and Crime: How Accruing Monetary Sanctions Impacts Recidivism*, 62 CRIMINOLOGY 331 (2024); Arul George Scaria et al., [Algorithms and Recidivism: A Multi-disciplinary Systematic Review](#), 7 PROCEEDINGS AAAI/ACM CONF. AI, ETHICS, & SOC'Y 1292 (2024); Patrice Villettaz, *The Effects on Re-offending of Custodial vs. Non-custodial Sanctions: An Updated Systematic Review of the State of Knowledge*, 11 CAMPBELL SYS. REV. 1 (2015); Joshua C. Cochran, Daniel P. Mears, & William D. Bales, [Assessing the Effectiveness of Correctional Sanctions](#), 30 J. QUANTITATIVE CRIMINOLOGY 317 (2014).

²⁴ See, e.g., Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013); Aaron Chalfin & Justin McCrary, [Criminal Deterrence: A Review of the Literature](#), 55 J. ECON. LIT. 5 (2017); Travis C. Pratt et al., [The Empirical Status of Deterrence Theory: A Meta-Analysis](#), in TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY (Travis C. Pratt et al., eds., 2017).

Issue for Comment #1 for Part B

The Commission's proposal to expand Zones B and C of the Sentencing Table is a constructive step toward encouraging courts to meaningfully consider the full range of sentencing options authorized by the Sentencing Reform Act. Expanding these zones may help address structural features of the Sentencing Table that historically have encouraged imprisonment to function as the default sanction in most federal cases.

The Sentencing Table organizes sentencing primarily around ranges of imprisonment. Because most guideline calculations culminate in the selection of a prison term, the table may unintentionally frame sentencing decisions around the length of incarceration rather than the threshold determination of whether imprisonment is necessary in the particular case. Behavioral research indicates that when one option is made especially prominent within a decision framework, including by designating it as the default, that option can serve as a salient reference point that shapes subsequent judgments and choices.²⁵

Expanding Zones B and C can partially mitigate this structural effect by ensuring that non-custodial or hybrid sanctions remain viable options across a broader range of table cells. When probation or community-based sanctions are clearly available within the guideline framework, courts are more likely to engage in a deliberate assessment of whether imprisonment is necessary to achieve the purposes of sentencing.

From a policy perspective, modest expansion of these zones is also consistent with developing empirical research on sentencing effectiveness. A recent comprehensive review of the research concluded that “a great deal of deterrence-based policy rests on an incorrect assumption that punishment deters.”²⁶ These scholars do not entirely discount the potential for penalties to deter, but emphasize that any such deterring consequences are likely to be highly contingent, such as varying based on individual perceptions and circumstances, the age-crime curve, type of crime, and the form of punishment (e.g., prison or probation).²⁷ Nonetheless, these scholars compare the evidence of policies based on deterrence versus rehabilitation:

[A] comprehensive analysis of systematic reviews . . . found that deterrence-based punishment strategies produced inconsistent results. there were sometimes increases in recidivism rates—which is to say, criminogenic effects . . . —and there were sometimes decreases. Rehabilitation strategies, on the other hand, consistently resulted in moderately large decreases in the likelihood of recidivism, though there was variation in the effects among different types of rehabilitation efforts.²⁸

For these reasons, the Commission may wish to consider expanding Zones B and C somewhat more broadly than proposed. Extending eligibility for non-custodial or partially custodial sanctions to somewhat higher offense levels would better reflect the statutory framework, which does not presume imprisonment as the preferred sanction. Such an approach would also allow courts to tailor sanctions more effectively to the characteristics of individual cases while reserving the most resource-intensive form of punishment (i.e.,

²⁵ See Felice Giuliani et al., *The Joint Effect of Framing and Defaults on Choice Behavior*, 87 PSYCHOL. RES. 1114 (2022); Luc Meunier et al., *Framing the Default Option Right*, 37 J. BEHAVIORAL DECISION MAKING e2395 (2024).

²⁶ DANIEL P. MEARS & MARK C. STAFFORD, COMPREHENSIVE DETERRENCE THEORY: THE SCIENCE AND POLICY OF PUNISHMENT 238 (2025).

²⁷ *Id.* at 234-34.

²⁸ Daniel P. Mears & Mark C. Stafford, *A Theoretical Critique of Deterrence-Based Policy*, 95 J. CRIM. JUST. 102305, at 3 (2024).

incarceration) for cases where it is clearly necessary to protect the public or reflect the seriousness of the offense. In other words, an expanded range for Zones B and C would be consistent with the Risk-Needs-Responsivity framework that is now recognized as an evidence-based framework, while also allowing for more individualized sentencing decisions than is currently available with the more restrictive zones.

In considering the scope of Zones B and C, the Commission may also wish to recognize the substantial role that criminal history already plays in determining guideline ranges. The Sentencing Table significantly increases recommended penalties based on prior convictions through the criminal history categories. As a result, individuals with prior system contact often face markedly higher guideline ranges than those with less criminal history (at least according to Chapter 4 counting rules), even when the current offense conduct is identical.

A growing body of research in criminology has also observed that criminal history measures may reflect cumulative contact with the criminal justice system over time, which can be influenced by a range of social and structural factors.²⁹ These dynamics do not undermine the relevance of criminal history in sentencing, but they do suggest that criminal history scores should be considered alongside other information about an individual's current risk and circumstances.

One particularly relevant consideration is the well-established age-crime curve. Criminological research consistently finds that criminal behavior tends to peak in late adolescence and early adulthood and declines substantially with age.³⁰ As individuals move further beyond the peak offending years, the likelihood of future criminal conduct generally decreases—even among individuals with prior criminal records.

Because criminal history categories are based on prior convictions accumulated over time, they may not always fully capture these life-course changes in risk. In some cases, particularly for older individuals, a criminal history category may reflect earlier periods of offending that are less predictive of future behavior. Providing courts with meaningful sentencing options beyond imprisonment in such cases may allow them to better account for the declining risk associated with age while still imposing sanctions that satisfy the statutory purposes of sentencing.

Modest expansion of Zones B and C would support this flexibility. Allowing courts to consider structured community-based sanctions or hybrid sentencing options across a somewhat broader range of guideline calculations may help ensure that the interaction between criminal history and offense level does not automatically lead to imprisonment in cases where other sentencing options could adequately protect the public and promote rehabilitation.

A potential critique is that encouraging greater use of probationary sentences would increase the workload of federal probation officers. But the proper comparison is not probation versus no correctional burden. It is community supervision versus imprisonment. A prison sentence also requires extensive public resources, including institutional staffing and confinement costs, and frequently results in a later term of

²⁹ See, e.g., Shawn D. Bushway, Brian D. Johnson, & Lee Ann Slocum, *Is the Magic Still There? The Use of the Criminal History Record in Risk Assessment*, 53 CRIMINOLOGY 1 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

³⁰ See Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIOLOGY 552 (1983); Alfred Blumstein & Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009).

supervised release that officers must oversee in any event. Indeed, federal supervision data show that probation officers already receive almost 10 times more individuals from prison onto supervised release than they do as probation cases.³¹ About 87% of prison sentences are assigned a term of supervised release and terms of supervised release are on average longer than probation terms.³² Thus, greater reliance on probation in appropriate cases would not create correctional work out of nothing; it would shift some cases away from the most expensive front-end sanction (prison) and, in many cases, avoid the need for both imprisonment and later (a potentially longer period of) post-custodial supervision. The relevant policy question, therefore, is not whether probation requires resources, but whether federal correctional resources are being used in the most effective and proportionate way. Indeed, it does not seem to be rationally or fiscally appropriate to send more individuals to prison because probation is not adequately resourced.³³

Another critique refers to the potential that over-supervising those at low risk can be associated with higher levels of recidivism. That is true, but the authors of such studies do not advocate for *prison* as the alternative to community sanctions. Instead, one group of authors (employed by federal Probation and Pretrial Services Office and the Administrative Office of the U.S. Courts) contend that it is more cost effective, while not endangering the public, for supervising officers to “expend minimal amounts of time and resources on low-risk offenders, while placing most of their efforts on offenders classified into the higher risk categories.”³⁴ Another study favored low-intensity supervision for lower risk probationers:

First, decreased supervision of low-risk probationers saves taxpayer dollars. . . . Second, every incarceration represents another dent on the person’s identity. Incarceration impairs the ties that the individual has to society and often to his or her family or other community supports. Low-intensity supervision of low-risk individuals reduces the harmful effects of incarceration and probation. Third, low-intensity supervision of low risk does not pose a threat to community safety. Findings from this study show no significant differences in rearrest rates for those placed on low-intensity versus regular caseloads.³⁵

A related critique is that studies indicate that mixing low-risk with higher-risk individuals in community programs can be criminogenic for the low-risk, but again the authors are not contending that prison is the less criminogenic and, thus, preferred alternative. Instead, another group of authors that included a former analyst with the Probation and Pretrial Services Office recommend that “[o]ffenders who are lower risk are best served with more traditional levels of supervision, whereas offenders who are higher risk should be

³¹ US Courts, [Federal Probation System – Persons Received for and Removed from Post-Conviction Supervision](#), tbl. E-1 (September 30, 2025) (reporting that for the 12-month period ending September 30, 2025, the federal probation system received 5,199 individuals on probation and 50,537 individuals on supervised release).

³² These figures were calculated using the Sentencing Commission’s Individual Datafiles for Fiscal Years 2020-2024, <https://www.ussc.gov/research/datafiles/commission-datafiles>. The mean supervised release term was 47 months (median 36 months) compared to the mean probation term of 35 months (median 36 months). *Id.* For the mean lengths of supervised release and probation, designations of amount unknown were set to system missing and a supervised release term for life was recoded to 470 months, consistent with Commission practices for treating sentencing outcomes involving life terms.

³³ Cyrus Tata, *Sentencing & Penal Policy: Ending Prison as the Default*, 12 PROBATION Q. 33, 35 (2019).

³⁴ Thomas H. Cohen, David Cook, and Christopher T. Lowenkamp, *The Supervision of Low-Risk Federal Offenders: How the Low-risk Policy Has Changed Federal Supervision Practices without Compromising Community Safety*, 80 FED. PROBATION 3, 9 (2016) (“federal officers can spend less time and resources on low-risk offenders without an accompanying rise in their recidivism rates”).

³⁵ Hacı Duru, Lori Brusman Lovins, & Brian Lovins, *Does Reducing Supervision for Low-risk Probationers Jeopardize Community Safety?*, 84 FED. PROBATION 21, 26 (2020).

kept in programming longer to address their risk factors and needs.”³⁶ Further, they suggest “this research has some clear implications for sentencing, especially when judges are considering conditions for supervision. To have the greatest impact on recidivism, length of supervision and services provided should be clearly tied to an offender’s risk level.”³⁷ Another study (conducted by a researcher then employed by the Federal Bureau of Prisons) acknowledged the potential negative effects of ex-offenders in halfway houses, though found no difference in recidivism rates for individuals assigned to the halfway house versus those on home detention, concluding that “it might be beneficial to promote electronic monitoring as a fiscally conservative approach to community reintegration.”³⁸

Issue for Comment #3 for Part B

The Commission asks whether it would be appropriate for the expansion of Zones B and C to result in situations in which defendants with the same applicable guideline range (for example, 15–21 months or 18–24 months) may be authorized for different sentencing options depending on their criminal history category. Some commentators may express concern that authorizing different sentencing options for defendants with the same guideline range could introduce inconsistency. In practice, however, such differences largely reflect the structure of the Sentencing Table, which organizes sentencing primarily around imprisonment ranges rather than around the broader range of sentencing options authorized by statute. Because sentencing options are defined through offense-level zones tied to that table, situations will inevitably arise in which identical month ranges intersect different zones. At its core, the Sentencing Table answers the question “*what imprisonment range applies?*”, while the zone structure layering over top of the table helps answer the question “*how much of that punishment must be served in prison?*” Allowing modestly expanded flexibility within this framework does not undermine consistency in punishment severity; rather, it ensures that courts retain the ability to consider whether imprisonment is necessary in individual cases.

Thank you for the opportunity to weigh in on this important proposed amendment.

Sincerely,

Melissa Hamilton

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³⁶ Christopher T. Lowenkamp, Edward J. Latessa, & Alexander M. Holsinger, *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs*, 52 CRIME & DELINQUENCY 77, 89 (2006).

³⁷ *Id.* at 89-90.

³⁸ Jody Klein-Saffran, *Electronic Monitoring vs. Halfway Houses: A Study of Federal Offenders*, ALTERNATIVES TO INCARCERATION 25 (Fall 1995).

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Shyer Maguire, Advocate and designer of Prison program

Topics:

- 2. Career Offender
- 3. Circuit Conflicts Concerning §4B1.2(b)

Comments:

Public Comment on Proposed Amendments to Career Criminal Guidelines

P.1 of 2

Submitted to the United States Sentencing Commission

03/17/26

I am writing to address the United States Sentencing Commission regarding the proposed amendments to the career criminal guidelines, with particular attention to the categorical approach and its impact on sentencing practices. These amendments are crucial for ensuring fairness and constitutional integrity in federal sentencing.

During the recent public hearing, David Safavian emphasized the urgent need to discontinue the categorical approach, arguing that state convictions should no longer serve as predicates for career offender enhancements. Safavian's remarks underscored the problems inherent in relying on state convictions, which often result in disproportionate and inconsistent enhancements for federal offenders. Including armed career criminal enhancements in this discussion is essential, as these enhancements frequently compound the injustices caused by the categorical approach.

To support Safavian's position, I respectfully request the Commission review the attached '10 meets 10' document. This document illustrates the flaws in the current system and provides concrete examples of how discontinuing the categorical approach can lead to fairer outcomes. Additionally, please note the now Chief of Appeals, Robert Zauzmer's quote in the '10 Meets 10' document attached, and his plea to fix the categorical approach. As he called for comprehensive reforms to the Armed Career Criminal Act. Both experts agree that these changes are necessary for restoring integrity to the sentencing process and preventing unwarranted enhancements.

You have the amendments, there has been endless discussion, now is the time to adopt them. They should most definitely be applied retroactively, ensuring that individuals currently serving sentences under the old guidelines have access to relief and that justice is not delayed for those most affected by the categorical approach.

Case in point, Zeph Pitt, serves as a compelling example of the urgent need for reform. Zeph Pitt's situation highlights constitutional violations and demonstrates how the categorical approach can lead to unjust outcomes. {ACCA enhancement with two "10 Meets 10", 20 and 25

year old petty drug offenses serving already longer than the Mx of his statute of conviction, for inheriting his deceased father's guns; the 1/10th of the federal possession law.} I urge the Commission to contact [REDACTED] at the White House regarding the Zeph Pitt file [REDACTED], and to consider moving his case forward as emblematic of the larger issues at stake.

In conclusion, I strongly encourage the Commission to adopt the proposed amendments, discontinue the categorical approach, reform career criminal and armed career criminal enhancements, and apply these changes retroactively. Reviewing the '10 meets 10' document and addressing the Zeph Pitt case will further support these reforms. Thank you for your attention to these important matters.

Shyer D. Maguire

Advocate and Author, TEDx Speaker Exec.Dir. Towers For Change

Working to break the School to Prison Pipeline [REDACTED]

RE: 18 USC §924(e)(2)(A)

When Congress wrote the most current amendment to 924e, AKA the Armed Career Criminal Act, they defined a predicate conviction as "{ii} an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of Ten years or More is prescribed by law".

The Burning Question is...

Was it the intention of Congress, that a state conviction; for example, MA Gen. Law Chapter 94c Section 32Aa, {drug possession with intent}, a statute with a punishment of, Zero to "Not More than Ten years", be considered a lawful predicate for the Armed Career Criminal Act? Can the Federal Floor meet the State Ceiling?

The United States District Court for the District of Massachusetts, the 1st Circuit, has said "Yes they can". Although the 4th and other Circuits says "no they can not".

For the past 30 years, the 1st Circuit prosecutors have allowed a conviction of Chap.94c Sec.32 (A)(a), to be used as an ACCA predicate offense when a person violates 18 USC §922(g)(1), "Felon in Possession of a Firearm". This means a 922g1 conviction, that could be non-violent, often victimless and sometimes unintentional, can have its penalty increased to ACCA's mandated minimum of 15 years all the way to life without parole. The result is that thousands of low-level offenders are swept up in the bulldozer of Mass Incarceration and sentenced to overlong punishments. Billions of wasted taxpayer dollars.

Why would the Federal Court say that Sec.32Aa with a punishment of NO MORE THAN TEN YEARS, fits the definition of Serious Drug Offense? Especially when the actual Serious Drug Offenses are in Chap. 94c Sec. 32(E)(a)(b) etc. with punishments of 2 to 15 years and 6 to 20 years, etc. Punishments that do have a probability of TEN OR MORE.

In the September 2021 D.O.J. Journal of Federal Law & Practice, AUSA Robert A. Zauzmer wrote: 'Fixing the Categorical Approach Mess'. He said: "each circuit contributes to a list of strange anomalies, where the definitions of [serious drug offense or] violent felony vary state to state".

We are looking for collaboration to amend 18 USC § 924(e)(2)(A)(i) & (ii). Just one simple

change to read "a punishment of More than TEN years" instead of the current phrase, "a punishment of TEN years or more", to stop the 1st and other circuits from saying that the Federal floor and the State ceiling "Meet at Ten".

Shyer Maguire,

CEO TowersForChange.org

Working to break the School to Prison pipeline.

TEDx Talk on Juvenile Recidivism

Submitted on: [March 18, 2026](#)

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

To: The United States Sentencing Commission
From: Jefri Wood
Date: March 18, 2026

Comment on Proposed Sentencing Options Amendment, U.S.S.G. Ch. 5, Pt. A

This comment is a response to a few issues that were raised in the testimony and comments provided at the March 9 hearing on the proposed sentencing options amendment.

I. The additional “instruction” provided by §5A1.1 is both helpful and appropriate.

The *Guidelines Manual* is not just a manual that sets out the various guideline provisions. It is also an *instructional* manual that tells judges, prosecutors, defense attorneys, and probation officers how to apply those provisions. This can be done in guidelines, policy statements, or commentary. It is certainly within the purview of the Sentencing Commission to provide additional guidance, or “instruction,” when evidence and experience indicates that would be useful.

To say, as some have, that judges and others involved in the guideline sentencing process “know” what the sentencing options are, and are supplied with sufficient information to properly make the required decisions, may be true for some but certainly not for all. New judges, new attorneys, and new probation officers need this kind of instruction. If the responses to the Federal Judicial Center’s judge orientation programs are any indication, participants are eager for any information that will help them in their duties—they want *more*, not less. And, as Judge Chang noted in his testimony, even experienced judges can use occasional reminders. The popularity of the FJC’s workshops and seminars for “mid-career” and experienced judges bear this out.

This is also the primary purpose of the long-running, well respected *Benchbook for United States District Courts*:

The *Benchbook* covers procedures that are required by statute, rule, or case law, and offers detailed guidance from experienced trial judges on these requirements and other matters that arise in the courtroom. New judges should benefit from the *Benchbook*, *but all judges may find useful reminders about how to handle both routine and more complex issues or how to handle situations they may encounter for the first time.*

Benchbook, Seventh Edition, Preface at iii (Federal Judicial Center February 2026) (emphasis added). For example, judges should know how to handle a sentencing hearing. Yet for years one of the most frequent requests, from new and experienced judges alike, was to add a sentencing colloquy, or “script,” to Section 4.01 that set out the required procedure. We did so in the 2013 Sixth Edition. (In fact, the initial draft of the colloquy was provided by then-Chief Judge Patti B. Saris (D. Mass.), who was not only on the *Benchbook* Committee but also the Chair of the Sentencing Commission at that time.)

It might also be expected that judges (and others) know all the ins and outs of appointment of counsel for indigent defendants—after all, this subject has been extensively covered by Supreme Court and appellate case law, statute, rules of procedure, and the Judicial Conference’s *Guide to Judiciary Policy*. Yet in March of 2024, the Defenders Services and Criminal Law Committees

felt that a joint memorandum on the “Right to Counsel at Initial Appearance” was needed to ensure that judges were properly, and promptly, appointing counsel for qualified defendants. Following suit, the 2026 *Benchbook* expanded its section on appointment of counsel at the initial appearance and also added Appendix B on “Timely Appointment of Counsel.”

And just last year, the Sentencing Commission completely revised and added to the guidelines on supervised release. Even though supervised release has been around since 1987, and is imposed in the vast majority of sentences, the Commission found it was too often handled improperly. The result is new USSG §§5D1.1 to 5D1.4, which carefully lay out the proper steps that sentencing courts must follow regarding supervised release. In response, the *Benchbook* added new material in Section 4.01 on the imposition of supervised release, and new Section 4.02 that covers modification, extension, and termination of supervised release.

The point here is that information that instructs, clarifies, or simply reminds judges and other stakeholders of guideline requirements and procedures is helpful, and should not be avoided just because some, or even most, judges already “know” what to do. Judges have to know, or be able to quickly recall, an enormous amount of information on a daily basis, and it is useful to have reminders and explanations, even for supposedly “routine” matters (is sentencing ever really “routine”?). Proposed U.S.S.G. §5A1.1(a)(1)–(4) falls into this category. It does not set forth a new procedural requirement, as some have cautioned (and subsection (b) can be revised to make that clearer). Rather, subsection (a) simply notes the four sentencing zones and directs courts to the applicable guideline sections. Although the section begins by telling the court to “determine the guideline range and zone applicable to the defendant’s offense level and criminal history category,” that determination will have been done before the sentencing hearing. The court may still have to settle any disputes about the proper offense level and CHC at the sentencing hearing, but that is generally part of the guideline calculation in Step One. To further clarify, one solution may be to assume that this has been done and simply remove the first sentence of subsection (a) to instead start with: “The Sentencing Table, U.S.S.G. §5A1.2, is divided into zones”

II. Adding 18 U.S.C. § 3553(a) factors or references to § 3553 in the proposed Commentary or Guideline is neither appropriate nor needed.

Some have stated that the proposed Introductory Commentary should reference 18 U.S.C. § 3553(a) and the various factors that courts are required to consider in order to impose a sentence that is “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. The Commission itself asks if the factors in § 3553(a)(2) should be listed in the guideline. This would seem to be inconsistent with the relevant statutes and the Guidelines themselves.

The Commission, in 28 U.S.C. § 994, is instructed to promulgate guidelines that “meet the purposes of sentencing as set forth in section 3553(a)(2)” (see § 994(g), referring to subsection (a)(1)), and policy statements that, “in the view of the Commission, would further the purposes set forth in section 3553(a)(2)” (see § 994(a)(2)). Section 991(b)(1)(A) states that the purpose of the Sentencing Commission is to establish sentencing policies and practices that “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).” The Commission, then, is obliged to take into account the purposes of sentencing *when it promulgates or amends* a guideline provision. Nowhere is the Commission instructed to ensure that sentencing courts, when calculating a *guideline sentence*, also consider the purposes of sentencing under § 3553(a).

See also U.S.S.G. §1A1.1, comment., at 3 (“The requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, however, do not apply to the sentencing court.”).

In fact, doing so would be inconsistent with § 3553(a) itself. The “kinds of sentence and the sentencing range established” by the guidelines, and “any pertinent policy statement” issued by the Commission, are factors to be considered under § 3553(a)(4) & (5). These factors are distinct, in the statute, from the purposes of sentencing set forth in § 3553(a)(2). It would be a kind of double-counting if the court was instructed to consider the § 3553(a)(2) factors while calculating the guidelines, and then consider them again as required by § 3553(a).¹ That would be kind of putting the cart before the horse (or perhaps putting the cart beside the horse, or on top of the horse—not sure what the appropriate analogy is here).

The proper sequence for and respective roles of the guidelines and § 3553 is recognized on the first page of the *Guidelines Manual*: “The guidelines and policy statements set forth throughout the Guidelines Manual represent the first step in the sentencing process and are one of multiple factors judges must consider under 18 U.S.C. § 3553(a).” U.S.S.G. Ch. 1, Part A, intro. comment. at 1. The Commentary to §1A1.1 then states that “the sentencing court must first correctly calculate the applicable guideline range as the ‘starting point and initial benchmark’ and *then* must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).” (Emphasis added.) Section 1B1.1 then carefully lays out the Application Instruction: “Step One” is the “Calculation of the Guideline Range and Determination of Sentencing Requirements and Options under the *Guidelines Manual*.” That determination includes “the sentencing requirements and *options related to probation, imprisonment, supervision conditions, fines, and restitution.*” U.S.S.G. §1B1.1(a)(8) (emphasis added). *Then*, as “Step Two”:

After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other 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.

U.S.S.G. §1B1.1(b) (emphasis added). Similar language in the Introductory Commentary to current Chapter Five is retained in the proposed amendment.

The purposes of sentencing set forth in § 3553(a)(2), while considered by the Commission when formulating or amending guidelines, thus should not play a role in the sentencing court’s determination of the guideline range or its consideration of the available sentencing options under the guidelines. While this may seem to some like splitting hairs since the court may well consider some of the § 3553(a)(2) factors in making its determination, it should not be a requirement in Step One since the court is required to consider those factors in Step Two.

The Commission has asked for “comment on whether proposed new §5A1.1(b) should reference the § 3553(a) factors, including § 3553(a)(2), or whether “referencing or incorporating these statutory factors [would] inadvertently create a procedural requirement that could be subject to litigation?” My answer would be NO, do not add the references, and YES, it *could*

¹ Note that the prepared testimony from the Department of Justice appears to largely agree: “collapsing the § 3553(a) analysis at step two into the guidelines calculation at step one not only fosters redundancy, it runs counter to the two-step process articulated by the Supreme Court in *Rita* and *Gall*—and enshrined in §1B1.1 of the guidelines themselves via last year’s simplification amendment.” *See* Witness Statement of Nick Linder, Criminal Chief, Southern District of Indiana (at Sentencing Commission Hearing of March 9, 2026), at 4.

indeed be seen as adding a procedural requirement. Plus it is unnecessary, as outlined above. Proposed §5A1.1(d) provides sufficient guidance for sentencing courts, although perhaps it should be revised to specifically note that consideration of “the applicable factors in 18 U.S.C. § 3553(a)” is Step Two and should *follow* Step One per U.S.S.G. §1B1.1(b). Courts are going to consider the various options anyway, first in Step One to determine what, if any, options are available, and then will consider § 3553(a) in Step Two when choosing the appropriate sentence.

If it is considered advisable to list, in some fashion, other requirements of 18 U.S.C. § 3553, it should be made clear that they are part of Step Two, and that courts should first complete the various guideline calculations and determinations in Step One.

III. Expanding Zones B and C is not likely to let serious offenders avoid “just punishment.”

Expanding the B and C Zones will not result in scores of defendants *automatically* getting probation or non-prison sentences. The amendment very specifically states, as does the current guideline, that courts are *authorized* to impose probation, etc., that defendants are *eligible* for these *options*. Nowhere does the amendment say, e.g., that any defendant is *entitled* to probation, or that courts are required or instructed or urged to impose probation or an alternative sentence. And the amendment keeps the current language in the Introductory Commentary that, after applying the relevant guidelines, “the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine the length and type of sentence that is sufficient but not greater than necessary.” See also proposed §5A1.1(b): “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.” And subsection (d): “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.”

To posit that judges will be overly swayed by the amended Zones and, as DOJ’s statement insinuates, inadequately punish serious offenders, seems like kind of an insult to district judges, who are quite capable of distinguishing among defendants, including those in the same “box” in the Sentencing Table. (And it is rather inconsistent with the DOJ statement at p.2, where it acknowledges that “judges approach with seriousness and thoughtfulness the task of imposing a sentence that is ‘sufficient but not greater than necessary’ to accomplish the goals of sentencing in an individual case.”) Plus, judges have probation officers and prosecutors to inform them about such defendants and make sentencing recommendations. When the crime involves a victim or victims, they have the right under the Crime Victims’ Rights Act to make their opinion known to the court while also consulting with the DOJ.

As it is now, judges already have the authority via a downward variance to sentence individuals as if they were, in fact, in these Zones. They also have the authority via an upward variance to not only decline to impose probation or an alternative sentence but to impose a prison sentence above the recommended guideline range. In fact, Table 19 in the Sentencing Commission’s *2024 Sourcebook of Federal Sentencing Statistics* shows that, for U.S. citizen defendants who were “eligible for alternative conditions of confinement as described in USSG §5C1.1, w[ere] not convicted of a Class A or Class B felony, and w[ere] not subject to any mandatory minimum penalty at the time of sentencing,” only 13.0%, received a “non-prison sentence.” (Note: “*Non-Prison Sentence* includes sentences including probation and/or any

alternative confinement, as described in USSG §5C1.1 (i.e., the entire sentence was not incarceration in jail/prison only.” *Id.* at Appendix, p.180.) And Table 14 reveals that 30.3% of defendants in Zone A (0–6 months) who were U.S. citizens not only did not receive probation but received a “prison only” sentence. It does not appear that there is a problem of judges being overly lenient to defendants.

Since it is now baseball season, an analogy: fielders back each other up to prevent errors or reduce their impact. In sentencing, 18 U.S.C. § 3553(a) is the ultimate backup. Whatever the recommended, advisory guideline sentence may be, § 3553(a) is always there as a backup to require the sentencing court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing. There is no indication that the proposed expansion of Zones B and C will change that.

Thank you for the opportunity to comment on the proposed amendment. While it could use some tweaking (as is usually the case with such a complex set of issues), the proposal is generally sound, practical, and helpful to judges, attorneys, and defendants.

Respectfully submitted,

Jefri Wood

Retired Senior Attorney/Writer/Researcher (Federal Judicial Center, 1987 to 2025)

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Paula Armstead Mar. 11, 2026

Topics:

2. Career Offender

Comments:

Dear Judge Reeves,

As people who have been uniquely impacted by prison sentences, we are grateful to the Commission for encouraging consideration of punishment outside the walls of prison. Judges have a range of sentencing options at their disposal, and the Commission's proposed introductory language and new guideline at §5A1.1 help encourage the use of these options.

This is particularly critical at a time when the Federal Bureau of Prisons is in crisis – overpopulated, understaffed, with infrastructure crumbling. Not everyone requires a prison sentence to facilitate rehabilitation and support public safety. In fact, for many people, a sentence to probation will provide the structure needed to rehabilitate, without the harm of custodial incarceration. To be sure, probation is still punishment and complying with its terms are demanding. But encouraging judges to consider alternatives to prison will benefit communities while also relieving pressure on the prison system. We support the language in the introductory comments, the new guideline, and the expanded sentencing zones.

For too long, too many people have been subject to heightened punishment under the career offender guideline, receiving lengthy prison sentences based on crimes that simply do not fit the punishment. The designation "career offender" was created to target serial recidivists. But it has swept in people with substance abuse disorder; people who are street-level drug dealers; people who are simply not "career criminals." Moreover, the career offender guideline exacerbates racial disparities in sentencing.

I hope that any change the Commission makes will address these problems and reduce the number of people subject to the career offender guideline.

Thank you for considering my views.

Submitted on: March 11, 2026

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Andra Banks

Topics:

1. Sentencing Options
2. Career Offender

Comments:

I respectfully submit this comment to express concern regarding the continued use of guideline enhancements—particularly enhancements that substantially increase sentences based on prior convictions rather than the actual conduct of the current offense.

Sentencing enhancements, especially the Career Offender guideline, often result in penalties that are disproportionate to the present offense. In many cases, a defendant's advisory range more than triples or quadruples due to prior convictions that may be decades old, non-violent, and rooted in outdated drug laws. This mechanical increase shifts the focus away from individualized assessment and toward automatic punishment.

Enhancements tied to prior drug convictions are particularly troubling given Congress's recognition that earlier crack cocaine sentencing laws were excessively harsh and racially disparate. When prior convictions from those outdated frameworks continue to trigger extreme enhancements today, the system perpetuates disparities that reforms were meant to correct.

Sentences should reflect the seriousness of the current offense, the individual's actual conduct, and principles of proportionality. Enhancements that dramatically inflate guideline ranges undermine fairness, reduce judicial discretion, and contribute to unnecessary incarceration costs without clear evidence of improved public safety outcomes.

I respectfully urge the Commission to reevaluate and narrow enhancements that produce disproportionate sentencing outcomes, particularly those based on prior non-violent drug convictions. Reforming these provisions would better align the guidelines with evolving standards of fairness, evidence-based sentencing policy, and the goal of proportional punishment.

Thank you for your consideration

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Rhiana Banks

Topics:

1. Sentencing Options
2. Career Offender
3. Circuit Conflicts Concerning §4B1.2(b)

Comments:

Regarding the 2026 Proposed Amendments

To the Honorable Members of the United States Sentencing Commission,

I respectfully submit this comment in support of the Commission's ongoing efforts to modernize the federal sentencing guidelines through the 2026 proposed amendments. These reforms are important because they address long-standing concerns about proportionality, fairness, and the need for individualized sentencing.

My loved one, Virok Webb, is currently serving a 30-year federal sentence. His case highlights why the issues the Commission is examining—particularly sentencing flexibility, enhancement severity, and the treatment of prior convictions—are so important.

First, I strongly support the Commission's discussion of expanded sentencing options and alternatives to lengthy incarceration. Many individuals serving long federal sentences today have demonstrated significant rehabilitation and very low risk of recidivism. In cases like Mr. Webb's, where a person has already served more than fourteen years and maintained an exemplary institutional record, greater flexibility for courts to consider alternatives to continued imprisonment would better align sentences with the purposes of punishment under 18 U.S.C. §3553(a).

Second, the Commission's reconsideration of the Career Offender guideline is critically important. Enhancements based on prior convictions can dramatically increase sentencing ranges, often in ways that do not accurately reflect a person's true risk or culpability. The Commission's discussion of raising the seriousness threshold for prior convictions—such as

considering whether longer terms of prior imprisonment should be required—demonstrates a thoughtful effort to ensure that only the most serious criminal histories produce the most severe sentencing consequences.

Third, the Commission's work to resolve circuit conflicts concerning the definition of "controlled substance offense" under §4B1.2(b) is also significant. Inconsistent interpretations across the federal courts have created disparities in how enhancements are applied. Clarifying these definitions will help ensure that similarly situated individuals are treated more consistently nationwide.

Although Mr. Webb's sentence involved a statutory enhancement rather than the Career Offender guideline itself, the policy concerns the Commission is addressing are directly relevant. His sentence was heavily influenced by a single prior conviction that significantly increased his mandatory minimum sentence. The Commission's reconsideration of how prior convictions should trigger severe sentencing consequences shows that these policies are being thoughtfully reevaluated. The Commission's current discussion about whether longer terms of prior imprisonment should be required before triggering severe sentencing consequences—such as the alternative one-, three-, and five-year thresholds being considered—highlights why many families believe the seriousness of prior convictions is being thoughtfully reevaluated at the national level.

Mr. Webb has now served more than fourteen years in federal custody. During that time he has worked continuously, completed numerous programs, and maintained a strong institutional record. His case reflects the importance of sentencing policies that recognize rehabilitation and allow courts to reassess sentences that may no longer reflect current sentencing principles.

Thank you for your continued efforts to promote fairness, proportionality, and consistency in the federal sentencing system.

Respectfully submitted,

Rhiana Banks
Wichita, Kansas
Family Member / Supporter of Virok Webb

Submitted on: [March 8, 2026](#)

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Matthew Bradley

Topics:

- 2. Career Offender
- 3. Circuit Conflicts Concerning §4B1.2(b)

Comments:

Paragraph 1

State convictions should not be used as predicates for Career Offender status under §4B1.2 because many state drug statutes are broader than federal law and criminalize conduct that would not qualify as a federal controlled substance offense, resulting in arbitrary and geographically unequal sentencing outcomes.

Continued reliance on such priors undermines uniformity and due process. Any amendment correcting this flaw must be applied retroactively, as Career Offender enhancements dramatically increase guideline ranges, and fairness and respect for the law require that individuals not remain incarcerated based on sentencing enhancements now recognized as legally unsound.

Paragraph 2

State drug convictions are broader than federal law and should not trigger Career Offender enhancements under §4B1.2, as this creates arbitrary, unequal sentences. Any correction must be retroactive to ensure fairness for those unjustly affected.

Submitted on: February 10, 2026

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Ashleigh Burcham

Topics:

2. Career Offender
3. Circuit Conflicts Concerning §4B1.2(b)

Comments:

PROPOSED AMENDMENT 2. CAREER OFFENDER

The United States Sentencing Commission should elect Crime of Violence Option 1, provide an explanation that the list of offenses includes the different ways by which these offenses are labeled by different jurisdictions, and then give some examples like the ones given in the "Issues for Comment" section of the Proposed Amendments. For example, Murder also means First Degree Murder, Murder in the First Degree, Deliberate Homicide, First Degree Intentional Homicide, Aggravated Murder, Capital Murder, or any other manner by which a jurisdiction might label the highest degree of murder. This would be a clear, simple, catch-all approach, but if the Commission lists every specific statute there is a risk of some statutes being inadvertently excluded. Moreover, the list would have to be updated periodically.

The exclusions to limit the scope of the definition of "crime of violence" should be: (i) the conviction for the offense resulted in a sentence for which the defendant served less than 60 days in prison; (ii) the acts for which the defendant is criminally liable did not cause, did not intend to cause, or did not create a serious risk of physical harm to another person during the commission of the offense; or (iii) the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct.

The Commission should elect Controlled Substance Offense Option 1 and revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The list of federal statutes that was proposed is appropriate. Option 1 would establish much-needed national uniformity while fairly and appropriately eliminating the need for the categorical approach for controlled substance offenses. Controlled substance statutes sometimes vary greatly from state-to-state and should not be the determining factor as to whether a federal sentencing enhancement applies or not, especially considering how severe the penalties are for the career offender enhancement. Lastly,

there should be a general prohibition against an individual's first federal offense being eligible for the career offender enhancement since they are unfamiliar with and have never been exposed to the federal system. Unlike statutes for which ignorance is no excuse, sentencing guidelines are more akin to regulations. Without proper notice, there is a serious due process concern with regard to applying the career offender enhancement for an individual's first federal offense.

The Commission should not use Controlled Substance Offense Option 2 because it would inappropriately rely on what substances a particular state criminalizes, that particular state's definition of a substance, and how much prison time that state prescribes for those offenses. All of these factors vary too much to govern a federal sentencing enhancement.

But if the Commission were to elect Controlled Substance Offense Option 2, how much prison time the defendant actually served would be a better indicator of the severity of the offense and culpability of the individual than the prison time imposed. Moreover, five years would be the most appropriate of the three options proposed.

PROPOSED AMENDMENT 3. CIRCUIT CONFLICTS CONCERNING USSG 4B1.2(b)

To address the circuit conflict relating to whether a substance involved in an offense must be controlled under federal law by the Controlled Substances Act ("CSA") to qualify as a "controlled substance offense" under 4B1.2(b), the Commission should elect Option 1 setting forth a definition of "controlled substance" that adopts the approach of the Second, Fifth, and Ninth Circuits and limits the definition of the term to substances that are specifically included in the CSA. Individual states criminalize different substances and define those substances differently. But federal sentencing should be consistent, reliable, and uniform. The "controlled substance" part of "controlled substance offense" has to be defined and should be guided and defined solely by federal standards.

To address the circuit conflict relating to which version of the applicable drug schedule determines whether a prior conviction qualifies as a "controlled substance offense" under 4B1.2(b), the Commission should elect Option 2 adopting the Third, Fourth, Sixth, Eighth, and Eleventh Circuit's approach of using the schedule that was in place at the time of the defendant's original conviction. The career offender enhancement is concerned with convictions that have already occurred and the Guidelines' language indicates that the court take a backward-looking approach and assess the nature of the predicate offenses at the time those convictions took place. But the Guidelines also require that a district court use the manual that is "in effect on the date the defendant is sentenced," unless it would violate the Ex Post Facto Clause of the Constitution. Therefore, it would be most appropriate to compare the drug schedule in place at the time of the defendant's prior conviction with the relevant federal provision at the time of the defendant's federal sentencing.

RETROACTIVITY OF PROPOSED AMENDMENTS

The proposed amendments regarding the career offender enhancement - specifically the proposed amendments to the definition of "crime of violence" and "controlled substance offense" as well as the proposed amendments addressing the circuit conflicts - should be included in subsection (d) of 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The purpose of the amendments would be to eliminate the need for the categorical approach, establish national uniformity in federal sentencing, and resolve circuit conflicts regarding the career offender enhancement.

IMPACT OF RETROACTIVITY MAY BE ALLEVIATED WITH PRECLEARANCE FORMS TO GUIDE COURTS

A novel solution to the impact of retroactivity would be for the Commission to publish an Appendix with preclearance forms that district courts throughout the United States can utilize to quickly determine an individual's eligibility for the relief an amendment provides. District courts are put under stress having to learn the nuances of changes to the Guidelines. A preclearance check list or court form that can quickly gather the relevant data that district courts need to determine eligibility and worthiness would aid judicial economy. Over the years, several district courts across the United States have independently developed their own in-house forms to pre-clear individuals for eligibility. District courts would greatly appreciate the Commission taking the initiative on this.

Submitted on: [March 12, 2026](#)

From: CAMPBELL, ~^!WILLIAM MARCELLU
Subject: [External] ***Request to Staff*** CAMPBELL, [REDACTED]
Date: WILLIAM, Tuesday, February 10, 2026 2:05:00 PM

CAUTION: This email originated from outside the organization. DO NOT click links or open attachments unless you recognize the sender and know the content is safe.

To: commissioner
Inmate Work Assignment: Laundry

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Commissioner,
I appreciate the proposed changes to the career offender guideline. i think that a person should have to serve at least 5 yrs before the enhancement should apply....thank u for your time and consideration....

From: ~^! CATO, ~^!MATTHEW JAYMES
Subject: [External] ***Request to Staff*** CATO, MATTHEW, [REDACTED]
Date: Tuesday, February 17, 2026 10:05:20 AM

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To:
Inmate Work Assignment: N/A

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Inmate Message Below

The following are comments regarding the US Sentencing Commission proposed amendments posted 9FEB2026, specifically the amendment on Sentencing Options.

Part (A) - Changes to Part A of Chapter Five

- In regards to the addition of Section 5A1.1.(d)'s disclaimer that judges are may impose a judgement "authorized by statute but not by the guidelines": While I understand the purpose of this disclaimer, this addition glosses over the very real professional consequences that judges are confronted by anytime they deviate from sentencing guidelines. For example, any appointment that must be confirmed by congress usually results in any such deviations being thrown in their faces as examples of unfitness. While I do not think this matter can be adequately addressed within the bounds of this ammendment, this is a concern that the USSC could be mindful of.
- In regards to whether "a sentence of probation or a term of imprisonment best protects the public and meets the other purposes of sentencing" and "whether the seriousness of the defendant's offense, and the nature and degree of harm caused by it, requires a term of imprisonment" should be included in the guidelines: Although limited, my interations with federal magistrates and judges have led me to believe that they are not lacking for guidance, but for flexibility in the options available to them. Including these statements would serve only to set an expectation of what the judge 'should' do, rather than let them determine the most appropriate punishment for the individual case.
- In regards to considering "whether the defendant is in need of education or vocational training, medical care, or other rehabilitative or correctional treatment" and "the nature and capacity of the penal, correctional, and other facilities and services available": This should absolutely be included as factors for consideration. Evidence Based Recidivism Reduction programs in prison are founded on the understanding that properly addressing these factors reduces likelihood of reoffense. Furthermore, capacity of prisons should certainly weigh in on whether incarceration is an appropriate place to receive this care. For example, a prisoner requiring significant mental health treatment would not be properly rehabilitated if sent to an institution with a treatment program if the program has a wait list of a year, especially if adequate treatment is not being provided outside of the scope of the program.
- In regards to including statements regarding "whether the defendant is: (1) a "first offender"" or "Whether the defendat has a history of prior criminal conduct": I do not believe there is any value to be added by these inclusions, as these factors are already captured under evaluation of a defendant's criminal history category.
- In regards to the inclusion of "any developing research and knowledge": It would be a disservice to judges to omit any such knowledge, as doing so would inhibit their ability to make decisions that best serve the interests of all parties.

Part (B) - Expansion of Zones B and C of the Sentencing Table

Note: Currently, the proposed ranges in the summary and text of the ammendment do not agree. For example, the summary lists the new ranges as 4-57 months for Zone B and 51-108 months for Zone C (for Criminal History Cat I), whereas the text lists these same ranges as 4-46 months for Zone B and 51-87 months for Zone C. These

suggestions assume that the ranges in the summary are correct, as the ranges in the text result in gaps (i.e. a sentence of 48 months falls into no Zone).

- In regards to whether the Zones should be expanded in a different manner: I would suggest that the expansion of Zone B be changed from 4-57 months to 4-60 months on the rationale that 60 months (5 years) is a mandatory minimum threshold. This would give judges the flexibility to apply Zone B guidelines to cases where the circumstances would usually merit a shorter sentence, but are limited by statutory requirements.

- In regards to providing guidance to prisoners who are re-zoned as a result of this amendment: To avoid clogging the courts with requests to be resentenced by these prisoners, perhaps implement a two phase system where phase 1 is reserved for cases with medical or treatment concerns.

- In regards to sentencing

From: ~^! CLOSE, ~^!THOMAS J
Subject: [External] ***Request to Staff*** CLOSE, THOMAS, [REDACTED]
Date: Tuesday, February 10, 2026 12:19:15 PM

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To: Honorable Chairperson Reeves
Inmate Work Assignment: Education

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Inmate Message Below

Honorable United States Sentencing Commission,

I just wanted to voice that adopting a broader approach to the Sentencing Zones is generally welcomed, and I specifically am excited by the expansion of options for Zone D relating to split sentences. Judges are frequently pigeon-holed into sentencing decisions that they publicly voice disagreement with on the record (mandatory minimums, guideline ranges that are inappropriately harsh, etc.). While Congress remains the voice of the people, it is the job of the USSC to represent scientific and data analysis in balancing the "tough on crime" attitudes that are popular (frequently without any actual statistical evidence in support thereof). By expanding sentencing approaches it allows judges to feel less constrained by the advice they receive from the commission, while simultaneously modernizing what is an antiquated United States justice system focused primarily upon "punishment" instead of "successful rehabilitation" or "functional re-entry". This ultimately can lower recidivism in ways far superior to mere incarceration, lowering crime statistics AND saving money on unnecessary incarceration. THAT is what the public truly desires - not silly slogans about putting people away forever. Our justice system performs poorly compared to Europe and Canada (costs, recidivism, etc.). Judges are intelligent enough to see this and strive toward improvement - let the commission lead them with data and studies, as Congress long intended. Federal Inmates are HUNGRY to improve ourselves and rejoin society to prove that we are changed men and women; allow us the chance to safely do so, and you will see this reality reflected in taxpayer savings.

Thank you, Honorable Judge Reeves. You do AMAZING work on the Commission.

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Stephen Cole Jr.

Topics:

2. Career Offender

Comments:

My dad received an career offender enhancement based off his prior state charges from 2003 which were conspiracy to deal a \$20 crack rock and the second charge was possession of 7 grams of crack but they charged him with dealing because of the amount,he was sentenced to 10 to run concurrent for both charges,he served 4 years 3 months and was released from prison 2007,so I vote for option 1 of the control substance career offender proposal,my dad never had a violent charge and is not a violent person,I feel he shouldn't have to do so much time based off such small amounts from 23 years ago...Thank for your time and listening...take care

Submitted on: February 13, 2026

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Jessica Croley

Topics:

- 2. Career Offender
- 3. Circuit Conflicts Concerning §4B1.2(b)

Comments:

Public Comment on Proposed Amendments Relating to §4B1.1 (Career Offender Guideline)
Submitted to the United States Sentencing Commission
February 2026

I respectfully submit this comment in response to the Commission's request for public input regarding potential amendments to §4B1.1, the career offender guideline.

My perspective is informed by closely observing a federal case involving an individual who received a very lengthy sentence that was driven primarily by criminal history considerations and perceived future risk rather than the conduct underlying the instant offense. Although the case may not fit the technical definition of a career offender designation, the sentencing outcome illustrates many of the same policy concerns that the Commission is currently examining.

One of the most significant issues is the heavy reliance on prior criminal history as a predictor of future dangerousness. In the case I observed, the individual had a high criminal history score accumulated over time, which created a perception of extreme risk. That perception contributed to a sentence that was substantially above the advisory guideline range. However, many years later, the individual's conduct, age, rehabilitation, and institutional record present a very different risk profile than what was assumed at sentencing. This experience highlights a broader concern: criminal history metrics, especially at higher point levels, may overstate risk and can lead to sentences that are longer than necessary to achieve the purposes of sentencing under 18 U.S.C. §3553(a).

Another concern relates to proportionality. When criminal history enhancements or career offender designations significantly increase sentencing ranges, the resulting punishment can exceed what is needed for deterrence or public safety, particularly when the current offense conduct is limited in scope compared to the historical record. Over time, individuals age, mature,

and often demonstrate meaningful rehabilitation, yet they remain incarcerated based on risk assumptions formed many years earlier.

The case I observed also illustrates how sentencing decisions driven by perceived dangerousness may rely heavily on past allegations or conduct that may not fully reflect the individual's current character or future behavior. Modern research consistently demonstrates that recidivism risk declines substantially with age and with sustained periods of incarceration without serious disciplinary issues. Sentencing frameworks that do not adequately account for this reality risk imposing punishment beyond what is necessary.

I encourage the Commission to consider reforms that more accurately reflect individual risk and culpability, including:

- Narrowing the criteria for career offender designation
- Reducing automatic placement into Criminal History Category VI
- Considering the age of prior convictions and time elapsed between offenses
- Incorporating empirical risk research into guideline structure
- Allowing courts greater flexibility to depart downward when criminal history overstates risk
- Providing retroactive relief where appropriate

Retroactivity is particularly important to ensure fairness and consistency. Individuals currently serving lengthy sentences based on prior versions of criminal history enhancements should have the opportunity for review under updated standards that better reflect current knowledge about recidivism and rehabilitation.

Finally, I encourage the Commission to continue examining how heavy reliance on criminal history can contribute to sentencing disparities and excessive incarceration costs without corresponding public safety benefits. Sentencing policy should balance accountability with proportionality and should recognize that people are capable of change over time.

Thank you for your consideration of these comments and for the Commission's ongoing work to improve the fairness and effectiveness of the federal sentencing system.

Respectfully submitted,
Jessica Nicole

Submitted on: February 24, 2026

From: ~^! DAVIS, ~^!RONALD E
Subject: [External] ***Request to Staff*** DAVIS, RONALD, [REDACTED]
Date: Saturday, February 14, 2026 10:05:08 AM

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To: Honorable judge Carlton Reeves
Inmate Work Assignment: rec orderly

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Inmate Message Below

The requested changes to the career offender statute is a well welcomed relief for those few of us sentenced under those current statutes, the career offender statute unfairly targets people in communities of color the percentage black people effected by these statutes are similar those those from the crack law's of the 1980's which no longer exist due to the unfair racial disparities in the law between crack cocaine and cocaine base, these same disparities that were happening then are happening now with this career offender statute check the statistics there are not many people that are not of color who even have the career offender application placed upon them blacks make up 90% of this statute that counts towards what 4.6% percent of the current population inside the FBOP therefore with retro activity it wont empty the system and most people with this designation are non-violent offenders like myself.. Thank you for placing this amendment back on the agenda for 2026 cycle its greatly appreciated...

Respectfully Submitted Ronald Davis [REDACTED]

From: ~^! DAY, ~^!MATTHEW
Subject: [External] ***Request to Staff*** DAY, MATTHEW, [REDACTED]
Date: Monday, February 23, 2026 2:05:06 PM

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To: U.S.Sentencing Commission
Inmate Work Assignment: B/A Day Shift

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within the U.S. sentencing commission's newly proposed amendments, are a list of changes that are being voted on pertaining to the Career offender enhancement. I Matthew Day feel that the options for a predicate to be considered a violent offence, that a offender should have to actually serve over a year and one month...

From: ~^! DIAZ, ~^!ENRIQUE
Subject: [External] ***Request to Staff*** DIAZ, ENRIQUE, [REDACTED]
Date: Friday, February 27, 2026 7:48:56 PM

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To: us sentencing commision
Inmate Work Assignment: na

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Inmate Message Below

i think they should change the career offender on may 2026 that they cant use the state charges like small drug offences

with federal trafficking's charges to enhance people to make them a career offender. also they should change it to that you would have to actually serve more than a year or two years to be a predicate offence. because they are giving way to much time and years, for people that have small drug charges that we are getting 15 to 20 years ,when most of us are users trying to make a lil money like a 100 dollars to use drugs .we need help and to be with our kids and family not to be in prison for so many years loosing our family's and kids, when people with hundreds or thousands of kilos are doing 60 to 90 months

please make it recto active for we can get home to our kids .please help us we trying to get home to our kids thank you so much for your time

From: ~^! FORRESTER, ~^!WALKER CHRISTIA
Subject: [External] ***Request to Staff*** FORRESTER, WALKER, [REDACTED]
Date: Monday, February 9, 2026 6:49:03 PM

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To: USSC
Inmate Work Assignment: Commissary

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Inmate Message Below

PUBLIC COMMENT:

I'm most excited for the implementation of the "ZONES" system. There needs to be discretion by the courts for each individual based on their situation. For instance, if someone has done half of their time and has shown post-sentence rehabilitation, they should be able to do the rest of their time on home confinement or probation since they've proved they can behave correctly.

ALL of the Amendments should be made retroactive, but ESPECIALLY this one.

Thank you,
Walker Forrester [REDACTED]

From: ~^! FORRESTER, ~^!WALKER CHRISTIA
Subject: [External] ***Request to Staff*** FORRESTER, WALKER, [REDACTED]
Date: Tuesday, February 10, 2026 12:34:03 PM

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To:
Inmate Work Assignment: Commissary

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Inmate Message Below

PUBLIC COMMENT:

I believe that there should be expansion of Zone B and C. But there should be a wider range of 'type' offenders. There are a rare amount of offenders who have less than 87-month-sentences. There are plenty of offenders who have demonstrated 100% or close to 100% clean records as well as learned trades post-sentencing (demonstration of rehabilitation) and have proved their ability to behave in society. They should be given the opportunity to serve the rest of their time on probation provided that they have shown rehabilitation and served a substantial amount of their sentence imprisoned.

Thank you,
Walker Forrester [REDACTED]

From: ~^! FRIEND, ~^!KENNETH R
Subject: [External] ***Request to Staff*** FRIEND, KENNETH, [REDACTED]
Date: Tuesday, February 10, 2026 11:49:07 AM

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To: chairman
Inmate Work Assignment: vt tutor

ATTENTION

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Inmate Message Below

This is to comment on the proposed amendments namely the "controlled substances section". The main issue with this section is that when we are sentenced in the state , they do not tell us in the sentencing colloquy " these crimes will be held against us at a later date." (should we reoffend) Or i guarantee that fewer people would take a plea, putting the state prosecutoe to the burden of proof. (beyond a reasonable doubt) We will never be able to say that we have paid our debt to society, upon the completion of the sentence imposed by the state court. So in all truth the majority of state offenders have been duped into pleading guilty not knowing that should they offend ., It can and will be hald against them for the purpose of enhancing their federal sentence. making it virtually impossible to fight (guilty or not) for our due process right . If we do we sre taxed not only by the prosecutoe but also the court. Resulting in a totally unfair and RIGGRD Proceeding . It would be a good idea to NOT hold the STATE conviction against us thank u for ur time

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Monica Fugedi

Topics:

1. Sentencing Options

Comments:

I strongly support the proposed 2026 Sentencing Guideline amendments, especially the expansion of zones B and C. These changes will reduce unnecessary incarceration, promote fairness and allow courts to use probation and split sentencing where appropriate.

These amendments should be made retroactive so families already impacted can benefit.

The Commission should not exclude people based on labels, including "sex offender" designation, especially non-contact offenses. Everyone deserves individualized consideration.

Monica Fugedi

Submitted on: March 16, 2026

From: ~^! GELIN, ~^!EDSON
Subject: [External] ***Request to Staff*** GELIN, EDSON, [REDACTED]
Date: Saturday, February 21, 2026 7:33:26 AM

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To: U.S. Sentencing Commission
Inmate Work Assignment: Unassigned

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This comment relates to the Proposed Amendments to the U.S. Sentencing Guidelines' "Career Offender" definition. I feel that the "Career Offender" definition to "Controlled Substance Offense" should be limited to "Federal Statutes"(Option 1) because, currently, the Guidelines often overstate a defendant's criminal history and subject them to excessive and/or arbitrary sentencing.

Public Comment to the United States Sentencing Commission

Subject: Career Offender Refinements & Proposed 2025–2026 Amendments

Dear Commissioners:

I respectfully submit this comment regarding the Commission’s proposed amendments for the 2025–2026 amendment cycle, including the Career Offender Refinements Proposal and the broader reforms set forth in the Reader-Friendly Proposed Amendments issued on 12 DECEMBER 2025. These proposed revisions collectively represent a significant modernization of federal sentencing policy grounded in proportionality, national uniformity, and empirical research.

I. Support for Refinements to the Career Offender Guideline

The Commission’s proposal to replace the longstanding categorical approach with an enumerated list of qualifying federal and state predicate offenses is both necessary and overdue. For more than three (3) decades, the categorical method has required courts to compare the statutory elements of prior convictions with “generic” federal offenses while disregarding the underlying conduct. This approach, shaped through multiple Supreme Court decisions, has produced extensive and recurring litigation over statutory divisibility, the elements-means distinction, and circuit-to-circuit inconsistencies. ^{1–4}

The practical effect has often been disproportionate sentencing outcomes, with the Career Offender guideline sweeping in individuals whose prior convictions—frequently low-level, outdated, or broader than their federal analogues—were never intended to trigger such severe enhancements. Transitioning to an enumerated-predicate framework will reduce over-inclusion, promote transparency, and ensure that the heightened sanctions of U.S.S.G. §§ 4B1.1–4B1.2 apply only where genuinely warranted.

This reform also aligns with the Commission’s broader effort to restore calibrated judicial discretion through increased eligibility for probation, home confinement, and split sentences. These companion amendments reinforce the principle that the most severe enhancements should be reserved for offenders whose criminal histories meaningfully indicate heightened culpability or recidivism risk.

II. Integration with the Broader 2025–2026 Proposed Amendments

The proposed refinements are well-situated within the Commission’s broader package of reforms addressing drug-offense guidelines, inflationary recalibration, economic crimes, multiple-count rules, and post-offense rehabilitation. These measures collectively support a more rational, administrable, and individualized federal sentencing system consistent with 18 U.S.C. § 3553(a).

A. Drug-Offense Revisions

The proposed adjustments to drug guidelines—including those affecting fentanyl, methamphetamine purity, and role-based distinctions—better distinguish culpability and diminish undue reliance on drug quantity as a proxy for harm. When integrated with a reformed Career Offender structure, these changes help prevent redundant penalty stacking and reinforce proportionate sentencing.

B. Simplification & Inflation Adjustments

The Commission's ongoing simplification initiatives and inflation-based recalibration of monetary thresholds enhance guideline usability and ensure that monetary benchmarks reflect current economic realities. These measures reduce interpretive friction and improve national uniformity.

C. Economic Crime & Multiple-Count Rules

The proposed refinements to the economic-crime guidelines appropriately emphasize individualized culpability rather than rigid adherence to loss amounts. Revisions to multiple-count rules mitigate mechanical escalation and reduce unwarranted severity in cases involving numerous technical counts.

D. Post-Offense Rehabilitation

Recognition of meaningful post-offense rehabilitation is consistent with contemporary criminological research demonstrating its strong relationship to reduced recidivism. Ensuring that such evidence may meaningfully affect sentencing prevents guideline enhancements—including Career Offender status—from eclipsing demonstrable progress.

III. Recommendations

To ensure effective implementation, I respectfully recommend that the Commission:

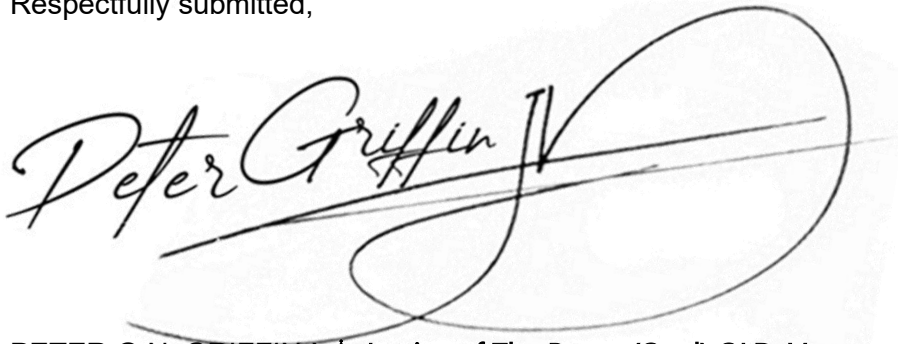
1. **Provide clear guidance** regarding the application of enumerated state predicates, including illustrative examples addressing functionally equivalent offenses across jurisdictions.
2. **Consider limited retroactivity**, given that the proposed changes would correct long-recognized overbreadth in predicate classifications. Federal appellate courts have acknowledged that defendants may be “actually innocent” of Career Offender status when subsequent legal developments clarify that a prior conviction does not qualify under governing definitions.⁵
3. **Develop comprehensive transition materials** for courts, probation offices, defenders, and prosecutors to facilitate uniform implementation across the federal system.

IV. Conclusion

The proposed amendments—particularly the transition to enumerated Career Offender predicates—represent meaningful progress toward a more proportional, coherent, and empirically grounded sentencing framework. I strongly support the Commission’s direction and urge careful attention to equitable implementation and national uniformity as the amendments move toward finalization.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in black ink that reads "Peter Griffin". The signature is stylized with a large, sweeping loop at the end of the last name.

PETER G.N. GRIFFIN |  Justice of The Peace (Qual) QLD, Veteran (C4L)

Bluebook Footnotes

1. *Taylor v. United States*, 495 U.S. 575 (1990).
2. *Shepard v. United States*, 544 U.S. 13 (2005).
3. *Descamps v. United States*, 570 U.S. 254 (2013).
4. *Mathis v. United States*, 579 U.S. 500 (2016).
5. *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020).

From: ~^! HILLIARD, ~^!SANDRA
Subject: [External] ***Request to Staff*** HILLIARD, SANDRA [REDACTED]
Date: Wednesday, February 11, 2026 3:49:01 PM

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To:
Inmate Work Assignment: Ordely

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In reference to the Career Offender changes, Option 2 shows different imposed sentence options as 1, 3, or 5 years in order to count as a predicate offense. Although I do believe that state "Controlled Substance" offences should be completely removed as counting as predicate offense under the current Career Offender determination (as previously stated) if I had to choose between the 1,3,or 5 year options I would say that prior sentences imposed of 5 years or less is a fair determination in figuring out if those 2 prior state sentences should apply as predicate offences for a Career Offender determination. I say this as as most Possession Of a Controlled Substances for Sale or Intent to sell statutes in other states have various other names at the higher level of those charges. (i.e... NV has a Trafficking in a Controlled Substances charge that is a category B Felony and has much different statutes than a Possession With Intent to Sell, a category D Felony, hence very different sentences imposed)

I believe that this change regardless of the change made (Option 1 or 2 or 2 subsection A) is made should definitely be made retroactive. Also taking out the actual Meth should be made retroactive as well...Post Conviction Relief as well, especially for those of us that sat in County Federal Holding over a year applying ourselves as best we could. In my case nearly 2 years beyond my control.

March 17, 2026

United States Sentencing Commission

One Columbus Circle, N.E., Suite 2-500

Washington, D.C. 20002-8002

Attention: Public Affairs – Proposed Amendments

Re: Public Comment on Proposed Amendment 2 – Career Offender (§4B1.2) – Retroactivity and Definitional Reform

I. Introduction

This public comment is submitted in response to the United States Sentencing Commission’s proposed amendments to the Sentencing Guidelines published January 30, 2026, with a comment period closing March 18, 2026. This comment addresses Proposed Amendment 2, which concerns the career offender guideline at §4B1.1 and the definitions of “crime of violence” and “controlled substance offense” under §4B1.2.

The proposed amendment represents a significant and long-overdue correction to a guideline that has, through application of the categorical approach, produced outcomes that the Commission itself describes as “odd” and “arbitrary.” This comment urges the Commission to: (1) adopt the revised definitions of “crime of violence” and “controlled substance offense” as proposed; (2) include meaningful retroactivity provisions under §1B1.10(d); and (3) provide clear procedural guidance to address the real but surmountable complexities of retroactive application.

II. The Proposed Definitional Changes Are Necessary and Well-Founded

A. The Categorical Approach Has Produced Demonstrably Unjust Outcomes

For decades, the categorical approach has required courts to assess whether a prior conviction qualifies as a “crime of violence” or “controlled substance offense” by examining only the statutory elements of the offense – not what the defendant actually did. The result, as multiple

circuit courts have acknowledged, is that individuals who committed demonstrably violent acts are treated as non-violent offenders for career offender purposes, while others receive career offender designations based on technical statutory analysis wholly disconnected from the conduct at issue.

Courts have not been shy in expressing frustration with this framework. The Eleventh Circuit described it as producing results that are “odd” and the Fourth Circuit has similarly critiqued the “arbitrary” nature of categorical approach outcomes. The Commission’s own proposal acknowledges this criticism directly. These are not fringe concerns – they are the consensus view of the federal judiciary.

The career offender guideline carries profound sentencing consequences. When triggered, it can more than double an otherwise applicable guideline range. A defendant facing an offense level of 28 with Criminal History Category III would ordinarily face a range of approximately 97–121 months. Application of the career offender guideline can elevate that same defendant to a range of 188–235 months or higher. Whether that near-doubling of incarceration occurs should not turn on the technical drafting of a decades-old state statute.

B. The Proposed Definitional Approach Is Appropriate

The proposal to replace the categorical approach with either a label-based system (Crime of Violence Option 1) or a federal-statute-elements-based system (Crime of Violence Option 2) for state offenses, combined with an enumerated list for federal offenses, is a sound structural reform. Either approach would:

- Anchor the career offender analysis in the actual nature of the conduct criminalized, not the technical elements of a statute that may have been drafted for unrelated purposes;
- Reduce the arbitrary geographic disparities that result from varying state statutory formulations of the same underlying conduct;
- Provide courts, defendants, and prosecutors with greater predictability in assessing career offender applicability; and
- Ensure that the guideline captures genuinely violent offenders while excluding those whose prior records reflect minor or technical violations.

The proposed exclusions and limitations are particularly important and should be retained in any final amendment. The provisions allowing defendants to rebut a presumptive crime of violence designation by demonstrating that their conduct did not inflict, intend to inflict, or threaten serious bodily injury – or that their conduct was limited to recklessness or negligence – restore proportionality to a guideline that currently has no such safety valves.

Similarly, the proposed limitations on which prior drug convictions qualify as “controlled substance offenses” – whether through the federal-offenses-only approach or through minimum sentence thresholds – address a longstanding critique that the career offender guideline has been used to stack decades-old, low-level state drug convictions to justify sentences that bear no rational relationship to a defendant’s actual history of serious criminal conduct.

III. The Commission Should Include Retroactivity Provisions Under §1B1.10(d)

A. The Case for Retroactivity Is Compelling

The Commission is required under 28 U.S.C. § 994(u) and §1B1.10 to make a deliberate determination about retroactivity. This comment respectfully but strongly urges the Commission to include the career offender definitional amendment in §1B1.10(d).

The three factors the Commission considers in retroactivity determinations – purpose of the amendment, magnitude of the guideline range change, and difficulty of retroactive application – are addressed in turn below.

B. Factor 1: Purpose of the Amendment

The core purpose of the proposed amendment is to correct a systemic flaw in how the career offender guideline has been applied. The Commission acknowledges that the categorical approach has produced outcomes that are arbitrary, inconsistent, and disconnected from the actual danger posed by defendants’ prior conduct. When the purpose of an amendment is remedial – correcting a methodology that has produced unjust sentences – the case for retroactivity is at its strongest.

People are currently serving sentences that were anchored to career offender designations the Commission now recognizes as potentially overbroad. Denying retroactivity means those individuals continue to serve years – sometimes decades – of imprisonment under a framework the Commission itself has determined to be flawed. The remedial purpose of this amendment is not served by leaving that harm in place.

C. Factor 2: Magnitude of the Guideline Range Change

The potential sentencing range reductions from this amendment are among the largest of any guidelines reform in recent memory. Because the career offender guideline operates by substituting an entirely different – and substantially higher – offense level and criminal history

category, a defendant who loses career offender status may see their guideline range reduced by 50% to 100% or more of their current range.

This magnitude counsels strongly in favor of retroactivity. The Commission has historically extended retroactivity to amendments producing far smaller changes. To decline retroactivity here, where the potential range reductions are among the most significant available, would be difficult to justify on consistent principles.

Moreover, the people most affected by retroactivity are by definition those who received the largest sentencing enhancements under the flawed framework. Retroactivity is not just appropriate here – it is the only mechanism that can address the full scope of the injustice the amendment is designed to correct.

D. Factor 3: Difficulty of Retroactive Application

The Commission has expressed concern that retroactive application of the career offender definitional changes would be complex, requiring individualized review of prior convictions for thousands of defendants. This concern is legitimate but should not be dispositive. Complexity has never been an absolute bar to retroactivity, and there are practical mechanisms to manage it.

The following observations are offered in support of workable retroactivity:

1. Many cases will be straightforward. A substantial number of career offender designations rest on prior convictions – particularly state drug offenses – that will clearly not qualify under the new definitions regardless of which option the Commission adopts. These cases can be resolved quickly without extensive litigation.
2. The Commission can provide structured guidance. By issuing clear application notes specifying how courts should assess prior convictions under the new definitions, the Commission can streamline the retroactive review process and reduce inconsistency. The same guidance that courts will need for prospective application can serve the retroactive context equally well.
3. The adversarial process is capable of managing complexity. Federal courts routinely adjudicate complex factual and legal questions. Defense counsel and prosecutors are well-positioned to identify which prior convictions are clearly excluded, clearly included, or genuinely contested under the new framework. The court's role in retroactive review need not be more burdensome than initial sentencing.
4. Courts retain discretion under §3553(a). Even where a career offender designation is eliminated retroactively, courts retain full discretion under 18 U.S.C. § 3553(a) to

determine whether a sentence reduction is appropriate. This built-in safety valve means that retroactivity does not mandate any particular outcome – it simply gives courts the opportunity to make an individualized determination.

5. The alternative is worse. The complexity of retroactive review must be weighed against the alternative: thousands of people continuing to serve sentences measured in decades, under a legal framework the Commission has formally repudiated. Courts managing complex retroactive dockets is a temporary administrative burden. Individuals serving excess imprisonment under a discredited guideline is a permanent injustice.

IV. The Interaction with 18 U.S.C. § 3553(a) and Compassionate Release

Even absent formal retroactivity under §1B1.10(d), the proposed amendment will generate significant § 3553(a) litigation through compassionate release motions under 18 U.S.C. § 3582(c)(1)(A). Courts are already grappling with whether non-retroactive guideline changes can constitute “extraordinary and compelling” circumstances justifying sentence reduction. The Commission can reduce this uncertainty and inconsistency in two ways.

First, by making the amendment retroactive, the Commission eliminates the need for defendants to pursue the more uncertain compassionate release pathway for what is fundamentally a guidelines correction.

Second, if the Commission declines full retroactivity under §1B1.10(d), it should issue guidance clarifying that courts may properly consider the amendment’s passage – and its acknowledgment of systematic flaws in the career offender framework – as one factor in the extraordinary and compelling circumstances analysis under § 3582(c)(1)(A). The sentencing disparity between defendants sentenced before and after the amendment is precisely the type of unwarranted disparity that § 3553(a)(6) is designed to prevent, and courts should be free to consider it.

V. Additional Recommendations

A. Adopt Crime of Violence Option 2 with Robust Limitations

Of the two options proposed for state offense definitions, Crime of Violence Option 2 – the elements-based approach grounded in federal statutory definitions – is preferable to the

label-based approach in Option 1. Label-based approaches introduce their own arbitrariness, as the same conduct may carry dramatically different labels across jurisdictions. An elements-based approach, anchored in well-established federal statutory definitions, provides a more principled and consistent foundation.

However, Option 2 should only be adopted in conjunction with the full set of exclusions and limitations proposed, including the defendant's ability to rebut the presumption by demonstrating no serious bodily injury was inflicted or threatened, and that conduct was limited to reckless or negligent behavior.

B. Adopt Controlled Substance Offense Option 1 or Suboption 2C

For the controlled substance offense definition, the Commission should either limit qualifying offenses to federal statutes (Option 1) or, at minimum, require that a prior state drug conviction resulted in actual incarceration of at least one year (Suboption 2C). The current framework, which can elevate a defendant to career offender status based on a years-old state drug conviction that resulted in probation or a short jail term, produces sentences grossly disproportionate to any reasonable assessment of the defendant's criminal history.

C. Effective Date and Transition

The Commission should provide clear transition guidance addressing: (a) how courts should handle cases currently on direct appeal where career offender status is at issue; (b) the interaction between the new definitions and pending § 2255 motions; and (c) the timeline within which retroactive motions under § 3582(c)(2) may be filed following the amendment's effective date.

VI. Retroactivity Cannot Be Delegated to Compassionate Release or Disparity Litigation

A. Compassionate Release Is Not a Systemic Correction Tool

When the Commission declines retroactivity, it often points implicitly or explicitly to alternative mechanisms – compassionate release under 18 U.S.C. § 3582(c)(1)(A), sentencing disparity arguments under § 3553(a)(6), or collateral review under § 2255 – as pathways through which affected defendants can seek relief. This reasoning is fundamentally flawed, and the Commission should reject it as a substitute for retroactivity.

Compassionate release was designed as a narrow mechanism for genuine individual emergencies – terminal illness, catastrophic family circumstances, extraordinary rehabilitation. It was never designed to function as a systemic correction for guidelines the Commission itself has determined were generating arbitrary sentences. Forcing thousands of defendants to pursue compassionate release motions for what is, at its core, a guidelines error does not solve the problem. It distributes the burden of the Commission’s error onto incarcerated individuals and their families – the people least resourced to carry it.

The results of that delegation are profoundly inconsistent. The same factual pattern that results in release in one district may result in denial in another. Courts have enormous discretion in compassionate release determinations, and that discretion, while appropriate for its intended purpose, is not a reliable mechanism for achieving the uniform correction that a systemic guidelines error requires. Non-retroactivity combined with compassionate release as the nominal remedy produces a system where relief depends not on the merits of the guidelines correction, but on the judicial lottery of which district and which judge a defendant happens to be before.

B. The Real Cost of Non-Retroactivity: A Concrete Illustration

The Commission has asked for public comment addressing the purpose of the amendment, the magnitude of guideline range changes, and the difficulty of retroactive application. This comment respectfully submits that there is a fourth consideration the Commission must weigh: the concrete human cost of declining retroactivity and leaving affected individuals to pursue alternative remedies that have already proven inadequate.

The following anonymized case illustrates that cost in terms the Commission should confront directly.

A defendant was convicted of a federal drug conspiracy offense in which he played the least culpable role of three participants. The other two participants had no qualifying prior convictions and received sentences of five years suspended and four years with two years served, respectively. The defendant had two prior state drug convictions – one eight years old and one ten years old at the time of federal sentencing – for a completely different controlled substance than the federal offense. Those aged state convictions triggered career offender status under §4B1.1, producing a 15-year sentence.

To be precise about what the career offender designation did in this case: the two most culpable participants received sentences of zero days served and two years served. The least culpable

participant received 15 years – based entirely on the mechanical application of a guideline the Commission now acknowledges produced arbitrary results.

The defendant subsequently qualified for compassionate release under § 3582(c)(1)(A) on the basis of caregiver incapacitation – the mother of his minor children passed away. Prior to her death, the children had been placed in emergency foster care for 79 days following a domestic violence incident in which the mother was the non-offending victim. The district court denied compassionate release. The Ninth Circuit affirmed the denial. As of this comment, the children have been without a permanent caregiver for over two years, since December 2023. They remain in the foster care system with no permanent placement identified.

This is not an edge case. This is the case the proposed amendment was designed to address: aged state drug priors for a different substance, the least culpable participant, co-defendants who have been home for years, children in foster care limbo. The defendant had what should have been among the strongest compassionate release cases available. It was denied. The Commission's implicit assurance that compassionate release provides an adequate remedy was tested in exactly this situation, and it failed.

C. Non-Retroactivity Harms Children, Not Just Defendants

There is a dimension to the retroactivity question that almost never appears in legal analysis and Commission commentary, and it deserves explicit recognition. When a parent is sentenced to a decade or more under a guideline the Commission has now formally acknowledged was generating arbitrary results, the harm does not accrue only to that parent. It accrues to their children, in real time, every day the sentence continues.

Children in foster care or other unstable placements who grow up without a parent do not get those years back when a sentence is eventually corrected or expires. The developmental, emotional, and relational harm accumulates daily. Family bonds that could have been maintained erode. By the time any relief arrives – if it arrives – those children have already grown up in a system rather than a home.

In the case described above, two children have now spent over two years in the foster care system without a permanent caregiver. Their father is the least culpable participant in a conspiracy. His co-defendants are home. The Commission is in the process of formally repudiating the guideline that produced his sentence. And yet those children remain in foster care because the mechanism Congress and the Commission designed for systematic guidelines corrections – retroactivity under §1B1.10(d) – has not been activated.

Non-retroactivity is not a neutral administrative choice. It is a decision the Commission makes with full knowledge that the harm being perpetuated extends far beyond the person serving the sentence. When the Commission weighs administrative complexity against retroactivity, it must weigh it against this reality, not against an abstraction.

D. Retroactivity Is the Commission's Responsibility, Not a Discretionary Courtesy

The Commission has the authority under 28 U.S.C. § 994(u) and the mechanism under §1B1.10 to directly correct sentences that were produced by a guideline it has determined was generating arbitrary results. Declining to use that authority, and instead pointing defendants toward compassionate release or disparity litigation, is an abdication of the Commission's core responsibility.

Compassionate release and sentencing disparity arguments require filing motions, retaining or appointing counsel, briefing legal arguments, waiting for hearings, and pursuing appeals. Each step takes months to years. The people most harmed by the career offender guideline's flaws – those who received the largest enhancements under a framework the Commission now acknowledges was wrong – are typically among the least resourced to sustain that kind of prolonged litigation. Non-retroactivity systematically advantages those with resources and disadvantages those without.

The argument for retroactivity in this context can be stated in a single sentence: retroactivity is not a courtesy the Commission extends to deserving defendants – it is the mechanism by which the Commission takes direct responsibility for the sentences its guidelines produced, and declining it is a choice to make individuals, their children, and their families bear the full and ongoing cost of a systemic error the Commission has already acknowledged.

VII. Additional Recommendations

A. Adopt Crime of Violence Option 2 with Robust Limitations

Of the two options proposed for state offense definitions, Crime of Violence Option 2 – the elements-based approach grounded in federal statutory definitions – is preferable to the label-based approach in Option 1. Label-based approaches introduce their own arbitrariness, as the same conduct may carry dramatically different labels across jurisdictions. An elements-based approach, anchored in well-established federal statutory definitions, provides a more principled and consistent foundation.

However, Option 2 should only be adopted in conjunction with the full set of exclusions and limitations proposed, including the defendant's ability to rebut the presumption by demonstrating no serious bodily injury was inflicted or threatened, and that conduct was limited to reckless or negligent behavior.

B. Adopt Controlled Substance Offense Option 1 or Suboption 2C

For the controlled substance offense definition, the Commission should either limit qualifying offenses to federal statutes (Option 1) or, at minimum, require that a prior state drug conviction resulted in actual incarceration of at least one year (Suboption 2C). The current framework, which can elevate a defendant to career offender status based on a years-old state drug conviction that resulted in probation or a short jail term, produces sentences grossly disproportionate to any reasonable assessment of the defendant's criminal history.

C. Effective Date and Transition

The Commission should provide clear transition guidance addressing: (a) how courts should handle cases currently on direct appeal where career offender status is at issue; (b) the interaction between the new definitions and pending § 2255 motions; and (c) the timeline within which retroactive motions under § 3582(c)(2) may be filed following the amendment's effective date.

VIII. Conclusion

The proposed Career Offender Amendment represents a meaningful step toward a guidelines system that reflects the actual nature of defendants' prior conduct rather than the technical drafting of decades-old state statutes. The Commission should adopt the proposed definitional reforms in their most protective form, extend retroactivity under §1B1.10(d), and provide the guidance necessary to allow courts to implement these changes consistently and efficiently.

As the case described in Section VI makes plain, the alternative to retroactivity is not a clean policy abstraction – it is children in foster care without a permanent caregiver, co-defendants home for years while the least culpable participant continues to serve a sentence the Commission has now formally questioned, and a compassionate release system that has already proven inadequate to carry the weight being placed on it.

The individuals most affected by this amendment are those who received the largest sentencing enhancements under a framework the Commission now acknowledges was producing arbitrary

results. They – and their families – deserve the opportunity to have those sentences reconsidered under a more just framework. The Commission has both the authority and the direct responsibility to provide that opportunity through retroactivity, not to delegate it to mechanisms that have already demonstrated their inadequacy.

The public comment period closes March 18, 2026. The Commission's serious consideration of these issues is appreciated.

From: ~^! JACKSON, ~^!HURLEY C
Subject: [External] ***Request to Staff*** JACKSON, HURLEY, [REDACTED]
Date: Tuesday, February 10, 2026 12:04:26 AM

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To: U.S. Sentencing Commission
Inmate Work Assignment: A&O

ATTENTION

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I think option 1 of the proposed amendments concerning Career Offenders and Controlled substance offense is the best way to move forward. Revise the definition of "controlled substance offense" to exclude state drug offense from the scope of its application. This option makes the most sense and is most justified for what the career offender directive were meant to accomplish. Like, in my current case I'm classified as a career offender. But, the most time I ever spent incarcerated in state is 20 months. I understand that the predicates carried a maximum sentence of 10years, but I was not sentenced to 10 years, and if the state would have really thought these predicates were serious drug offenses, the state state would have sentence me to a heavier sentence. This brings me to "Sub option 2B" yes, please, and thank you! It should be a five year minimum on state drug offenses in order for one to qualify as a career offender. The most time I ever spend in prison before this federal sentence is 20 mos. Now I'm in federal with 20years because of these state predicates that were used to justify me as a career offender. I am a non-violent offender, in state and federal. I have no violent history. But I received 20 years for drugs because my career offender status. These options makes so much sense. I'm requesting and praying that you make this change to the career offender, or controlled substance statue. I am rehabilitated and my criminal lifestyle is over. I have learned my lesson and I would never touch drugs again. I have been incarcerated for 10 years now and has been the longest prison sentence. This has really been a life changing experience for me. Thank you all for your consideration.

From: ~^! KOLONIS, ~^!JACOB
Subject: [External] ***Request to Staff*** KOLONIS, JACOB, [REDACTED]
Date: Monday, February 9, 2026 6:18:56 PM

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To:
Inmate Work Assignment: orderly

ATTENTION

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Inmate Message Below

Hello,

My comments on the proposed amendments are as follows:

-In regards to expanding the guideline zones A-D

Expanding the guideline zones upward is an appropriate response to the increasing data that is available on incarceration versus rehabilitation. Continual studies have shown that mandatory minimums have been used by the court and prosecutorial systems to keep the caseloads of federal and state and local officials to a minimum while seeking to prevent circuit and appeals and supreme court interference through the appeals process. By allowing a more expanded, compassionate, and research-proven option to incarceration, such as:

- Split-time
- Home incarceration
- Expanded fines versus expanded incarceration
- Longer terms of supervised release versus longer terms of incarceration

This allows communities to heal, for appropriate, research-proven convictions to be carried out, as well as for those individuals convicted to prove themselves out in the community rather than sealing them away from their communities so that their families suffer, their skills diminish, and the local, state, and federal governments become overburdened by cost, corruption, abuse, and scandal.

Furthermore, such an expansion of the guideline zones need to be retroactive, to allow for more common-sense solutions realized now to allow those convicted beforehand to receive true justice.

As well as differentiating between hands-on crimes versus cyber crimes, especially within the age of technology and AI that we live in now, making clear that hands-on versus cyber need to be categorized in separate categories, as well as with separate mandatory minimums, or those convicted of cyber crimes will be serving longer sentences than those with hands-on crimes, as is the case right now.

I and the tens-of-thousands of federal inmate, and the tens-of-millions of family members impacted by having their sons and daughters confined in such deplorable conditions, hope that you will go with the proven methods of incarceration, that appropriately defines cyber crimes versus physical crimes, and that the strenuous and difficult impact that mandatory minimums has on the incarcerated and on communities as a whole gets relaxed and retroactive to allow communities and families to heal.

I and my family and the millions living in prison thank you for your consideration.

Sincerely,
Jacob Kolonis

From: ~^! LOPEZ, ~^!XAVIER
Subject: [External] ***Request to Staff*** LOPEZ, XAVIER, [REDACTED]
Date: Thursday, February 12, 2026 1:49:08 PM

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To:
Inmate Work Assignment: n/a

ATTENTION

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Inmate Message Below

I would like to add that the zones B & C of the guideline table be expanded to cover higher sentences, especially for categories 2&3 given that it only takes one felony prior to the current case to move someone to a criminal history category 2 and usually different states have different ideas of what constitutes a felonious offence. the expansions should be to at least 120 months in category 2 and 84 months in category 3 to make things more fair and proportionate to the individual and instant offence.

From: ~^! MCCLENDON, ~^!CHRISTOPHER
Subject: [External] ***Request to Staff*** MCCLENDON, CHRISTOPHER, [REDACTED]
Date: Thursday, February 12, 2026 11:18:40 PM

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To: not sure
Inmate Work Assignment: hosp comp

ATTENTION

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Inmate Message Below

it should be changed to 1 level per illegal adult harbored or transported and 2 to 4 levels per minor transported or harbored

From: ~^! ROGERS, ~^!DEREK
Subject: [External] ***Request to Staff*** ROGERS, DEREK, [REDACTED]
Date: Wednesday, February 11, 2026 10:05:00 PM

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To: USSC
Inmate Work Assignment: Outside Warehouse

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Inmate Message Below

My name is Derek Rogers,

I was sentence under the career offender status. The probation department enhance me on a 2014 Marijuana charge that i had in the state of Colorado for 12 ounces. I went to trial and was found guilty of 1 of 2 charges. I was sentence to 4.5 months community service. The government used this same charge against me to make me a career offender. I was only facing 77-90 months on this federal charge, but once I was enhanced to a career offender, the government sentenced me to 210 months on a charge that I was only sentence to 4.5 months of community services. This is very unfair for people to be sentence twice for something they have already done time for. This career offender charge does not make since. Who would ever think they would do time on a charge that they already serve time for 8 years later. I'm asking this U.S. Sentencing Commission to please get rid of people being charge with state crimes that they have already serve time for. I think it would be fair for this Sentencing Commission to chage the law so that the government can not use state charges on people that served under a [5] [3] or [1] year incarcerated. I serverd 4.5 months on this same Marijuana charge that I was enhanced as a career offender for and the govenment sentence me to 17.5 years. Marijuana was legal in the state of Colorado at the time and still is legal. Since my arrest, there have been plenty of states passing Marijuana Laws. I'm asking for y'all help to make things right. I go to work everyday outside of the fence at Englewood FCI. I'm one of the Trusted Inmates at Englewood FCI. My jobs are all trustee jobs.

From: ~^! SCHWARTZBERG, ~^!SAGI
Subject: [External] ***Request to Staff*** SCHWARTZBERG, SAGI, [REDACTED]
Date: Saturday, February 21, 2026 4:34:05 PM

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To: Chairman Reeves
Inmate Work Assignment: Safety

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Inmate Message Below

RE: Comments for Expansion of Sentencing Table Zone C

Dear Commission,

As an inmate serving a 120-month sentence for a crime that included a 5-year mandatory minimum, I believe that the expansion of Zone C should provide for a split-sentence possibility for up to, and including, 120 months. The reasons are as follows: First, many crimes in the United States Code have a 5-year mandatory minimum term of imprisonment. Allowing first time offenders that are sentenced in such cases to split their sentence will ensure they are appropriately punished while giving them the opportunity to reintegrate before the lengthy sentence imposed has counter-productive effects (such as increasing rate of recidivism), while still serving the required 5-year prison term. Secondly, the sentencing guidelines--by all accounts--are too high. Especially for first-time offenders with 0 criminal history points. Giving the Court more flexibility in a "split sentence" allows the Court to really tailor the punishment to the specific offender in considering the 3553(a) factors. Third, given the ongoing cuts to the BOP's budget and ongoing mismanagement with healthcare issues, providing the Court with the ability for a split sentence for those sentenced up to 120 months (which is a significant amount of first time offenders) can, and likely will, result in a reduction of tax money required to house low-level offenders with a low, or non-existent, recidivism risk. Therefore, instead of 108 months as the top of Zone C, it should be 120.

RETROACTIVITY:

I believe, and fully support, the inclusion of this amendment in Section 1B1.10 to make it retroactive. This will allow the Courts to consider a split sentence for those inmates who have truly taken rehabilitation seriously and reduce the prison population. While making this amendment retroactive may result in additional filings for reduction in sentences, this increase will be 1) short lived, and 2) allow the Court to truly consider the individual defendant for those cases that the Court had no other choice even though the defendant may not have deserved such a lengthy prison sentence. Giving the Court this opportunity to revisit unjust sentences should be provided by this Commission, and it can do so by making this change retroactive.

Thank you for your time and consideration.

From: ~^! STEVENS, ~^!ROMELL C
Subject: [External] ***Request to Staff*** STEVENS, ROMELL, [REDACTED]
Date: Monday, February 9, 2026 12:05:02 PM

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To: HONORABLE CARLTON REEVES et. al.
Inmate Work Assignment: Food Serv. PM.

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Inmate Message Below

Your Honor, I am a elderly man 62 .5

I have read the proposed amendment and I think that the Career Offender, which I am is too broad and should only count Federal Offenses. I would not be here today if this was the case. The 2016 report which stated the 3 type of career Offender's, issues a recommendation to congress that low-level non-violent drug offenders should not be Careerred. Please think of the guys whom have spent years in this prison system for very small amt. of drug possession. In my case 15grams of a substances containing meth. Any retroactive reduction to career offender's is a welcome.

From: ~^! STOELTING, ~^!CIERA MONIQUE
Subject: [External] ***Request to Staff*** STOELTING, CIERA, [REDACTED]
Date: Saturday, February 28, 2026 6:04:43 PM

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To:
Inmate Work Assignment: ---

ATTENTION

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Inmate Message Below

I think it is a great idea to allow zone D be able to be considered for a split sentencing.

From: ~^! SYLVER, ~^!EARNEST E
Subject: [External] ***Request to Staff*** SYLVER, EARNEST, [REDACTED]
Date: Saturday, February 14, 2026 9:05:11 AM

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To: U.S. Sentencing Commission
Inmate Work Assignment: Orderly Recreation

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Inmate Message Below

Good Morning. In response to your proposed guideline changes. I think the expansion of of Zone C that would split the sentences of defendants in Zone D would be a great incentive especially for those who do not have FSA, who is currently programing, has done a third of their time, has not had any 100 or 200 series incident reports, maintains a low recidivism status while incarcerated, and is a model inmate. A lot of inmates have very high sentences because of the enhancements that added more time to the sentences that really don't fit all of the conduct because under the Booker Supreme Court case of 2005, the Supreme Court stated that Sentencing Guidelines were advisory only. For a first time offender to get 168 months in the federal court system is an abuse of discretion in sentencing matters, and attorney's sometime fail to argue this on behalf of their clients. In summary, I think expanding zones A, B, C, and Splitting Zone D would help inmates with long sentences. Thank you for you time in this matter.

Public Comment - Proposed 2026 Amendments (January 2026)

Submitter:

Linda Vaughn

Topics:

2. Career Offender

Comments:

Proposed Career Offender Amendment
Supporting Suboption 2C and the "Served Five Years or More" Standard

Submitted by: Linda Vaughn

I write in strong support of the proposed amendment to the Career Offender guideline, and specifically Suboption 2C, which limits qualifying prior convictions through a time-served approach. I respectfully urge the Commission to adopt the "served five years or more" requirement within this suboption.

Suboption 2C represents a thoughtful and necessary refinement of the Career Offender guideline by ensuring that only prior convictions reflecting substantial seriousness and sustained criminal conduct trigger enhanced penalties. A five-year time-served threshold appropriately distinguishes between individuals who served lengthy terms of imprisonment and those whose prior convictions resulted in shorter sentences that may reflect lower-level conduct, plea negotiations, or outdated sentencing practices.

Length of time actually served is a more accurate and objective indicator of offense severity than the mere existence or classification of a conviction. By focusing on time served, Suboption 2C improves proportionality and ensures that the Career Offender designation is reserved for defendants whose criminal history demonstrates the level of culpability the guideline was originally intended to address.

In addition, the five-year standard promotes sentencing uniformity and reduces unwarranted disparities. Under the current framework, individuals with markedly different criminal histories can receive identical enhancements, leading to excessive sentences that do not meaningfully advance public safety. Suboption 2C corrects this imbalance by tying enhanced punishment to demonstrated seriousness reflected in actual incarceration.

Further, this approach aligns with empirical research showing that recidivism risk declines over time and that excessively broad career offender enhancements often yield diminishing public safety returns. Narrowing eligibility through Suboption 2C supports individualized sentencing, better resource allocation, and respect for rehabilitation.

Adopting Suboption 2C with the five-years-or-more time-served requirement would strengthen the fairness, credibility, and effectiveness of the federal sentencing system while maintaining appropriate accountability.

Thank you for the opportunity to submit this comment.

Respectfully submitted,
Linda Vaughn

Submitted on: February 19, 2026

UNITED STATES SENTENCING COMMISSION

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