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

March 6, 2026

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

Dear Chair Reeves and Members of the Sentencing Commission:

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

1. Sentencing Options

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

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

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

1. Addition of New Introductory Commentary

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

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

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

sentences in 2025).[4]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

home confinement with location monitoring.

2. Career Offender

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

Changes Relating to "Crime of Violence"

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

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

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

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

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

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

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

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

Changes Relating to "Controlled Substance Offense"

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

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

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

Changes to Other Guidelines

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

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

3. Circuit Conflicts

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

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

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

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

4. Human Smuggling

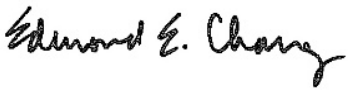
The proposed Human Smuggling amendment would expand the tiers in §2L1.1(b)(2) for the number of persons smuggled, providing better gradation of the impact of the offense. It also adds a new 2-level increase for certain forms of concealing or carrying persons in a vehicle or vessel, and adds provisions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

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

Conclusion

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

Respectfully submitted,



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