

**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,<sup>1</sup> 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.

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<sup>1</sup> "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.<sup>2</sup>

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,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.”<sup>6</sup> Courts

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<sup>2</sup> See USSC, [2026 Proposed Amendments: Career Offender](#) at 1 (“Synopsis of Proposed Amendment,” referencing some opinions making these complaints).

<sup>3</sup> 28 U.S.C. § 994(h) (also referenced herein as the “career-offender directive”).

<sup>4</sup> 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.”).

<sup>5</sup> 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).

<sup>6</sup> [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*.<sup>7</sup> From the start, Commission data showed “extensive use of [downward] departures” in career-offender cases.<sup>8</sup> And judges felt quite strongly: “Such departures were often accompanied by disparaging comments about the career offender provisions or about the Commission itself.”<sup>9</sup>

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,

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[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).

<sup>7</sup> 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)).

<sup>8</sup> Michael S. Gelacak, et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (1996).

<sup>9</sup> *Id.* at 356.

in increasing numbers, for 20+ years.<sup>10</sup> But *Booker* does not nullify the career-offender guideline’s pernicious influence: the career-offender sentencing range still has a powerful anchoring effect.<sup>11</sup> 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.<sup>12</sup>

The existence of a career-offender guideline is Congress’s fault: the guideline was created to comply with the congressional directive at § 994(h).<sup>13</sup> But from the start, the career-offender guideline’s definitions have covered more offenses than § 994(h) requires.<sup>14</sup> And since then, the Commission has

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<sup>10</sup> 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.”).

<sup>11</sup> 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. . .”).

<sup>12</sup> 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).

<sup>13</sup> USSG §4B1.1 (Background).

<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> And it continued post-*Booker*, although well-below-guideline-range sentences became the norm.<sup>17</sup> 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*.<sup>18</sup> Then it expanded definitions again in 2023.<sup>19</sup> 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

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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.

<sup>15</sup> 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).

<sup>16</sup> 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.

<sup>17</sup> [2016 Report to Congress](#) at 22.

<sup>18</sup> 576 U.S. 591 (2015); *see also* USSG, App. C, [Amend. 798](#) (2016).

<sup>19</sup> 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.<sup>20</sup> 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.”<sup>21</sup> A working group in 1991 presented multiple additional ways of restricting §4B1.2's definitions to serious offenses, again related to both definitions.<sup>22</sup> 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.<sup>23</sup>

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<sup>20</sup> 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.

<sup>21</sup> [1988 Peters Memo](#) at 15-16.

<sup>22</sup> [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).

<sup>23</sup> 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.<sup>24</sup> 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.”<sup>25</sup>

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.<sup>26</sup>

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<sup>24</sup> 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.

<sup>25</sup> 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]most 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”).

<sup>26</sup> 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.”<sup>27</sup> Moreover,

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range at a rate of 70.4% (as compared to 82.1% in instant drug-trafficking cases). [Individual Datafiles](#), FY20-24.

<sup>27</sup> [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,”<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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

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<sup>28</sup> *Borden v. United States*, 593 U.S. 420, 442 (2021).

<sup>29</sup> *See supra* note 26.

<sup>30</sup> [2026 Data Briefing](#) at 15.

<sup>31</sup> 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.”<sup>32</sup> 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

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<sup>32</sup> 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.<sup>33</sup> And these averages include misdemeanor probation (which in most states can last *years*).<sup>34</sup> Further, it is easy for judges to impose lengthy probation sentences since, in many jurisdictions, they can reduce them later.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> This was meant to

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<sup>33</sup> The Pew Charitable Trusts, [States Can Shorten Probation and Protect Public Safety](#) 4, Fig. 1 (Dec. 2020).

<sup>34</sup> *Id.* at 17 (explaining that statutory maxima for *misdemeanor* probation in most states range from two to ten years).

<sup>35</sup> *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).

<sup>36</sup> *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).

<sup>37</sup> [1988 Peters Memo](#) at 15-16.

“distinguish[] between career offenders who have committed serious prior offenses and those whose prior offenses were relatively minor[.]”<sup>38</sup> 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[.]”<sup>39</sup> 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[.]”<sup>40</sup> For decades, federal judges have complained about the career-offender guideline treating drug-trafficking offenses (instant and prior) the same as violent offenses.<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 16.

<sup>40</sup> See [2016 Report to Congress](#) at 3.

<sup>41</sup> 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.<sup>42</sup> Data also establish that inclusion of drug-trafficking offenses in the career-offender guideline exacerbates unwarranted racial disparities.<sup>43</sup> 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.<sup>44</sup>

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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”).

<sup>42</sup> 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.

<sup>43</sup> 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).

<sup>44</sup> 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:

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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[.]<sup>45</sup>

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,<sup>46</sup> 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.<sup>47</sup> 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

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<sup>45</sup> 28 U.S.C. § 994(h)(2)(B).

<sup>46</sup> The Commission’s Option 1 does not include this “punishable by” language. We include it to maintain consistency with the current CSO definition.

<sup>47</sup> 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.<sup>48</sup> Three of the bracketed offenses aren't even trafficking offenses per se; they are merely *related to* trafficking.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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.

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<sup>48</sup> [2025 Defender Comment on Career Offender](#) at 8-9.

<sup>49</sup> 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).

<sup>50</sup> [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).

<sup>51</sup> 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."<sup>52</sup> As we have said before: The career-offender guideline "is an unwarranted-disparity-creating machine."<sup>53</sup>

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.<sup>54</sup> 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,

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<sup>52</sup> [Fifteen Years Report](#) at 134.

<sup>53</sup> See [2023 Defender Comment on Career Offender](#) at 3.

<sup>54</sup> 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.<sup>55</sup> And even three years is too low.<sup>56</sup> With drug-trafficking offenses, many states have mandatory

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<sup>55</sup> 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).

<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> A modest prior-sentence minimum will not tease out these cases, particularly given states’ overburdened courts and indigent-defense systems.<sup>59</sup>

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.<sup>60</sup> 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,<sup>61</sup> 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.<sup>62</sup> 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.

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<sup>57</sup> 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).

<sup>58</sup> See generally Kimberly Kessler Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. Rev. 2001 (2023).

<sup>59</sup> 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).

<sup>60</sup> [2025 Defender Comment on Career Offender](#) at 29-32.

<sup>61</sup> See 21 U.S.C. § 802(58)(A), (59)(A).

<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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,<sup>65</sup> or (2) replacing

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<sup>63</sup> 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.

<sup>64</sup> 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%)).

<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> As Defenders said in our comment last year, we don’t think the Commission needs to be concerned about this directive.<sup>68</sup> 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

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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).

<sup>66</sup> 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.

<sup>67</sup> Pub. L. No. 103-322, § 110513, 108 Stat. 1796, 2019 (1994).

<sup>68</sup> [2025 Defender Comment on Career Offender](#) at 34.

criminal histories weren't all that different.<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> If §2K2.1 adopts ACCA's definitions without the residual clause—that is, the

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<sup>69</sup> USSC, [Report of the Firearms and Explosive Materials Working Group](#) at 20-23 (Dec. 11, 1990).

<sup>70</sup> The current §4B1.2's definitions are so much broader than ACCA's definitions that they do not serve this purpose.

<sup>71</sup> 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.<sup>72</sup> 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.”<sup>73</sup>

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.<sup>74</sup> And the Commission was right about that.<sup>75</sup> 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).

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Commission deleted the residual clause from the Guidelines Manual (with support from all corners). USSG, App. C, [Amend. 798](#) (2016).

<sup>72</sup> 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).

<sup>73</sup> *Johnson*, 576 U.S. at 605.

<sup>74</sup> USSG, App. C, [Amend. 798](#) (2016).

<sup>75</sup> 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.<sup>76</sup> We briefly summarize three principal reasons here:

First, Option 1 reflects the principle, “do the least harm.”<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.”<sup>80</sup> This would produce arbitrary results and unwarranted sentencing disparities: a defendant could have a career-offender sentence triggered by a

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<sup>76</sup> [2023 Defender Comment on Career Offender](#) at 26-30.

<sup>77</sup> 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.

<sup>78</sup> 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).

<sup>79</sup> *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—furthers 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”).

<sup>80</sup> *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.<sup>81</sup>

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.<sup>82</sup> Relatedly, other federal recidivist provisions triggered by drug offenses continue to relate only to federally controlled substances.<sup>83</sup>

### **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."<sup>84</sup> 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

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<sup>81</sup> 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.").

<sup>82</sup> See [2023 Caruso Statement](#) at 32-34.

<sup>83</sup> 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").

<sup>84</sup> *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.<sup>85</sup>

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.”<sup>86</sup> 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.

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<sup>85</sup> See *United States v. Gibson*, 55 F.4th 153, 163 (2d. Cir. 2022) (discussing requirements for updating and republishing drug schedules).

<sup>86</sup> *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)).