

# PROBATION OFFICERS ADVISORY GROUP

*An Advisory Group of the United States Sentencing Commission*

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March 2, 2026

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following written testimony to the United States Sentencing Commission (the Commission) regarding the proposed amendments issued on January 30, 2026.

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

POAG appreciates that the Commission is addressing two circuit conflicts involving the definition of Controlled Substance Offense” in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

### *Conflict Regarding Controlled Substances Covered under CSA vs. State Offenses*

The first conflict concerns whether the term “controlled substance” in §4B1.2(b) refers exclusively to a substance controlled by the CSA pursuant to 21 U.S.C. § 801, or whether the definition also includes substances that are either federally controlled or controlled under applicable state law. Resolution of this issue is significant, given that the definition in USSG §4B1.2(b) applies to the Career Offender guideline at §4B1.1, as well as several other guidelines that incorporate this definition by reference and rely on prior convictions for a Controlled Substance Offense to determine the offense level.

Option 1 and Option 2 each define “controlled substance” as a drug or other substance, or immediate precursor listed in the CSA, however, Option 2 has the added language “or otherwise controlled under applicable state law.”

POAG believes that an expansive definition of a “controlled substance,” which allows one to factor substances either included in the CSA or otherwise controlled under applicable state law, is ultimately the most appropriate approach if the goal is to punish a pattern of conduct. POAG recognizes that Option 2 will result in more offenses qualifying as predicate priors for career offender purposes. However, as endorsed above, POAG believes limitations regarding the sentence imposed balances this concern. Additionally, it does not represent a substantive departure from the long-established understanding of Controlled Substance Offenses prior to the recent divergence in circuit interpretations. POAG discussed that Option 1 has introduced substantial doctrinal and administrative complexity when applied through the categorical and modified categorical frameworks that govern prior-conviction analysis. As such, the majority of POAG believes that Option 1 is too narrow and could create significant complications at sentencing.

The core difficulty lies in the structure of state drug statutes. Many states define “controlled substance” by reference to their own schedules, which are frequently broader than the federal schedules. Some states criminalize substances that are not listed under federal law. Others employ broader definitions of isomers, salts, or analogues. As a result, under a CSA-only definition, numerous state statutes would be categorically overbroad because they encompass substances outside Schedules I–V of the CSA.

Determining whether a statute is divisible requires careful analysis of the governing state law, including statutory text, jury instructions, and relevant appellate decisions. Probation Officers are not trained to conduct this type of legal analysis, and the primary stakeholders – the AUSA and

defense counsel – often advance competing interpretations when advocating for their respective positions. Until a case reaches the Circuit Court, and there is a holding relevant to that statute, courts are often left with differing interpretations, resulting in inconsistent application.

As the Commission addresses in the Synopsis of the Proposed Amendments, federal courts have grappled with slight differences between the federal and state definitions of cocaine, heroin, and methamphetamine, including in the context of § 4B1.2(b), with some courts holding that the relevant state definitions are categorically broader than the federal definitions. This has resulted in most state offenses not qualifying as a predicate Controlled Substance Offense for Career Offender purposes.

Additionally, stakeholders challenge the definition of state statutes which also include isomers, analogues, or chemical variants that are not federally controlled. This can result in years of resource-intensive analysis including expert testimony regarding the chemistry of the controlled substance. There are times when this causes delays in sentencing as parties wait to see the outcome of pending cases.

If the statute is determined to be divisible, courts may apply the modified categorical approach and consult *Shepard* documents to determine whether the conviction rested on a federally controlled substance. However, *Shepard* documents often do not resolve the question. Many older charging instruments and plea records refer generically to a “controlled substance” without specifying the particular drug. In those cases, a conviction under a divisible but overbroad statute may fail to qualify because the record does not establish which statutory alternative formed the basis of conviction. Similarly, there are disparities in access to *Shepard* documents. As such, defendants with materially similar criminal histories may receive different treatment based solely on the level of detail preserved in records or availability of documents.

While Option 2 is the preferred approach, potential disparity concerns regarding the applicable state law within Option 2 were discussed as well. The controlled substance schedules and their corresponding quantity thresholds vary from state to state. Meaning a defendant with a prior conviction from one state will qualify as a career offender, but a defendant in the neighboring state who trafficked the same substance would not qualify as a career offender because the substance trafficked was not a Controlled Substance Offense in that state or the same quantity received different treatment state-to-state. Although these substances are not the mainstream types of drugs involved in the drug trade, when relying on state law to determine a guideline provision, such as career offender, it does invite some disparity into the process.

POAG recognizes that under either framework – whether the prior offense involves only a federally controlled substance or substance regulated under state law – the application of the rule necessarily produces disparate outcomes. These concerns notwithstanding, a defendant’s choice to violate those rules is the central issue that should be focused upon.

### *Conflict Regarding Temporal Version of the Applicable Drug Schedule*

The Commission seeks to resolve the temporal issue with regard to “when” a predicate offense is considered a controlled substance offense for career offender designation. POAG supports the Commission using the proposed Option 2 language to clarify that controlled substance offenses refer to those substances that were classified as controlled at the time of the original conviction.

In 2024, the Supreme Court considered this same question with regard to a state Serious Drug Offense in light of ACCA applications (*Brown v United States*, 602 U.S. 101, 123, 144 S. Ct. 1195, 1210 (2024)). In *Brown*, the Court held that a predicate offense qualified if it involved a drug designated as a controlled substance at the time original offense. Specifically, the Court held that “...a defendant’s “history of criminal activity” does not “cease to exist” merely because the crime was later redefined...”. The majority of POAG supports this same approach to predicate controlled substance offenses for career offender enhancements.

Section 4B1.2 is, by its very nature, a backward-looking guideline. It is meant to assess whether prior convictions, already adjudicated and sentenced, qualify as predicates for enhanced punishment. Because this guideline looks backwards, POAG believes the determination should be based on the nature of the predicate offense at the time the convictions for those offenses occurred.

Comparing the state statute of conviction to the CSA to determine if the “controlled substance” charged in the prior offense remains a “controlled substance” under current law requires cumbersome analysis that is most often resolved through continued litigation, with no bright-line distinction. To reinterpret a prior conviction through statutory amendments or evolving case law changes the object of the inquiry. It turns a historical question (“What was this conviction?”) into a moving target (“How would this conviction be classified today?”). That approach is inconsistent with the guideline’s backward-looking design. Treating the conviction differently years later based on legal changes that did not exist and, therefore, could not be considered at the time, alters the legal consequences of a completed judgment. POAG believes that a backward-looking enhancement should attach to what the conviction was, not to future changes in the law.