

# VICTIMS' RIGHTS ADVISORY GROUP

*A Standing Advisory Group of the United States Sentencing Commission*



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

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

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

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

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

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

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## **PROPOSED AMENDMENT: CAREER OFFENDER**

### Crime of Violence

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup> See proposed §4B1.2(a)(2): “Aiding and Abetting, Inchoate Offenses Included, —The term “crime of violence” includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.”

### Controlled Substances

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>4</sup> §4B1.1(a) reads:

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

<sup>5</sup> §4B1.2(b) and (c) read:

(b) CONTROLLED SUBSTANCE OFFENSE. —The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

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

(c) TWO PRIOR FELONY CONVICTIONS. —The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

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

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

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

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

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

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

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

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

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<sup>6</sup> *See* §4B1.2(e)(4): “‘**Prior felony conviction**’” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.”

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

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

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

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

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

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

because Guidelines § 4B1.2(b) defines a "controlled substance offense" by reference to certain prohibited conduct, not by reference to a federal criminal statute or a "generic" crime like burglary. *See Shular v. United States*, — U.S. —, 140 S. Ct. 779, 783, 206 L.Ed.2d 81(2020). So we must "determine not whether the prior conviction was for a certain offense, but whether the conviction meets some other criterion." *Id.* at 783[.]

[...]

The "other criterion" to which we must compare the elements of Lewis's prior conviction, *Shular*, 140 S. Ct. at 783, comes directly from the Guidelines definition of controlled substance offense in § 4B1.2(b). That definition contains three parts: (1) "an offense under federal or state law," (2) "punishable by imprisonment for a term exceeding one year," (3) that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance," or possession with the intent to do so. U.S.S.G. § 4B1.2(b)."

*Id.*, at 768.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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