PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

March 2, 2026

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Practitioners Advisory Group Comment on Proposed Amendments to the Sentencing Guidelines, January 30, 2026

Dear Judge Reeves,

The Practitioners Advisory Group ("PAG") submits these comments to the Commission's proposed amendments regarding (1) sentencing options, (2) the career offender enhancement, (3) certain circuit splits affecting § 4B1.2, and (4) human smuggling.

With respect to sentencing options, the PAG is grateful to the Commission for proposing the revised introductory language making clear judges' non-carceral options and the expansion of Zones B and C. The proposals are welcome and would better align the Guidelines with the Sentencing Reform Act and the realities of current sentencing practices. That said, the PAG suggests further refinement to the introductory language and recommends the elimination of zones altogether. The zone-based structure incorrectly suggests non-statutory limits on judicial discretion with respect to sentencing options and is inconsistent with post-*Booker* judicial authority. In the alternative, the PAG recommends further expansions to the zones, including Zone A, and replacing the prefatory term "authorizes" in § 5A1.1(a)(1)-(4) with "recommends" to comport with the Commission's stated goal of emphasizing the options available to judges and avoid impermissibly narrowing those options.

Regarding the career offender guidelines, the PAG opposes eliminating the categorical approach for crimes of violence. That said, of the options presented for comment, the PAG supports Option 1 for both the crime of violence and controlled substance offenses. Those options provide the best hope for a simplified determination of career offender status and for narrowing the class of people subject to a provision that has been roundly criticized for its overbreadth and unjustified severity. For similar reasons, we recommend Option 1 for both circuit splits regarding the timing and scope of substances covered by § 4B1.2.

Lastly, we oppose the proposed amendments to the human smuggling guidelines as unsupported by empirical evidence or valid policy considerations.

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II. Career Offender

A. *Crimes of Violence: The Categorical Approach Should Not Be Abandoned*

For decades, both courts and the Commission have recognized, as does the PAG, that the career offender guideline is one of the harshest, least empirically grounded, and most disparity-producing features of the Guidelines.[12] The career offender guideline routinely generates excessive sentences, disproportionately

[12] *See, e.g.*, U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Enhancements* 35 (2016) ("USSC Career Offender Report") (noting that judges granted departures or variances from the career offender guideline in roughly 75% of drug-based career offender cases, often sentencing close to the non-career offender drug guideline); U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 131-34 (2004) (noting that the career offender guideline produced a significant and unwarranted adverse impact on Black defendants); U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004).

impacts defendants of color, and performs poorly as a predictor of recidivism.[13] Any proposal that expands its reach, rather than narrows it, should therefore be viewed with caution. Eliminating the categorical approach as a means for determining what qualifies as a crime of violence would do exactly that.

Not only would eliminating the categorical approach unwisely expand application of the career offender guideline, but it would likely lead to the sort of litigation its critics decry. For the many years that courts and litigants have been living with the categorical approach, a comprehensive body of case law has developed guiding its application. We now know how to apply the categorical approach. Abandoning it would entail starting from scratch, necessitating a flood of new litigation over the application of whatever new approach the Commission adopts.

Still further, the categorical approach, whatever its flaws, avoids re-litigation of old cases at sentencing, which could potentially require litigants to locate stale evidence, to refresh faded recollections, and to chase down long-lost witnesses in an effort to establish the facts underlying a previous conviction. Certain portions of the proposal would engender just that in some cases—*and* it would unfairly place the burden on defendants to do so, requiring the defendant to prove that the underlying facts of old convictions do not qualify for career offender treatment.[14]

i. Abandoning the Categorical Approach Expands a Deeply Flawed Guideline

The problems with the career offender guideline do not stem from the categorical approach. They stem from the guideline itself. It is overly punitive, lacks empirical justification, and has been criticized by judges[15], Federal Defenders[16], and the Commission's own reports.[17] Even the Department of Justice ("DOJ") has recognized that the guideline "has been the subject of considerable criticism for producing overly long sentences."[18] Criticisms of occasional under-inclusiveness cannot justify replacing an elements-based framework with one that will sweep in even more defendants under an already overbroad enhancement.

If the guideline is fundamentally broken, expanding it will not fix it. The categorical approach has been tested in the courts. Over the course of thirty-five years, it has been shown to be consistent with Congress's intent as expressed in 28 U.S.C. § 994(h). It passes Constitutional muster. It has the added benefit of appropriately limiting the application of the flawed career offender guideline. For all these reasons, the PAG urges that the categorical approach should not be abandoned.

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[13] *Id.*

[14] *See, e.g.*, Proposed Amendments at 25 ("An offense of conviction shall not qualify as a 'crime of violence' under subsections (a)(1) and (a)(2) if the defendant can establish [that] . . . [d]uring the commission of the offense, the acts for which the defendant is criminally liable did not inflict, did not intend to inflict, and did not threaten to inflict . . . bodily injury to another person.").

[15] *See, e.g.*, *United States v. Newhouse*, 919 F. Supp. 2d 955, 967 (N.D. Iowa 2013) (noting "the growing chorus of federal judges who have rejected applying the Career Offender guideline in certain cases," and collecting cases).

[16] *See, e.g.*, Statement of Juval O. Scott, *Before the United States Sentencing Commission Public Hearing on Proposed Amendments to the Career Offender Guideline* (March 8, 2023) (noting that the guideline "has long been recognized – including by the Commission – to be overly punitive, to have no empirical basis, and to exacerbate racial disparities in guideline sentencing").

[17] *See generally* USSC Career Offender Report.

[18] Letter from U.S. Dep't of Just., Crim. Div., to U.S. Sent'g Comm'n, at 27 (Feb. 27, 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

ii. The Categorical Approach Protects Constitutional Boundaries

For more than thirty-five years, the Supreme Court has required an elements-based method for determining predicate convictions.[19] The Court has rejected fact-based, conduct-based, and accusation-based alternatives for the same basic reasons: they create unfairness, invite re-litigation of old cases, and risk Sixth Amendment violations.[20] Congress too has consistently tied recidivist enhancements to convictions, not allegations.[21]

The Commission's proposal flips this structure on its head. In certain cases, it authorizes sentencing courts to engage in precisely the kind of mini-trials that *Taylor*, *Descamps*, and *Mathis* warned against—except with the burden on the defendant to show that the underlying facts of the prior conviction do *not* qualify. This proposal will generate exactly the "daunting" factfinding the categorical approach was designed to avoid.

Replacing a constitutionally grounded, Supreme Court-mandated framework with an untested conduct-based process would destabilize a well-settled area of law and raise serious constitutional concerns.

iii. Efficiency Cannot Trump Fairness

Ten years ago, the Commission urged Congress to reform the career offender directive because of the unjust sentences it produces.[22] This proposal would move in the opposite direction, broadening a guideline the Commission has repeatedly acknowledged is unduly severe.

While the PAG supports simplifying the Guidelines when doing so promotes fairness, jettisoning the categorical approach would do the opposite in both respects: it would make sentencing *more* complex—requiring mini-trials at sentencing and necessitating development of an entirely new body of caselaw—and it would expand the application of a guideline that is flawed and unfair.

Eliminating the categorical approach would expand an already flawed guideline, undermine decades of Supreme Court precedent, generate extensive new litigation, and increase sentencing disparities. The Commission should preserve, not discard, the categorical framework that has served as the backbone of recidivist sentencing law for over 35 years.

B. *Changes Relating To "Crime of Violence" – Option 1 Is The Best Option*

Should the Commission jettison the categorical approach, the PAG believes it should adopt the *first* of the two proposed options for determining which state offenses qualify as "crimes of violence."[23] Additionally, the PAG supports the Commission's proposed exclusions and limitations to the scope of the "crime of violence" definition.

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[19] *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016).

[20] *See, e.g.*, *Mathis*, 579 U.S. at 501.

[21] Dispensing with an elements-based test runs afoul of the plain language of § 994(h), which emphasizes actual convictions over speculative conduct.

[22] *See* USSC Career Offender Report at 3.

[23] *See* Proposed Amendments at 18–19.

The PAG recognizes that stakeholders have consistently criticized the categorical approach as too "difficult to apply."[24] Option 1 addresses this criticism head-on and would be easy for judges, practitioners, and probation officers to apply. If a state has labeled a certain offense as a crime that is included on Option 1's list, the offense presumptively qualifies as a "crime of violence"—no further analysis needed. Overbreadth issues, which will inevitably arise, are then addressed by the Commission's proposed exclusions and limitations to the "crime of violence" definition.

Option 2, on the other hand, would complicate the analysis and is antithetical to the Commission's stated desire to simplify the Guidelines.[25] Option 2 will require judges, practitioners, and probation officers to determine how a crime is defined, rather than labeled. In doing so, Option 2 invites the same kind of complaints regarding the categorical approach that have flooded the Commission's inbox over the years.

Asking a stakeholder to determine how a state crime is "defined" is not all that different than asking someone to "list" the elements of a particular state offense.[26] As such, the same problems with interpreting confusing legal terms and potentially having to utilize statutory interpretation to define such terms are going to occur. The only major difference in the two approaches is that, under Option 2 and unlike with the categorical approach, one will *not* be required to entertain whether a particular means of satisfying a required element renders an offense overbroad.[27]

The following example illustrates the PAG's concern. Under Option 2, "domestic violence" is a listed offense and is defined as "committing any act with the intent to kill or injure a spouse, intimate partner, or dating partner."[28] The term "spouse" is easy enough to define and would likely encompass many of the domestic violence offenses the Commission seeks to include in the "crime of violence" definition.
But what constitutes an "intimate partner"?[29] How intimate and how long a partnership is required? Would the answer to that question be the same in every state? And even if the term were easy to define, does

[24] Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISCOURSE 132, 135 (2019); *see also Larios v. Att'y Gen. United States*, 978 F.3d 62, 65 (3d Cir. 2020) (stating that the categorical approach "has proven difficult (and often vexing) in practice").
[25] *See* US. Sent'g Comm'n, amend. 836 (discussing "the Commission's exploration of ways to simplify the guidelines").
[26] *See Mathis v. United States*, 579 U.S. 500, 504–05 (2016) (describing the basics of the categorical approach).
[27] *See* Proposed Amendments at 19 (noting that Option 2 is designed to allow courts to look to "any" part of a statute, including any listed "means of committing any element" of an offense, to "determine whether any part of the statute of conviction includes an offense that constitutes" an enumerated offense"); *see also United States v. Lightsey*, No. 20-13682, 2026 WL 531922, at *4 (11th Cir. Feb. 26, 2026) (noting that a key part of the categorical approach analysis requires one to assume that the prior offense rested upon the "least culpable conduct" (citation and quotation marks omitted)).
[28] Proposed Amendments at 23.
[29] *See, e.g.*, 18 U.S.C. § 921(a)(37) (defining "dating relationship" as "a relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature"); 18 U.S.C. § 921(a)(32) (defining "intimate partner" as "with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person"); NCGS § 50B-1(b)(6) (specifically stating that "a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship" and that "[a] casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship"); NCGS § 14-32.5 (establishing the offense of "misdemeanor crime of domestic violence" without providing that said offense can be committed against an "intimate partner").

every state afford the same legal protection to intimate partners as spouses in the context of domestic violence?

Answers aside, these questions illustrate the problems inherent with Option 2: it is not simple and will result in an equal to or similar amount of litigation that the categorical approach has already generated. As such, Option 2 would effectively take us "back to square one" in this endeavor, only without the benefit of the well-developed case law we currently enjoy with respect to the categorical approach. For these reasons, the PAG encourages the Commission to either retain the categorical approach or, in the alternative and should it choose to abandon it, adopt the first of its two proposed options that does so.

C. *Changes Relating To "Controlled Substance Offense"- Option 1 Is The Best Option*

According to the Commission's recent Public Data Briefing regarding the proposed Career Offender Amendments, in FY 2024 only 18% of the defendants sentenced under the career offender guideline received a within range sentence.[30] This data point is consistent with the decades-long trend of below-guideline sentences for most career offenders.[31] It is beyond debate that a majority of the judiciary deems the career offender guideline over-inclusive and that far fewer defendants should qualify for an enhanced sentence under the guideline.

Unless Congress modifies the career offender directive of 28 U.S.C. § 994(h), a certain category of defendants who have previously committed drug offenses must have Guidelines that are "at or near the maximum term authorized," and the career offender guideline should be designed to fulfill that directive. But that statutory category of drug offender defendants contemplated by Congress does not consist of defendants with two or more "controlled substance offenses" as currently defined in the guideline. Instead, the statutorily mandated category only includes defendants with two or more prior convictions under specified sections of the federal Controlled Substances Act ("CSA") and the federal Controlled Substances Import and Export Act. 28 U.S.C. § 994(h)(2)(B). The most logical way to comply with the congressional directive while at the same time fixing the over-inclusive nature of the career offender guideline is to limit the "controlled substance offense" definition to the federal offenses listed in the statute.

Controlled Substance Offense Option 1 comes closest to the best fix and is thus endorsed by the PAG. This option remains over-inclusive, because it includes federal offenses not listed in § 994(h). But Option 1 is preferable to Options 2 A-C because those options continue to allow some state drug felonies to be counted as controlled substance offenses. Congress did not include state drug offenses in its career offender directive and thus Options 2 A-C remain substantially over-inclusive. Simply put, Option 1 is preferable because more defendants will be excluded from career offender consideration under Option 1.

Additionally, it is the experience of the PAG's members that federal drug prosecutions usually involve higher level drug traffickers while state prosecutions typically target smaller scale drug activities. Even when higher level drug defendants are initially investigated and arrested by state law enforcement, those defendants know their cases are likely going to be federally charged. Limiting the career offender

[30] U.S. Sent'g Comm'n, *Public Data Briefing Video Transcript: 2026 Proposed Amendments on Career Offender* 3 (Feb. 2026), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2026_Career-Offender.pdf.
[31] USSC Career Offender Report at 22.

guideline's reach to federal drug offenders will properly focus the guideline, in most cases, on defendants with substantial involvement in the drug trade.[32]

Finally, Option 1 is preferable because it is the simplest. The PAG has long agreed with the Commission's policy priority of simplification. Option 1 is straightforward and easy to apply. A sentencing court need only determine whether the defendant was convicted under one of the enumerated federal statutes. Options 2 A-C are far more complicated. Those options will require the parties to litigate issues concerning not only the nature of the state court conviction (*e.g.*, did it involve a controlled substance or counterfeit controlled substance? Did it involve manufacturing, importing, exporting, distributing, or dispensing? Did it involve possession with intent?), but also the state court sentence imposed, the amount of time that a defendant served in state prison or jail facilities, and whether parts of the sentence imposed or time served were attributable to other non-drug offenses. The cases in which a defendant served a state court sentence consisting of multiple concurrent sentences, only some of which were controlled substance offenses, may be particularly thorny. Options 2 A-C do not further the goal of simplification to the same degree as Option 1.

For these reasons, the PAG urges the Commission to adopt Controlled Substance Offense Option 1.

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

A. *The Commission should amend the Guidelines to clarify that for an offense to qualify as a "controlled substance offense" under § 4B1.2(b), a substance involved in that offense must be controlled by the Controlled Substances Act (Option 1).*

Over the past decade, a circuit split has developed over whether a "controlled substance offense" under § 4B1.2 encompasses offenses involving substances controlled under state law or only offenses involving federally controlled substances. To resolve that split, the Commission has proposed two options for an amendment to § 4B1.2. Option 1 defines "controlled substance offense" to include only offenses involving substances that are listed in the CSA. Option 2 would include offenses involving substances that are controlled under state law. As it did when a similar amendment was proposed in 2023,[33] the PAG supports Option 1.

Option 1 offers a straightforward framework for assessing whether a defendant's prior conviction is a "controlled substance offense" for career offender and other guideline purposes. Under that framework, defendants (and their lawyers) will have no doubt where to look to determine whether the substance at issue qualifies. Option 1 would also bring the guideline into alignment with the recidivist penalty enhancement provisions of 21 U.S.C. § 841(b) and the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2). Both define "serious drug offense[s]" by reference to the same CSA definitions – not state analogues. Next, Option 1 will promote uniformity by minimizing litigation over varying state definitions used to categorize offenses. And finally, it will reduce to some degree the overly harsh outcomes of the career offender guideline. As noted above, in FY 2024, only 18% of the defendants sentenced under the career

[32] In cases where a defendant's record reflects a prior serious state court drug conviction, sentencing courts can consider an upward variance.

[33] Letter from PAG to U.S. Sent'g Comm'n, at 18-19 (Mar. 14, 2023).

offender guideline received a within range sentence.[34] A narrower set of qualifying substances would help to bring Guidelines recommendations more in line with the judiciary's view of appropriate sentences in these cases.

In contrast, Option 2 would increase complexity and result in unwarranted sentencing disparities. That option would rely on inconsistent state law definitions, raising opportunities for litigation over which definitions, precisely, should apply to a given case. It would also subject defendants to vastly different Guidelines recommendations depending on where they live. Take, for example, state offenses involving cannabidiol ("CBD"). CBD has been decriminalized at the federal level since 2018.[35] But CBD remains criminalized in some states.[36] A Florida resident may be convicted for possessing certain kinds of CBD recreationally, while a Californian may possess CBD without risk of prosecution.[37] Based on that distinction, the Floridian could be subject to a career offender enhancement for conduct substantively identical to the Californian's. This result is particularly troubling given that the conduct underlying the prior conviction is not a federal crime.

B. *The Commission should amend the Guidelines to clarify that for an offense to qualify as a "controlled substance offense" under § 4B1.2(b), the substance involved in that offense must be controlled at the time of sentencing (Option 1).*

A circuit split has also arisen over whether a "controlled substance offense" under § 4B1.2 encompasses offenses involving substances that have been decriminalized by the time of sentencing for the instant offense. The Commission has proposed two options to resolve that split. The PAG supports Option 1 of the proposed amendments, which would require that the substance involved be controlled at the time of sentencing. We do so for three reasons: Option 1 would (1) simplify the Guidelines, (2) better reflect the defendant's actual culpability, and (3) prevent unwarranted sentencing disparities.

First, adopting Option 1 would further the Commission's goal of simplifying the Guidelines. Option 1 would require consulting the drug schedules in place on the date of sentencing. Option 2, by contrast, would require courts to consult historical federal drug schedules—and historical state drug schedules, should the Commission choose Option 2 for the first circuit conflict—to determine how "controlled substance" was defined on the date of the defendant's conviction for that offense. Particularly where the prior conviction was under state law, this process may be tedious and susceptible to errors. But perhaps more importantly, courts would have to conduct this inquiry anew for each and every defendant. Option 1, especially when paired with Option 1 of the proposed amendment to address the first circuit conflict, would streamline the process of determining the applicable law by allowing courts to look only to current federal drug schedules.

Second, Option 1 would help courts fulfill 18 U.S.C. § 3553(a)'s sentencing purposes and goals. Section 3553(a)(2)(A) requires courts to impose sentences that reflect the need for the sentence imposed "to reflect

[34] U.S. Sent'g Comm'n, *Public Data Briefing Video Transcript: 2026 Proposed Amendments on Career Offender* 3 (Feb. 2026) *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2026_Career-Offender.pdf.
[35] Agriculture Improvement Act of 2018, Pub. L. 115-334, 132 Stat. 5018 (Dec. 20, 2018).
[36] *See The CBD Map of the United States*, COVA Software (2025), *available at* https://www.covasoftware.com/hubfs/cbd-legality-map-2025.png (showing that Florida permits CBD only with a prescription, while California has fully legalized it).
[37] *Id.*

the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Option 1 would direct courts to impose sentences based on drug schedules that reflect present-day understanding of the relative seriousness and potential harm of drugs. Given the vast shift in public opinion—and the resulting changes to federal and state drug policy—over the last forty years, it is inappropriate to set sentencing guidelines based on since-abandoned drug schedules. Even though the Guidelines are merely advisory, their powerful anchoring effect would all but ensure defendants receive harsher sentences for conduct that society no longer views as wrong.[38]

Finally, Option 1 would better minimize unwarranted sentence disparities among similarly situated defendants, as required by 18 U.S.C. § 3553(a)(6). Imagine for a moment, two defendants who are identically situated in every way except for the date of their past conduct involving a now-decriminalized controlled substance. The unlucky earlier defendant has a conviction for that conduct; the lucky later defendant has none. If those defendants are sentenced on the same day by the same judge for a subsequent offense, they may receive radically different Guidelines ranges and, by extension, radically different sentences for the exact same underlying conduct. In contrast, under Option 1, those defendants would receive the same Guidelines ranges.

Accordingly, the PAG urges the Commission to adopt Option 1 of the proposed amendment addressing this circuit split.

[38] *See United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) ("[I]t would be illogical to conclude that federal sentencing law attaches 'culpability and dangerousness' to an act that, at the time of sentencing, Congress has concluded is *not* culpable and dangerous."); *United States v. Abdulaziz*, 998 F.3d 519, 528 (1st Cir. 2021) ("A guideline's enhancement for a defendant's past criminal conduct . . . is reasonably understood to be based in no small part on a judgment about how problematic that past conduct is when viewed as of the time of the sentencing itself.").

[39] Letter from Scott Meisler, Deputy Chief, Crim. Div., U.S. Dep't of Just., to U.S. Sent'g Comm'n at 14 (July 18, 2025), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=97.

[40] U.S. Dep't of Just., Criminal Resource Manual § 1907, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-1907-title-8-usc-1324a-offenses.