Witness Statement of Robert Zauzmer,
Chief of Appeals, U.S. Attorney's Office, Eastern District of Pennsylvania
Sentencing Commission Hearing of March 9, 2026

Proposed Career Offender and Circuit Conflict Amendments

The Department commends the Commission's continuing efforts to address the pernicious effects of the categorical approach in federal sentencing, particularly regarding what constitutes a "crime of violence" that warrants an enhanced sentence to protect the public from violent recidivists. The shortcomings of the approach are, in our view and that of countless judges, beyond dispute: it assesses an offender's culpability based not on what he or she did, but based on whether some other hypothetical person could commit the same offense with less violence; it requires an often arduous examination of case law in search of nonviolent examples; and identification of the defendant's offense of conviction relies on judicial records that are inconsistently maintained and often insufficiently specific. The result is grossly different treatment of identical offenders, based on discrepancies in states' drafting of offenses and maintenance of records, and the failure to properly sentence many defendants who unquestionably committed violent crimes.

The Commission's proposed amendments contain some promising paths toward correcting this unfortunate situation. We offer preliminary comments on the proposals here but reserve the right to refine or expand upon these views in our formal comment letter to be submitted on March 18.

Turning first to the definitions in the career-offender guideline, the Department generally supports the idea of establishing federal predicates as crimes of violence by reference to a list of federal statutes, though we submit that the list must be considerably longer than the Commission's proposal to be effective. For state predicates, we do not support a listed-offenses approach but do see promise in the Crime of Violence Option Two. That option is, in effect, the inverse of the solution that the Department has repeatedly advocated. The Department's long-standing proposal would retain the current crime-of-violence definition and, for statutes of conviction that are overbroad, allow courts to consider actual conduct to understand specific basis of the conviction. The Commission's Option Two uses the same approach but flips the order of operations: it would include overbroad statutes as presumptive crimes of violence and then allows the defendant to show that the actual conduct was not violent or was reckless. Both approaches are a mix of applying the categorical approach and considering the facts of each case. The ultimate viability of the Commission's proposal, though, would depend on how the Commission resolves some of the policy choices before it, including both the scope of the initial list and the breadth and nature of the exclusions from the crime-of-violence definition.

The Department separately offers comments here on the two circuit conflicts relating to §4B1.2(b) that the Commission proposes resolving. In line with our comments last year and in 2023, we support Option 2 under both proposals, which would treat state crimes as controlled substance offenses whether the drug at issue is controlled under state or federal law and would peg the inquiry to the state of the law at the time of the prior conviction. No sound policy reasons justify the minority view on either question, which instead highlight the most pernicious aspects of the categorical approach and perpetuate unwarranted disparities.

I. Crime of Violence

A. Federal Offenses.

The Commission's proposal first presents a list of federal offenses that would qualify as "crimes of violence." The Department agrees that such an approach to federal offenses is eminently sensible and administrable, removing the need for any categorical analysis of indisputably violent crimes. But whether this proposal would effectuate the statutory and policy goals of the career offender enhancement depends almost entirely on the list's contents. Because the definitions in §4B1.2 apply to both prior and instant offenses, and because federal law contains numerous variations on quintessentially violent offenses (such as murder and robbery), treating like offenders alike requires either a lengthy list or resort to an alternative method.

The Commission's proposed list is as follows, with some offenses presented by the Commission in brackets.

18 U.S.C. § 113(a) (assault)
[18 U.S.C. § 844(i) (arson)]
18 U.S.C. § 1111 (murder)
18 U.S.C. § 1112 (manslaughter)
18 U.S.C. § 1201 (kidnapping)
18 U.S.C. § 1951 (robbery and extortion)
[18 U.S.C. § 2111 (robbery)]
[18 U.S.C. § 2113 (bank robbery)]
[18 U.S.C. § 2118 (robberies and burglaries involving controlled substances)]
[18 U.S.C. § 2119 (carjacking)]
18 U.S.C. § 2241 (aggravated sexual abuse)
18 U.S.C. § 2242 (sexual abuse)
18 U.S.C. § 2244(a)(1)–(a)(2)) (abusive sexual abuse with a child)
[49 U.S.C. § 46502 (aircraft piracy)]

A list of qualifying federal crimes should feature all of these offenses, including those listed by the Commission in brackets. All of the bracketed offenses similarly involve violence against persons or property that has long been sanctioned by the law. There are two caveats:

- Option 2 for assessing state offenses suggests invoking the elements of assault in violation of 18 U.S.C. § 113(a) but would exclude "a state offense that would otherwise be simple or misdemeanor assault or simple or misdemeanor battery but for the identity of the victim or perpetrator." The Department does not object to a similar exclusion from the list of federal offenses, that is, excision of 18 U.S.C. § 113(a)(5) (simple assault).

- With respect to 18 U.S.C. § 1112 (manslaughter), the Department maintains its long-standing position that only voluntary manslaughter, not involuntary manslaughter, should qualify as a "crime of violence."

As stated, the Department supports an approach presenting listed federal offenses, but only if a proper list of qualifying federal crimes is included. The Department will provide the Commission with a list in its final letter. The federal code contains numerous variations of offenses that should be included, such as murder, assault, sexual abuse, child endangerment, and other violent acts (such as bombing and use of dangerous weapons). These variations often rest on different federal interests or bases for jurisdiction, but they are no less serious than the offenses included on the Commission's short list. For instance, just with respect to murder, the code also includes the following provisions: 18 U.S.C. § 351 (murder, kidnapping, or assault of member of Congress, the Cabinet, or the Supreme Court); 18 U.S.C. § 930(c) (killing in the course of an attack on a federal facility); 18 U.S.C. § 1091 (genocide); 18 U.S.C. § 1114 (murder of officer or employee of the United States); 18 U.S.C. § 1116 (murder of foreign officials, official guests, or internationally protected persons); 18 U.S.C. § 1118 (murder by a federal prisoner); 18 U.S.C. § 1119 (foreign murder of United States nationals); 18 U.S.C. § 1120 (murder by escaped prisoner); 18 U.S.C. § 1121 (killing persons aiding Federal investigations or State correctional officers); 18 U.S.C. § 1512(a)(1) (murder of a witness); 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire); and 21 U.S.C. § 848(e) (intentional killing in furtherance of a continuing criminal enterprise or narcotics trafficking).

It is also essential that the list include umbrella offenses. A defendant who commits a series of murders or aggravated assaults as part of a criminal enterprise and is convicted for violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, or Violent Crimes in Aid of Racketeering Act (VICAR), 18 U.S.C. § 1959, is an equally violent (and often more dangerous) offender.

Notably, the Commission has included on the list for state crimes in Option 2 many offenses that have federal analogs—*e.g.*, the production of child sexual abuse material and various forms of human trafficking and sex trafficking. To properly align the lists, it is necessary to include those federal offenses on the federal list. For all of these reasons, the Department anticipates presenting a lengthier list of statutes for consideration, as well as potential alternative methods for capturing quintessentially violent federal offenses if the Commission is disinclined to adopt the full list.

B. State Offenses

1. Qualifying Offenses

The Commission presents two options for determining which prior state offenses should qualify as crimes of violence: (a) an approach that looks to the title or label that the state offense carries; and (b) one under which one certain state offenses presumptively qualify as crimes of violence, subject to a series of exclusions. We view this second option as preferable because it would be more administrable; more consistent in including all the necessary offenses; and, although retaining a focus on the elements of crimes, would eliminate the worst feature of the

categorical approach, under which violent conduct is excluded because of the overbreadth of the statute of conviction.

a. Option 1: Labels

Option 1 provides that a qualifying offense is one "punishable by imprisonment for a term exceeding one year, that is designated under state law under one of nine labels (Aggravated Assault, Arson, Extortion, Kidnapping, Murder, Rape, Robbery, Sexual Assault, and Voluntary Manslaughter). The Department does not support this option for multiple reasons.

First, without further definitions, this approach would generate significant confusion about—and, accordingly, litigation over—which of thousands of possibly qualifying state offenses fall within these labels. As stated in the introductory comment in the amendment package, "jurisdictions name each of these offenses in various ways," and, as Issue for Comment No. 4 recognizes, some states do not label offenses at all. Second, and relatedly, not all identically named offenses are identical, which all but guarantees that this approach will result in unequal application of §4B1.2 to offenders based on the happenstance of geography—replicating one of the core problems wrought by the current categorical approach. For instance, states vary widely in assigning the degree of an offense; what might be first-degree murder in one state bears a different label in another state.[1]

Accordingly, while the labels approach has some superficial appeal, we do not view it as a viable or advisable path forward.

b. Option 2: Elements of State Offense

Option 2 provides that a state offense presumptively qualifies if it proscribes conduct that either is addressed by a qualifying federal statute or is specifically defined in the guideline. This is a superior proposal compared to Option 1.

For ease of application, the Department suggests that the qualifying federal and state offenses should largely match; there is no reason for one set to be materially broader than the other. At the same time, the proposal in Option 2, following and copying language from 18 U.S.C. § 3559(c), includes and defines additional terms that capture violent state crimes that are not a general match for federal offenses. The Department supports that additional list and the suggested definitions. Therefore, we propose the following language:

> (B) An offense under state law, by whatever designation, punishable by imprisonment for a term exceeding one year, that proscribes at least some conduct that could establish the elements (other than federal jurisdictional requirements) of one of the following offenses, regardless of whether the state statute of conviction includes additional elements (or

[1] *Compare, e.g.,* Wash. Rev. Code Ann. 9A.32.030 (intentionally causing the death of another is first-degree murder), *with* N.Y. Penal Law 125.25(1) (same offense is second-degree murder).

means of committing any such elements) that are broader than those of the listed offense, or also proscribes conduct that would not establish the elements of the listed offense:

(i) Any federal offense listed in subparagraph (A).

(ii) [the Commission's list of defined offenses: assault with intent to commit rape, child abuse, coercion, domestic violence, firearms use, hostage taking, human trafficking].

The Commission proposed, in bracketed language, two basic formulations for comparing state offenses to target offenses. The first option—"meets each of the elements (other than federal jurisdictional requirements)"—is unlikely to accomplish the Commission's goal of including overbroad offenses. Courts would likely interpret this language as simply the categorical approach in different linguistic clothing. An "offense" is defined by its elements; if those elements "meet" the elements of the listed offense, the state offense is a categorical match. Courts are likely to conclude that an overbroad "offense" cannot "meet each of the elements" of a listed offense.

The second option, which focuses on the conduct proscribed by the state offense, would capture overbroad offenses because a statute can, and usually does, proscribe multiple types of conduct—whether by alternative elements or alternative means—and some of that conduct can establish the elements of a listed offense, even if other covered conduct does not. The Department suggests additional language to fully clarify this point. The Commission asks whether "conduct" or "acts or omissions" is better; either is acceptable, but "conduct" is clearer in our view.

As noted, the proposed definitions in the amendment package of the terms in the last paragraph above are largely copied from 18 U.S.C. § 3559(c) and are appropriate. The proposal, however, departs from Section 3559(c)'s definition of arson; it should not. The proposal includes "arson (as described in 18 U.S.C. § 844(i) (but not to include arson of property other than a building)." The definition of "arson" in 18 U.S.C. § 3559(c)(2)(B)—"an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive"—is more consistent with the contemporary understanding of the offense. The Commission should use that definition here.

C. Inchoate Offenses (§4B1.2(a)(2))

The Commission next proposes moving the current language from subsection (d) into subsection (a)(2). The Department supports this change.

D. Exclusions

To balance expanding the list of presumptively qualifying offenses, the Commission next proposes adding a series of exclusions that ensure that qualifying convictions are limited to

violent conduct. The Department understands the need for exclusions but has some concerns about the scope of those that the Commission has proposed.

1. Length of Sentence Imposed (§4B1.2(a)(3))

The first proposed exclusion aims to exclude arguably petty offenses, based on one of three criteria:

> any offense where the sentence imposed was
>
> (i) a term of unsupervised probation;
>
> (ii) a term of **[**supervised**]** probation **[**of less than **[**one year**]****[**three years**]****[**five years**]]**; or
>
> (iii) a term of imprisonment of less than **[**60 days**]****[**30 days**]**.

Section 4B1.2 already excludes convictions that the sentencing court determined were truly minor or far in the past—those that do not receive criminal history points under §4A1.1. It is not unusual for violent crimes, particularly first offenses in state court, to result in light sentences. The fact that the court showed a defendant mercy on his first conviction and granted him a second chance does not mean that his recidivist behavior is any less culpable or dangerous.

Moreover, this focus could exacerbate intrastate and interstate sentencing disparities. For example, it is not unusual for local prosecutors or local judges within the same state to have differing views and practices regarding sentencing. Thus, the same conduct in one county could receive a prison sentence, but a probationary sentence in another. A fairer approach is to focus on the fact of the underlying conviction itself without allowing career offender status to turn on variations in local sentencing practices. This keeps the focus simply on the defendant's ongoing recidivist conduct when determining career offender status.

Accordingly, the Department objects to a broad exclusion on this basis. At most, offenses that resulted in a term of probation of less than one year should be excluded.

2. Length of Sentence Served (§4B1.2(a)(4)(A))

The next suggested exclusion would apply where: "The conviction for the offense resulted in a sentence for which the defendant served less than **[**60 days**]****[**30 days**]** in prison." This exclusion is also undesirable. The criminal history rules in the guidelines typically turn on "the sentence pronounced, not the length of time actually served."[2] We see no reason to deviate from the practice here, especially because time served is not necessarily a useful proxy for severity. Prisoners are released early for various reasons, including overcrowding and other budget issues, that might be wholly unrelated to the severity of an offense. Reliable proof of time served, as opposed to the length of a sentence imposed, is also occasionally difficult to find,

[2] U.S.S.G. §4A1.2 cmt. (n.2).

requiring the existence and examination of local records, the quality of which varies greatly between and even within jurisdictions, particularly when dealing with older sentences.

3. Injury or Harm (§4B1.2(a)(4)(B))

The next proposed exclusion states that a crime will not qualify if the defendant establishes that the offense was not, in fact, violent, as defined by reference to injury or harm as follows:

- **[**SERIOUS**]** BODILY INJURY.—During 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 **[**serious**]** bodily injury to another person**[**. *Provided*, however, that this limitation shall not apply to extortion and arson offenses**].]**

- **[**PHYSICAL HARM.—During the commission of the offense, the acts for which the defendant is criminally liable did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person**[**. *Provided*, however, that this limitation shall not apply to extortion and arson offenses**].]**

The Department favors the bodily injury passage (without limitation to "serious" bodily injury). That passage is consistent with the Supreme Court's long-standing definition of a violent crime as one "capable of causing physical pain or injury to another person."[3] Retaining this standard definition also promotes efficiency. Notwithstanding the oddities produced by the categorical approach, courts have identified numerous state offenses that categorically qualify as crimes of violence under the prior "elements clause" because they categorically—that is, in all instances—require proof of the infliction, attempted infliction, or threatened infliction of bodily injury. That conclusion will necessarily preclude an assertion that such a prior offense was committed without violence.

The stated exception for extortion and arson offenses is also appropriate, as those crimes classically involve acts or threats of violence toward property. In fact, the Department proposes expanding and simplifying this exception to apply to any offense involving property damage (consistent with those statutes, like 18 U.S.C. § 924(c), that recognize that violent crimes include those directed at property, such as extortion and arson). The passage should make clear that the analysis focuses on all conduct related to the commission of the offense, consistent with the Guidelines' general approach.[4] Finally, the exclusion should establish that sexual abuse—which may involve conduct not causing physical injury, such as crimes committed by coercion or against incapacitated persons or children—constitutes a violent crime.

The Department suggests this language:

[3] *Johnson v. United States*, 559 U.S. 133, 140 (2010).

[4] *See* U.S.S.G. §1B1.3(a)(1).

> BODILY INJURY OR PROPERTY DAMAGE.—Neither the defendant nor another for whose conduct the defendant is criminally liable, inflicted, intended to inflict, or threatened to inflict physical pain or injury to another person, or damage to property, or engaged in sexual abuse as defined in 18 U.S.C. §§ 2241 and 2242 (apart from federal jurisdictional requirements presented in those statutes) during the commission of the offense, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for the offense.

4. Recklessness or Negligence (§4B1.2(a)(4)(C))

Finally, the proposal provides an exclusion if the defendant establishes:

> (C) RECKLESSNESS AND NEGLIGENCE.—The defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. **[**However, an offense is not excluded under this provision if the defendant's conduct included extreme reckless conduct.**]**

In principle, the Department does not object to this limitation. Consistent with earlier passages, however, this provision should be rephrased as:

> The conduct for which the defendant is criminally liable, that occurred during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, was limited to reckless or negligent conduct. However, an offense is not excluded under this provision if that conduct included extreme reckless conduct.

This change is necessary to ensure consistent treatment in the guideline in addressing accomplice liability. The exception for extreme reckless conduct is consistent with the universal judicial recognition that such conduct, often termed malice, is a heightened *mens rea* akin to knowledge.

II. Controlled Substance Offense

The proposals regarding controlled substance offenses are similar to those published (and not acted upon) in 2025. The Department's positions remain the same.[5]

Option 1 would exclude state drug offenses from the definition of "controlled substance offense." The Department strongly objects. This would upend years of federal sentencing practice, is not supported by the data that the Commission has publicly released, would create unnecessary disparities between similarly situated defendants based merely on which jurisdiction (federal or state) previously prosecuted them, and would be in tension with the congressional

[5] Letter from Scott A.C. Meisler, U.S. Dep't of Justice, to Hon. Carlton W. Reeves, Chair, at 12-18 (Feb. 3, 2025) ("2025 DOJ Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=716.

directive in 28 U.S.C. § 994(h). Most notably, given that exceedingly few defendants qualify as career offenders based on convictions for controlled substance offenses in three separate federal cases, this change would essentially erase controlled substance offenses as a basis for career offender liability, in derogation of the plain congressional intent.

Option 1 would again also limit the range of qualifying federal drug offenses. As with the 2025 version, this proposal continues to inadequately treat like offenders alike. At the very least, if the Commission were to limit the career offender provision to federal drug offenses, it should at least ensure that all felonies under Title 21 and all Title 18 offenses that involve drug trafficking qualify as controlled substance offenses.

Option 2 would not narrow the definition of a "controlled substance offense," and is, in that limited sense, preferable to Option 1. But Option 2 would limit qualifying convictions by setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense." It provides three suboptions for limiting prior convictions. The Department continues to oppose each of these proposals but recommends that, if the Commission adopts one, it should exclude only one-point convictions under §4A1.1(c) (sentence of imprisonment of less than 60 days; Suboption 2B without the bracketed language); this limitation should apply only to controlled substance offenses. Each proposal is also in some tension with the congressional directive in Section 994(h), which does not suggest that otherwise qualifying convictions can or should be cabined based upon the sentence imposed or served.

Of particular note, Suboptions 2A and 2B both include bracketed language that would exclude convictions if the defendant could "establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison"; Suboption 2C would require the government to prove the inverse. For the reasons stated earlier, the Department objects to any limitation based on the period of time served, as opposed to the length of the sentence imposed (which is the measure currently used in the guidelines to gauge the severity of a prior conviction).

III. Consistency of Definitions in the Guidelines

Section 4B1.2's definitions of "crime of violence" and "controlled substance offense" also apply to the firearms guideline (§2K2.1), as well as several other provisions in the Guidelines Manual. The Commission has offered two options for §2K2.1: (a) incorporate the relevant parts of current definitions in §4B1.2 of "crime of violence" and "controlled substance offense" into the commentary to §2K2.1, thereby maintaining the current state of the law ("Firearms Option 1"); or (b) amend the commentary to §2K2.1 to define, for purposes of that guideline, the terms "controlled substance offense" and "crime of violence" by reference to the terms "serious drug offense" and "violent felony," respectively, in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) ("Firearms Option 2"). A third option is also available: make no changes to §2K2.1 and allow the changes in §4B1.2 to cross-apply by default. The Commission also presents Issue for Comment No. 10, which asks how other guidelines that currently incorporate the §4B1.2 definitions should be treated.

In general, the Department believes that the same definitions of "controlled substance offense" and "crime of violence" should apply consistently throughout the Guidelines Manual.[6] Accordingly, with two critical caveats, we prefer not to make any change to the cross-references to §4B1.2 in other guidelines. Both Firearms Options 1 and 2, by contrast, would present significant complexity and confusion in applying the guidelines.

Notably, the terms at issue apply far more frequently outside the career-offender context than within it. For example, according to Commission data for Fiscal Year 2023, approximately three times as many offenders received an enhancement under the firearm provision (§2K2.1) for prior commission of a "crime of violence" or "controlled substance offense" than were subject to the career offender guideline. Thus, if the Commission adopts one of the amendments to §4B1.2 discussed above, there could be particular benefit to applying that change to all applications of the term "crime of violence" in the guidelines. Retaining the current definitions or resorting to the ACCA definitions, on the other hand, would do little to decrease the amount of categorical approach litigation or the resulting disparities. Furthermore, Firearms Options 1 and 2 would both produce a Guidelines Manual that defines identical terms differently in different places, which would result in significant confusion for litigants and courts as the case law inevitably becomes increasingly muddled.

The critical caveats mentioned above are twofold. First, if the Commission were to exclude state drug crimes entirely from the definition of "controlled substance offense" under §2K2.1, or substantially narrow the number of such crimes that qualify under that provision, the amendment could run afoul of a congressional directive specific to that provision. The pertinent directive refers to the definition of "serious drug offense" in the ACCA,[7] and that definition expressly reaches some "offense[s] under State law."[8]

Second, maintaining consistent definitions across the guidelines may not be advisable as a policy matter if the Commission makes certain substantive changes to these important definitions. For example, if the Commission were to substantially revise the definitions in §4B1.2 in a manner likely to generate litigation or short-term uncertainty, it may wish to confine the changes to the career-offender guideline and study carefully whether the changes are workable in practice before spreading them to the entire Guidelines Manual.

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

The Department supports proposed amendments that would make clear that (A) the definition of "controlled substance" in §4B1.2(b) rests on either federal or state law (as the plain language of the provision has long provided), and (B) the term refers to any substance that was controlled under applicable law at the time the defendant was originally convicted for the predicate offense. On each question, Option 2 is the clearest, simplest, and fairest choice.

---

[6] *See* 2025 DOJ Letter at 19-21.

[7] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 110513, 108 Stat. 1796, 2019.

[8] 18 U.S.C. § 924(e)(2)(A)(ii).

A. Which Controlled Substances Qualify

Option 2—that a controlled substance is any substance "either included in the [federal Controlled Substances Act (CSA)] or otherwise controlled under applicable state law"—is readily administrable and logical. In assessing a prior state conviction, the court need look only to the state statute defining the offense: if the offense conduct qualifies, the fact that the defendant was convicted suffices. There is no need to dig through any drug schedules to compare chemical compounds.

In contrast, Option 1—that the definition must align with that provided in the federal Controlled Substances Act (CSA)—is a recipe for complication, irrationality, and unfairness. It produces a system in which state definitions are deemed overbroad based on meaningless distinctions with federal definitions.

It cannot be emphasized strongly enough that the current minority view of circuits, that the state definition of a controlled substance at issue in a state offense cannot be broader than the federal definition of that substance, produces nothing other than nonsensical results. That is because the controlled substances at issue in nearly all predicate state convictions—such as methamphetamine, cocaine, heroin, and marijuana—are proscribed by both federal and state law, and any distinctions in definitions are utterly meaningless to any trafficker. This is already apparent in litigation under ACCA, where the definition of a "serious drug offense" rests on comparison to the federal schedules.

A prominent example involves cocaine. In 2015, federal authorities made one exceedingly minor adjustment to the definition of cocaine on the federal schedule, removing [^{123}I]ioflupane from the definition. That substance is derived from cocaine via ecgonine, both Schedule II controlled substances. [^{123}I]ioflupane is a radiated form of ioflupane. It was recently developed to serve as the active pharmaceutical ingredient in DaTscan, approved by the FDA in 2011, which is an injectable radiopharmaceutical used in performing brain scans of adult patients with Parkinson's syndrome. It has a single purpose: diagnosis of Parkinson's disease. DEA concluded that it presents no potential for abuse (in part because meaningful extraction of [^{123}I]ioflupane from DaTscan would be impossible due to its limited production and availability and because extraction is technically complex and would require advanced equipment not available to the general public). And indeed, we are unaware of any federal or state prosecution anywhere, ever, regarding trafficking in this substance. The authorities thus agreed to remove this substance from the federal schedule.[9]

Yet courts that insist on application only of the federal schedule in defining a "controlled substance" under §4B1.2(b) necessarily must conclude that, for any state that did not get around to adopting the same exclusion of [^{123}I]ioflupane, a state conviction for cocaine trafficking after 2015 presents a conviction based on an overbroad definition of a controlled substance (as has occurred in applications of ACCA). Similar results have followed where states define the

[9] 80 Fed. Reg. 54715-01 (Sept. 11, 2015).

isomers that qualify as cocaine and heroin in a manner that differs slightly from the federal definitions.[10]

This makes little sense.[123] Iioflupane is certainly unknown to any offender who ever trafficked in powder or crack cocaine. Yet cocaine traffickers in states that did not make this minor adjustment would be excluded, under Option 1, from application of the career-offender guideline and other guideline provisions keyed to the definitions in §4B1.2. The same is true for offenders who have no idea what an isomer is but who reside in states that present slightly different definitions of applicable isomers.

There is no sensible policy rationale for the minority view. To the contrary, those views largely produce nonsensical results at odds with the goals of federal sentencing to produce consistent and sensible terms for like offenders. As recent experience has demonstrated, a focus on variations between federal and state definitions acts only to identify meaningless distinctions and to thereby relieve application of the career offender provision to offenders who unquestionably committed controlled substance offenses under any logical definition of that term.

Exhibiting all pernicious impacts of the categorical approach, the resulting assessment often demands a complex scientific analysis of substances not actually involved in the case before the court, it absolves offenders based on a hypothetical possibility having nothing to do with their actual conduct, and it produces striking disparities between identical offenders that rest only on differences in regulatory drafting in different states.

To repeat, every case in which courts have adopted the minority views at issue in the proposed amendments, limiting a controlled substance definition to the federal Controlled Substances Act, has involved a similarly meaningless distinction having nothing to do with the conduct of the offender before the court or any comparable offender. If the Commission adopts the proposed Option 1, the results would be highly unfortunate, for no appreciable benefit. There would be extensive litigation to identify discrepancies in state and federal definitions. An example appears in *United States v. Wilkes*,[11] where the court was compelled to assess whether "diastereomers" of cocaine addressed in Michigan law fall within the "geometric isomers" cited in the federal definition. Further, this approach would result in varying outcomes in different states, as applied to identical offenders. These results, like so many applications of the categorical approach, produce inconsistent and senseless results that bring the law into disrepute.

The Department urges the Commission instead to adopt Option 2, confirming the Commission's longstanding dictate that controlled substance offenses under either federal or state law qualify as career offender predicates.

[10] *See, e.g.*, *United States v. Owen*, 51 F.4th 292, 295-96 (8th Cir. 2022).

[11] 78 F.4th 272 (6th Cir. 2023), *supplemented*, 133 F.4th 600 (6th Cir. 2025).

B. Time of Offense Versus Time of Sentencing

With respect to the question of timing regarding the definition of the controlled substance, the Department supports Option 2, dictating that the schedule in effect at the time of the predicate crime controls. That is the conclusion the Supreme Court recently reached on this question under the ACCA in *Brown v. United States*, 602 U.S. 101 (2024), and there is no sound reason for the Commission to come to the opposite conclusion. As with the ACCA, the career offender enhancement is principally a recidivist provision "that gauges what a defendant's 'history of criminal activity' says about his or her 'culpability and dangerousness.'"[12] This requires a "backward-looking examination of previous convictions," as "a defendant's history of criminal activity does not cease to exist merely because the crime was later redefined."[13] The guidelines elsewhere embrace this reality: convictions that are set aside or pardoned "unrelated to innocence or errors of law" still count as measures of the defendant's criminal history.[14] Section 4B1.2 should not be any different.

Once again, moreover, experience teaches that a focus on the current definition would simply absolve all traffickers of a particular substance of responsibility based on a meaningless change. The most prominent example (which was at issue in *Brown*) involves the definition of marijuana. In 2018, hemp was removed from the definition under federal law, leading ACCA defendants to argue that the current definition of marijuana should be employed, rendering overbroad any conviction under a statute that before 2018 included hemp in the definition (or any marijuana conviction ever in a state that did not make the hemp exclusion).[15] That outcome is particularly absurd given that, to our knowledge, no authority has ever prosecuted the distribution of hemp.

In sum, focusing on the time of sentencing means that the slightest narrowing in a definition would make overbroad the definition that was applied earlier, and possibly remove application of a guideline recidivism enhancement to anyone who *ever* was convicted in the jurisdiction of a predicate offense involving that substance, before or after the definitional change.[16] This compounds the pernicious effects of the categorical approach in producing inconsistent and inexplicable results, ones that vary between jurisdictions and ignore the defendant's actual conduct.

---

[12] *Brown*, 602 U.S. at 112 (quoting *McNeill v. United States*, 563 U.S. 816, 823 (2011))

[13] *Id.* at 112-14 (internal quotation marks omitted).

[14] U.S.S.G. § 4A1.2 cmt. (n.10.)

[15] *See*, e.g., *United States v. Minor*, 121 F.4th 1085, 1088-93 & n.1 (5th Cir. 2024) (holding, based on the 2018 exclusion of hemp, that the defendant's 2010 federal convictions for possessing marijuana with intent to distribute and importing marijuana did not qualify as controlled substance offenses at his sentencing on four more drug charges in 2022).

[16] *See also Brown*, 602 U.S. at 110-11 (cataloguing the other "strange results" that would result from assessing the definition of a "serious drug offense" under ACCA at the time of the federal sentencing).

The proper solution is adoption of Option 2, which focuses on the definition in effect at the time of the predicate offense.

C. Other Guidelines

The Commission also inquired whether the changes should apply to all of the guideline provisions that currently define the term "controlled substance offense" by reference to § 4B1.2(b). Subject to the caveats described above, the Department generally prefers a uniform definition of the term throughout the guidelines and believes that resolving the circuit conflicts in line with the majority views would likely yield a definition administrable across the various provisions that reference §4B1.2(b).[17]

[17] *See* 2025 DOJ Letter at 20-21.