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SENTENCING GUIDELINES COMMITTEE**

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March 18, 2026

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

Re: Public Comment on January 2026 Proposed Amendments

Dear Judge Reeves:

Enclosed are the Federal Public and Community Defenders' supplemental comments on the January 2026 proposed amendments. For ease of reference, we have also attached our initial comments on each proposal, which were filed on March 2, 2026 to serve as witness statements for the March 9 hearing:

[Proposal 1: Sentencing Options](#)

[Initial Comment on Sentencing Options](#)

[Proposals 2-3: Career Offender and Circuit Conflicts](#)

[Initial Comment on Career Offender and Circuit Conflicts](#)

[Proposal 4: Human Smuggling](#)

[Initial Comment on Human Smuggling](#)

We appreciate the Commission's consideration of our views and look forward to continuing to work together to improve federal sentencing policy.

Heath E. Eddins

Heather Williams
Federal Public Defender
Chair, Federal Defender Sentencing
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Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
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**Federal Public and Community Defenders
Supplemental Comment on Sentencing Options
(January Proposal 1)**

March 18, 2026

Defenders supplement our original comment here to briefly respond to matters raised at last week’s hearing on sentencing options.

I. Part A

As we have explained, both social science and statutory scheme support this amendment, which provides important guidance that the current Manual lacks.¹ The Department of Justice (DOJ) and other opponents of Part A claimed at the hearing that this proposed amendment is unnecessary because federal cases are inherently serious, such that probation is rarely appropriate, and because it will create an additional burden on courts. We address these claims below.

A. The Department’s claims about offense seriousness are unsupported.

The DOJ argued that this amendment is unnecessary, claiming probation is rare because 1) DOJ only prosecutes serious cases, and 2) probation has limited statutory availability.²

As for the DOJ’s first claim, their written statement describes their focus on serious matters with a quote from 1940—nearly half a century before the Sentencing Reform Act (SRA)—from then-Attorney General Robert Jackson.³ This in fact disproves the DOJ’s point: despite a longstanding focus of federal prosecutorial resources on “the most serious and consequential crimes,”⁴ before passage of the SRA, probation was a common sentence in federal court.⁵ Further, Defenders and others have laid out data and history debunking any idea that offense seriousness—as opposed to the original

¹ We include our original comment as an attachment here for ease of reference.

² See [DOJ Witness Statement of Nick Linder](#) at 2-3 (Mar. 9, 2026).

³ See *id.* at 3 (quoting Robert H. Jackson, [“The Federal Prosecutor,” address delivered at the Second Annual Conference of United States Attorneys](#) (Apr. 1, 1940)).

⁴ *Id.*

⁵ See [Defenders’ Comment on the USSC’s 2026 Proposed Amendments: Sentencing Options](#) at 5 (Mar. 2, 2026) (“Defenders’ Initial Comment on Sentencing Options”) (“Prior to the SRA, straight probation accounted for 44% of federal sentences, and 63% of federal sentences included some period of probation. Even among those convicted of ‘violent offenses,’ one-third received probationary sentences.” (citing Cecelia Klingele, [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#), 34 Fed. Sent. R. 322, 323 (2022) (discussing data from 1986))).

Commission's prison-presumptive policy choices—explains the disappearance of probation.⁶ And while districts differ, individual defenders around the country have seen a wide variety of low-level federal offenses prosecuted. The DOJ's claim that federal prosecutions “will, and should, mostly yield prison sentences”⁷ not only defies Congressional intent for the SRA to include a variety of sentence options,⁸ but it also evinces an inherent distrust of courts. The proposed amendment does not change the fact that imprisonment is *always* an option across every zone. With the guidance in the proposed amendment, judges will be better positioned to make an informed decision as to the appropriate sentence type.

As for the second claim, DOJ incorrectly stated that probation was unavailable for “approximately half” of the cases sentenced in fiscal year 2024.⁹ This is a miscalculation. The Department incorrectly compared the number of probation-eligible *U.S. citizens* to the total number of sentenced *individuals*, with a denominator including over 21,000 non-citizens.¹⁰ In fact,

⁶ See *id.* at 5-6 (citing, *inter alia*, Melissa Hamilton, [Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration](#), 51 Hous. L. Rev. 1271 (2014); and Hon. Carlton Reeves, [Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership](#), 36 Fed. Sent. R. 130 (2024)).

⁷ [DOJ Witness Statement](#) at 3.

⁸ See [Defenders' Initial Comment on Sentencing Options](#) at 2-4 (discussing how the text and legislative history of the SRA support the Commission both promoting, and giving courts guidance on, alternatives to incarceration).

⁹ [DOJ Witness Statement](#) at 2-3 (“[I]t is worth remembering that probation is not a legally available sentencing option for a large swath of federal offenders—by our estimate, approximately half of the cases sentenced in Fiscal Year 2024.”).

¹⁰ See *id.* at 3 n.7 (incorrectly comparing number of probation-eligible U.S. citizens from Data Briefing to total number of sentenced cases, including both U.S. citizens and non-citizens). Compare USSC, [Public Data Briefing: Proposed Amendment on Sentencing Options](#) at 6 (Feb. 13, 2026) (showing 27,656 individuals being statutorily eligible for probation in Fiscal Year 2024, noting that “Non-U.S. citizens were excluded from analysis”), with USSC, [2024 Sourcebook of Federal Sentencing Statistics](#) at tbl. 9 (showing 40,038 citizens and 21,304 non-citizens sentenced in fiscal year 2024). Thus, for Fiscal Year 2024, of the 40,038 U.S. citizens sentenced, 27,656 were statutorily eligible for probation (69%).

Commission data show that 69% of U.S. citizens sentenced in fiscal year 2024 were statutorily eligible for probation.¹¹

B. Proposed §5A1.1 provides structure for existing requirements for courts.

The CLC and DOJ both argued that §5A1.1 could create new procedural requirements for courts, including potentially requiring courts to go “one-by-one” through all zones listed in proposed §5A1.1(a)(1)-(4).¹² This is unfounded; the new guideline simply solidifies and structures requirements that already exist in the statute and Guidelines. The Guidelines already require courts to determine a person’s guideline range, which automatically includes a determination of their zone. Nothing changes under the proposed §5A1.1(a), which simply summarizes the existing zones (without any one-by-one consideration requirement).

The CLC witness suggested that if the Commission removed the proposed §5A1.1(b), which would give guidance on “determining the appropriate sentencing option(s) from those [recommended] under the guidelines,”¹³ he would be less concerned about the Commission

¹¹ See sources cited *supra* n. 10. The data briefing did not include the filters used to determine statutory eligibility for probation so we were unable to replicate this calculation across all sentenced cases, but we note that some non-citizens can be excellent candidates for probation.

¹² [CLC Comment to USSC on 2026 Proposed Amendments](#) at 5 (Mar. 6, 2026) (“[T]he proposal appears to add new, formal step-by-step requirements for sentencing courts, which might be interpreted to require parties and courts to rigidly follow, inviting litigation over each formal step For example, given that proposed 5A1.1(a)(1)-(4) sets forth each of Zones A, B, C, and D, would sentencing courts be required to go one-by-one to explicitly consider and then reject or accept—perhaps with written findings—each of the Zones on the record?”); [DOJ Witness Statement](#) at 5 (alleging that proposed §5A1.1 “could be viewed as interjecting another mandatory procedural step between the existing two-step process”); see also USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 17:02-18:30, 28:30-30:22 (Mar. 9, 2026) (discussing procedural concerns and answering questions from Vice Chair Laura Mate related to those concerns).

¹³ [2026 Proposed Amendments: Sentencing Options](#) at 7 (Jan. 30, 2026). Note: Defenders propose using the word “recommended” in lieu of “authorized” as a global edit to §5A1.1 to avoid the suggestion that the Guidelines are mandatory. See [Defenders’ Initial Comment on Sentencing Options](#) at 16 (suggesting removing the word “authorize[d]” as Guidelines are advisory).

inadvertently creating additional procedural requirements for litigants and courts.¹⁴ But under the SRA, courts are *already required* to consider sentence type (*i.e.*, whether to impose a term of imprisonment, probation, or something else); likewise, the Guidelines require this determination in step one of the two-step process for sentencing.¹⁵ These instructions are codified in 18 U.S.C. §§ 3553(a), 3562(a), and 3582(a); likewise §1B1.1(a)(8) now instructs courts to determine the “sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.”¹⁶ We certainly hope judges already understand this requirement, but it makes sense for the Commission to ensure that they do. As the DOJ itself pointed out while arguing for increases to the human smuggling guideline, “we shouldn’t be relying on § 3553 to hope that judges all get to the right place.”¹⁷

Finally, while a sentencing court is required to explain its reasons for the imposed sentence in a manner that allows for meaningful review,¹⁸ it is not generally required to explain why it did not choose a different sentence.¹⁹

¹⁴ See USSC, [Public Hearing](#) at 28:30-30:22 (CLC Witness) (raising concerns that the proposed §5A1.1(b), as opposed to §5A1.1(a), might be viewed as requiring an additional “step-by-step analysis” not already required by law).

¹⁵ See [Defenders' Priority Letter](#) to USSC at 5 (July, 18, 2025) (discussing statutory framework and order of operations); *see also* USSG §1B1.1 (laying out the two-step sentencing process, which includes §1B1.1(a)(8), instructing courts to “determine from . . . Chapter Five the sentencing requirements and options”); USSC, [Public Hearing](#) at 3:38:08-3:38:17 (FPD Witness) (“And [proposed §5A1.1] is not a different step. It’s not a new step. And it is statutorily required. We are all still in step one, right— calculate the guidelines and the range. This is still step one.”).

¹⁶ While §1B1.1(a)(8) currently covers consideration of sentence type, if the proposed amendment is adopted, we do suggest two small conforming changes:

“(8) For the particular guideline range **and zone**, determine from Parts **A B** through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.”

¹⁷ USSC, [Public Hearing](#) at 5:20:13-5:20:18.

¹⁸ See *Gall v. United States*, 552 U.S. 38, 50 (2007) (“After settling on the appropriate sentence, [the court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.”).

¹⁹ See 18 U.S.C. §3553(c) (“The court, at the time of sentencing, shall state in open court the reasons for *its imposition of the particular sentence*” (emphasis added)); *see also* *Gall*, 552 U.S. at 51 (describing bases for appeal including “failing to adequately explain *the chosen sentence*” (emphasis added)); *id* at 54 (explaining

Section 5A1.1 would not convey requirements to sentencing courts beyond those that already exist.

II. Part B

Opponents of Part B of this amendment misused relevant social science literature and conflated supervised-release-violation proceedings with front-end sentencing decisions. We correct these misconceptions below.

A. DOJ and POAG misread the supervision literature.

POAG and DOJ misread certain studies regarding supervision practices to caution against Part B's zone expansion.²⁰ The studies they cited are inapposite to the proposed amendment, which simply expands the recommended front-end sentence options for certain groups of people to include other sentence types, in addition to straight imprisonment.

The POAG witness statement cited studies showing that over-supervising low-risk people can increase the risk of those people recidivating.²¹ But the studies focused on the relationship between supervision intensity and supervision outcomes (arguing in favor of low-intensity methods); they did not compare high-intensity supervision to *imprisonment*.²² And it does not follow that front-end imprisonment leads to

that, at a sentencing hearing, "it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative"). A court, however, will normally explain why it has rejected the government's or defense's nonfrivolous arguments to impose a different sentence, and why it has deviated from the guidelines when imposing a particular sentence. *Rita v. United States*, 551 U.S. 338, 357 (2007); *Gall*, 552 U.S. at 51; § 3553(c)(1).

²⁰ See, e.g., [POAG Witness Statement to USSC on 2026 Proposed Amendments](#) at 2 (Mar. 2, 2026); [DOJ Witness Statement](#) at 7.

²¹ [POAG Witness Statement](#) at 2 (citing, e.g., Thomas H. Cohen, et al., *The Supervision of Low-Risk Federal Offenders: How the Low-Risk Policy Has Changed Federal Supervision Practices without Compromising Community Safety*, 80-JUN Fed. Probation 3 (2016); Hacı Duru, et. al, *Does Reducing Supervision for Low-risk Probationers Jeopardize Community Safety?*, 84-JUN Fed. Probation 21 (2020)).

²² See, e.g., [Cohen, et al.](#) at 9 ("Low risk [individuals] should be provided with minimal supervision services, because . . . correctional interventions aimed at reducing recidivism . . . can actually produce higher recidivism rates for this risk group." (citations omitted)); [Duru, et. al.](#) at 21 ("The following study examines the relationship between supervision intensity and supervision outcomes . . . among low-risk [individuals].").

better outcomes, nor do these studies support the POAG's arguments against this amendment, which does not move a single person from low-intensity supervision to high.

The DOJ argues against Part B's expansion because "extensive periods of intensive supervision or community confinement" can "lead to a revolving door of violations."²³ Confusingly, the DOJ grounds its opposition to expanding alternatives to prison by citing with approval a Vera Institute of Justice report opposing mass incarceration.²⁴ The report details how probation, originally seen as a "solution to the problem of mass incarceration[,] can ultimately result in incarceration and thus contribute to jail populations."²⁵ Importantly, that report encouraged *reforms to probation* practices and *greater use of other, less punitive, alternatives* to prison to avoid unnecessary incarceration, not choosing prison over probation in the first instance.²⁶

Defenders agree that courts should avoid imposing over-long terms of probation and supervised release, along with unnecessary and onerous conditions.²⁷ We also agree that in some cases even a sentence to straight probation is more punitive than necessary, when perhaps a fine would

²³ [DOJ Witness Statement](#) at 7.

²⁴ Compare [DOJ Witness Statement](#) at 7 & n. 24 (contending that lengthy community confinement "lead[s] to a revolving door of violations" (citing Alex Roth et al., Vera Inst. Just., [The Perils of Probation: How Supervision Contributes to Jail Populations](#) 5 & n.17 (2021))), with [Roth et. al.](#) at 31 (calling for further study of "the problem of probation's impact on jail populations" so that jurisdictions may take "more targeted steps to reduce the use of jail for probation violations," which is "essential not only to reduce the number of people in jail, but also to reverse the trend of probation being used as an . . . auxiliary of mass incarceration").

²⁵ [Roth et. al.](#) at 1.

²⁶ *Id.* at 29-31.

²⁷ See, e.g., [Defenders' Comment on the USSC's 2025 Supervised Release Proposed Amendment](#) at 10-16 (Mar. 3, 2025) (encouraging the Commission to remove the former minimum supervised release term lengths and prune the list of standard conditions of supervised release); [Defenders' Reply Comment on the USSC's 2025 Supervised Release Proposed Amendments](#) at 5-6 (Mar. 18, 2025) (discussing testimony and studies regarding negative consequences of unnecessary supervision conditions).

suffice.²⁸ But that does not undercut the wisdom of this amendment, which provides for the individualized consideration of additional front-end sentence options.

B. Individual choices at supervised release revocation proceedings do not counsel against expanding zones B and C.

As further grounds to reject Part B of the amendment, the DOJ argued that some individuals facing supervised-release-revocation proceedings prefer imprisonment to continued supervision.²⁹ The implied suggestion was that people being sentenced *for the instant federal offense* would prefer a sentence of straight imprisonment—which very often includes a period of supervised release to follow³⁰—rather than a probationary or alternative sentence. This comparison to the supervised release context is irrelevant for two primary reasons. First, individual choices made in the context of supervised-release violations speak to the difficult nature of supervision following life-altering terms of imprisonment.³¹ Back-end revocation proceedings are very different

²⁸ 18 U.S.C. § 3551(b) (“An individual found guilty of an offense shall be sentenced . . . to— (1) a term of probation . . . ; (2) a fine . . . ; or (3) a term of imprisonment . . .”).

²⁹ [DOJ Witness Statement](#) at 7 (“Indeed, in our experience, defendants at supervised release violation hearings who are given the choice between a period of incarceration with no supervision to follow or a longer period of supervision with additional constraints will choose the incarceration option.”); *see also* USSC, [Public Hearing](#) at 3:18:35-3:21:10 (DOJ Witness) (responding to a question from Chair Reeves about whether a lengthier term of supervision could reasonably be viewed as “counterproductive” when the only alternative is imprisonment, by focusing on individual preferences at back-end supervised-release-revocation hearings rather than front-end sentencing hearings).

³⁰ While data on the impact of last year’s supervised release amendment remain to be seen, data from before that amendment indicate the imposition of supervised release has been almost routine. USSC, [Quick Facts: Supervised Release](#) (FY 2024) (90% of sentences including a term of imprisonment also included a term of supervised release).

³¹ *See* [Defenders’ Initial Comment on Sentencing Options](#) at 11 n.36 (citing 2025 witness statements discussing difficult nature of supervision after prison). *Cf.* DOJ, [Report on Resources and Demographic Data for Individuals on Federal Probation and Supervised Release](#) 15-16 (2023) (noting that, among the cases revoked in fiscal years 2021 and 2022, technical violations—which did not include conduct constituting crimes—made up approximately two-thirds of federal revocations of supervised release and probation combined).

from front-end sentencings, and individual back-end decisions are no reason to take additional front-end sentencing options off the table for everyone.³²

Second, at the front end, it is hard for us to imagine many clients who would choose prison over probation.³³ Our clients seeking probation or alternative sentences typically have jobs, bills to pay, children to feed, and parents to care for; being removed from their community, even for a short while, can have a devastating impact on them and their families.³⁴ And while broader data are scarce given the low percentage of probation terms imposed generally, data from the Administrative Office of the U.S. Courts indicate that individuals sentenced to probation have relatively low revocation rates.³⁵

III. The fiscal and human costs of imprisonment support both parts of this amendment.

Finally, at last week's hearing (as at the February hearing), Commissioners asked the DOJ and CLC witnesses whether their amendment

³² The DOJ also overgeneralizes. Individuals being sentenced—whether for the instant federal offense or for a violation of probation or supervised release—are not a monolith. While some individuals facing revocation might prefer a short prison sentence with no supervision to follow over continued or additional supervision, that is certainly not true of everyone—especially people who would risk losing housing, employment, or even custody of their children if their community supervision was interrupted by a prison stay. The DOJ simply cannot speak for our clients on this issue. The group best situated to speak on behalf of sentenced individuals is the SIAG, which supports expanding zones B and C. See [SIAG Witness Statement of Dr. Shaneva D. McReynolds](#) at 3 (Mar. 2, 2026).

³³ Each of our clients is a unique individual, of course, and the Supreme Court has made clear that each person's sentence must be individualized. See *Gall*, 552 U.S. at 50 (discussing how the sentencing judge “must make an individualized assessment based on the facts presented”).

³⁴ See [Defenders' Initial Comment on Sentencing Options](#) at 8 (“Even short terms of imprisonment can be incredibly disruptive . . . by interfering with employment, family stability, and community ties that are themselves protective against future criminal conduct.” (collecting sources)); see also [SIAG Witness Statement](#) at 2 (discussing how “[e]ven a short custodial sentence would have been destabilizing” for 21-year-old suffering from mental health issues).

³⁵ See U.S. Courts, [Data Table E-7A: Federal Probation System – Post-Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2025](#) (showing that among cases terminated during the reporting period, 11% of probation cases ended in revocation, as opposed to 37% of supervised release cases ending in revocation).

positions account for the costs of incarceration. Defenders appreciate the question: beyond the human costs, imprisonment is extremely costly compared to alternative sanctions.³⁶ This supports the inclusion of other less expensive (yet effective) sentence options in the Manual. At the February hearing, the DOJ methamphetamine witness's answer revealed that prosecutors are not factoring these costs into their charging decisions.³⁷ In March, the CLC witness indicated that there are judges who consider costs and others who doubt that costs are pertinent to their sentencing decisions.³⁸ Yet, POAG, DOJ, and CLC consistently urge the Commission to account for probation's resources (or lack thereof) and the courts' time and resource constraints in discussing potential amendments and retroactivity. Sentencing policymakers should not ignore the dramatic costs of incarceration—both in dollars and in human lives.³⁹ Thus, we urge the Commission to factor this consideration into its decision to adopt this amendment.

³⁶ US Courts, [The Public Costs of Supervision Versus Detention](#) (June 5, 2025) (showing that in fiscal year 2024, the annual cost to imprison a person after sentencing was \$51,711 versus only \$4,742 to supervise them in the community after sentencing).

³⁷ See USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 1:35:36-1:38:49 (Feb. 17, 2026) (DOJ Witness) (responding to Chair Reeves' question regarding cost of incarceration stating that DOJ does not consider costs of incarceration in pursuing drug mandatory minimums).

³⁸ USSC, [Public Hearing](#) at 25:56-26:30.

³⁹ See also [Defenders' Initial Comment on Sentencing Options](#) at 6 (discussing § 994(g) and unsafe conditions within BOP).

**Federal Public and Community Defenders
Comment on Sentencing Options
(January Proposal 1)**

March 2, 2026

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Defenders enthusiastically support the proposed amendment on Sentencing Options. Part A would add new introductory commentary to Chapter Five of the Guidelines Manual, underscoring the importance of the initial determination of sentence type and the role of non-imprisonment sentences. It would also create a new guideline, §5A1.1. This new provision would, for the first time, explicitly direct courts to decide the appropriate sentence type before deciding on sentence length and conditions, and it would guide them in this decision. Part B would increase the number of people who qualify for a non-prison sentence under the Guidelines by expanding Zones B and C of the Sentencing Table.

Below we recommend ways this proposal could go further to encourage alternatives to prison in appropriate cases. But at a minimum, the Commission should adopt this amendment. The proposed changes (as well as our suggested improvements) are empirically justified. And they better align Chapter Five with the Sentencing Reform Act (SRA), which requires the Commission to provide guidance to courts not only on the appropriate length of a prison sentence, but also on whether to impose a prison sentence in the first place,¹ and contemplates that courts will consider the kinds of sentences available before turning to the question of sentence length or amount.

And both parts of this amendment recognize what Defenders and our clients have long understood: Probation *is* punishment—it involves significant restrictions on liberty and onerous conditions—but it also provides a transformative chance at rehabilitation, which in turn reduces recidivism and makes communities safer. As laid out below, both statute and social science support the proposed amendment, which we hope will result in fewer prison-only sentences, while promoting the important statutory purposes of sentencing.

Our Comment proceeds in three parts. Part I explains how this amendment is consistent with SRA text and legislative history. Part II discusses how developments in social science reinforce the need for this amendment. And Part III affirms Defenders’ support for the proposal and suggests small modifications. Specifically, we offer additional or alternate text to ensure the new §5A1.1 best achieves the Commission’s goals. We also offer support for the proposed expansion of zones in Part B, and we suggest

¹ See Section I, *infra* (discussing 28 U.S.C. § 994(a)(1)(A) & (B); 18 U.S.C. § 3553(a)(3), (4)).

an additional expansion of Zones B and C further for people in Criminal History Categories (CHCs) II and III.

I. The statutory scheme for federal sentencing supports the proposed amendment, which would ameliorate the Guidelines’ current default sentence of imprisonment.

As we explain below, the Commission’s organic statute is unequivocal: The Guidelines must instruct courts not only on how to select the length of any sentence, but also on how to determine what type of sentence to impose. Despite this, the original Commission made a series of decisions that were at odds with this mandate and created a default outcome of imprisonment, with grave consequences.² The current proposal is an important step toward bringing Chapter Five in line with the SRA and expanding the universe of available punishments under the Guidelines.

A. The SRA supports giving courts guidance on, and promoting the use of, a variety of sentence types.

The SRA’s text instructs sentencing courts to consider the § 3553(a) factors “in determining *whether* to impose a term of” probation or imprisonment, distinct from its consideration of those same factors in determining the length of any sentence.³ And it further instructs the Commission to guide courts not just as to the length of sentence, but also on “whether to impose a sentence to probation, a fine, or a term of imprisonment,” so that the sentence best achieves the purposes of sentencing in each individual case.⁴

In drafting the SRA, Congress did not provide for a single default sentence type and showed no preference or presumption for one sentence over

² See Section I.B. *infra* (discussing original Commission choice to disregard SRA mandate and subsequent decrease in federal noncustodial sentences).

³ 18 U.S.C. § 3582(a); 18 U.S.C. § 3562(a).

⁴ § 994(a)(1)(A); *see also* § 994(f) (requiring the Commission, in designing guidelines, to “promote the purposes set forth in section 991(b)(1),” which in turn discusses the § 3553(a) factors, disparity, individualization, and advancement in knowledge of human behavior, among other things).

another.⁵ Legislators explicitly chose not to include a presumption for, or against, sentences of probation.⁶ The SRA framers desired, “in all cases . . . to encourage the intelligent balancing of often competing considerations,” through individualized consideration of the § 3553(a) factors.⁷

Probation, of course, is one of three available punishments under the SRA—not just for misdemeanors but also for most C, D, and E felony offenses.⁸ Outside of a handful of prescriptions, the SRA leaves to the Commission the task of designing guidelines that align with each of the

⁵ When Congress intended a certain type of sentence to prevail in a certain type of case, it said so explicitly. *See, e.g.*, 28 U.S.C. § 994(j) (“The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases” involving a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”); § 994(h) (mandating “that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized” for certain “categories of defendants”). Even when commanding the Commission to create guidelines reflecting that “in many cases, [pre-SRA] sentences do not accurately reflect the seriousness of the offense,” the text does not state that prison is the only appropriately serious sanction. *See* 28 U.S.C. § 994(m). The absence of a presumptive sentence type in the mine-run case is notable considering that at the time of the SRA, most people received some period of probation. *See* Cecelia Klingele, [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#), 34 Fed. Sent. R. 322, 323 (2022) (“In 1986, for example, straight probation accounted for 44.4% of federal sentences, and 62.5% of federal sentences included some period of probation.”).

⁶ [S. Rep. No. 225](#), 98th Cong., 2d Sess. at 91 (Sept. 14, 1983) (“[T]he Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission ... and the courts, the full exercise of full discretion in tailoring sentences to the circumstances of individual cases.”).

⁷ *Id.* at 91-92 (discussing 18 U.S.C. § 3562, which directs courts to “consider the factors set forth in section 3553(a)”).

⁸ 18 U.S.C. § 3551(b) (authorizing sentences to a term of probation, a fine, or a term of imprisonment); 18 U.S.C. § 3561(a) (describing the categories of offenses for which probation is not available); *see also* *Esteras v. United States*, 606 U.S. 185, 196 (2025) (“Fines, probation, and imprisonment are a court’s primary tools for ensuring that a criminal defendant receives just deserts.”). While the bulk of this Comment focuses on probation, we note that fine-only sentences are also often permitted under the statutory scheme, which also allows for a wide variety of creative intermediate sanctions via supervision conditions.

purposes of § 3553(a)(2),⁹ which can be achieved by multiple forms of punishment.¹⁰

Moreover, several provisions of that Enabling Statute seem to counsel in favor of far more probationary and alternative sentences than courts impose today. For example, § 994(j) focuses on the appropriate nature of noncustodial sentences for many individuals without criminal history. Section 994(g) requires the Commission to consider correctional resources and minimize the risk of exceeding federal prison capacity. And § 994(k) directs the Commission to avoid recommending imprisonment as a means of rehabilitation.

B. The inaugural Commission's choice of imprisonment as default punishment failed to give courts important guidance, with grave consequences.

Despite clear statutory text and Congressional intent, the inaugural Commission created a Guidelines structure that did not comply with the SRA and under-promoted non-prison sentences. The original Commission failed to give guidance on sentence type, and instead explicitly and implicitly positioned imprisonment as the default sentencing option.¹¹ Since the dawn

⁹ See 28 U.S.C. § 991(b)(1)(A) (requiring that the Commission “establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18”).

¹⁰ See Hon. Lynn Adelman & Jon Deitrich, [How Federal Judges Contribute to Mass Incarceration and What they Can Do About It](#), 99 *Judicature* 72, 77 (2015) (“Judges also need to overcome the notion that probationary sentences are necessarily lenient The conditions of probation may serve to punish . . . , to incapacitate . . . , and to deter Finally, probation can ensure that a defendant receives needed correctional treatment”); Ellen C. Brotman, [Make Probation a Real Option at Sentencing](#), 23 *Fed. Sent. Rep.* 257, 258 (2011) (“Given how high the statutory eligibility for probation reaches, it is patently unreasonable—and contrary to the statutory structure of federal sentencing as a whole—to focus on a guideline chart that treats probation as only possibly appropriate in the most trivial or extremely mitigated cases.”).

¹¹ See Defenders’ [Priority Letter to USSC](#) at 4 (July, 18, 2025) (discussing failure of Guidelines to effectuate SRA mandate); Tina M. Woehr, [Federal Alternative Sentences: A Critically Endangered Species](#), *Sentencing Matters Substack* (Jan. 5, 2026) (“[T]he Guidelines Manual has, from the start, treated imprisonment as the default outcome, both explicitly and implicitly.”).

of the Guidelines regime, commenters have bemoaned this choice as a misapprehension of the statutory mandate.¹²

Prior to the SRA, straight probation accounted for 44% of federal sentences, and 63% of federal sentences included some period of probation.¹³ Even among those convicted of “violent offenses,” one-third received probationary sentences.¹⁴ By contrast, in fiscal year 2024, only 12% of statutorily eligible U.S. citizens—already a much reduced population after passage of the SRA—receive a straight probation sentence, with another 8% receiving something other than a prison-only sentence.¹⁵ While multiple factors have contributed to the disappearance of non-prison sentences, the Guidelines’ prison-presumptive approach has been a leading factor.¹⁶

¹² See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1955 (1988) (criticizing the original Commission’s failure to address the statutory mandate to reduce probability of prison overcrowding even though “[a] number of obvious options were available” to do so including “propos[ing] alternatives to incarceration as [a] means of reducing the incarceration rate.”); Steven Lindemann, [Opening the Federal Sentencing Guidelines to Alternatives](#), 15 William Mitchell L. R. 555, 600 (1989) (“This article makes a prima facie case that the Commission did not adequately consider nonimprisonment sanctions, the purposes of sentencing, and the impact of the guidelines on prison overcrowding.”); Daniel Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1706 (1992) (“Congress said nothing in the statute about abolishing or even drastically curtailing probation. . . . The Commission, however, drafted guidelines containing a presumptive sentence of imprisonment for every felony. . . .”).

¹³ See [What’s Missing? The Absence of Probation in Federal Sentencing Reform](#) at 323 (discussing data from 1986).

¹⁴ *Id.*

¹⁵ USSC, [Public Data Briefing: Proposed Amendment on Sentencing Options](#) at 6 (Feb. 13, 2026). While the data briefing focused on U.S. citizens, we note that many non-citizens are eligible for, and can be good candidates for, probation, depending on the offense and circumstances.

¹⁶ Melissa Hamilton, [Prison-by-Default: Challenging the Federal Sentencing Policy’s Presumption of Incarceration](#), 51 Houston L. Rev. 1271, 1299-309 (2014) (using sentencing data to establish that “the Commission is largely, perhaps primarily, responsible for a trend toward reliance on incarceration in the vast majority of cases”); see also USSC, [Supplementary Report on the Initial Sentencing Guidelines and Policy Statements](#) at 60 (1987) (“The projections of our basic model indicate that the guidelines will reduce the number of straight probation

The original Commission's choice caused tremendous harm, including contributing to the exploding federal prison population¹⁷ and compounding racial disparities.¹⁸ And despite the Commission's statutory requirement to minimize the likelihood of prison overcrowding, these choices also contributed to the crisis facing the Bureau of Prisons (BOP) system.¹⁹ BOP facilities are unsafe, with insufficient staffing, crumbling facilities, and insufficient medical, psychological, or rehabilitative options available to address the needs of those incarcerated.²⁰ The Commission has acknowledged the

terms. . . . Second, the guidelines will, for a number of crimes, increase somewhat the average length of time served.”).

¹⁷ Hon. Carlton Reeves, [*Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership*](#), 36 Fed. Sent. R. 130, 132 (Feb. 1, 2024) (highlighting that original Commission chose “to write guidelines that made incarceration the default sanction in nearly every case” and “there is no doubt that the policy choice made forty years ago is a major reason why alternatives to incarceration today are all but nonexistent in the federal system”); *see also* Rachel Barkow, [*Sentencing Guidelines at the Crossroads of Politics and Expertise*](#), 160 UPALR 1599, 1605 (2012) (“between 1995 and 2004, the federal prison population increased at an annual average rate of 7.8%, compared to an average annual increase of 2.7% in the states.”); Defenders’ 2025 [Priority Letter](#) at 3 n.6 (discussing impact of Guidelines’ structural failure to incorporate probation sentences).

¹⁸ *See Alternatives To Incarceration and the Sentencing Commission: A Call For Progress Through Partnership at 130-132* (discussing racial disparities in criminal legal system over past century); Jelani Jefferson Exum, [*Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*](#), 58 Am. Crim. L. Rev. 1685, 1686 (2021) (highlighting importance of Reconstruction period in the “criminal sentencing context where law and policy have been used to perpetuate racialized oppression”).

¹⁹ *See* Congressman Jamie Raskin et al., [Letter to BOP Director re: Staffing Shortages](#) at 1-2 (Feb. 20, 2026) (“We are concerned that staffing issues have reached a crisis point.”); *see also* [Defenders’ Comment on the USSC’s 2025 Drug Offense Proposed Amendments](#) at 8-13 (Mar. 3, 2025) (discussing BOP crisis); Max S. Wolson et al., [From Sickness to Cure: Obeying 28 U.S.C. § 994\(g\)’s Mandates as a Remedy to Bureau of Prisons Overcrowding](#), 38 Fed. Sent. Rep. 98 (publication forthcoming May 2026) (same).

²⁰ *See, e.g.*, Keri Blankinger, [We’re Broken: As Federal Prisons Run Low on Food and Toilet Paper, Corrections Officers are Leaving in Drove for ICE](#), ProPublica (Nov. 21, 2025); Sen. Richard J. Durbin, [Priority Letter to USSC re: BOP practices](#) at 5 (July 18, 2025) (urging Commission to consider amendments that account for the limited nature and capacity of facilities and services available within BOP); Nicole B. Godfrey, [Decades of Indifference and Failures in Accountability in the Provision of Medical Care in Federal Prisons](#), 25 Nev. L. J. 755, 755 (Spring 2025) (describing “BOP’s well-known institutional failures in its provision of medical care

difficulty of incentivizing sentences other than straight imprisonment, yet an effective solution has proved elusive, perhaps until now.²¹

II. Advancements in knowledge of human behavior show the proposed amendment would advance public safety.

Moving on from the inaugural Commission’s past oversights, advancements in our knowledge of human behavior since passage of the SRA support the proposed amendment’s recalibration of the Guidelines’ prison-first structure, in terms of promoting the purposes of sentencing.²²

Specifically, research has called into question overreliance on incarceration as a means of promoting public safety. We now know that the value of imprisonment in promoting general deterrence is questionable at best: research shows that certainty of apprehension, as opposed to severity of sanction, carries more deterrent value.²³ Thus, expanding the availability of non-prison sentences will not diminish the general deterrent purpose of sentencing.²⁴

to incarcerated people”); OIG, DOJ, [Top Management and Performance Challenges Facing the DOJ 2025](#) at 2 (“The Federal Bureau of Prisons (BOP) continues to face persistent challenges, most critically those presented by staffing shortages, deteriorating infrastructure, and the introduction of contraband.”).

²¹ Defenders’ 2025 [Priority Letter](#) at 10 (discussing past Commission attempts to promote alternative sentences); *see also* USSC, [Alternative Sentencing in the Federal Criminal Justice System](#) at 1 (2015) (noting “continued decreasing trend in the imposition of alternative sentences” despite previous expansion of zones); USSC, [Alternatives to Imprisonment Project Report](#) at 4 (1990) (noting a “clear need exists for the U.S. Sentencing Commission to consider alternatives to imprisonment . . .”).

²² The Commission has an ongoing duty to ensure that the Guidelines “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. § 991(b)(1)(C).

²³ Nat’l Inst. of Justice, DOJ, [Five Things About Deterrence](#) at 5 (May 2016); *see also* Roger Pryzbylski et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship*, 36 Fed. Sent. Rep. 81, 82 (2023) (“The certainty and swiftness of consequences function as a more effective crime deterrent than their severity.”); Daniel Nagin, [Incarceration & Public Safety](#), Arnold Ventures (July 2022) (explaining how certainty principle “calls into question the effectiveness of over four decades of U.S. crime-control policy predicated on the premise that lengthy prison sentences . . . are an effective deterrent to crime”).

²⁴ § 3553(a)(2)(B).

With respect to recidivism, noncustodial sentences can be just as, if not more, effective than incarceration.²⁵ Defenders have witnessed the social harms inflicted by removing vast numbers of people from their communities.²⁶ Even short terms of imprisonment can be incredibly disruptive—especially to people who have made steps toward post-offense rehabilitation—by interfering with employment, family stability, and community ties that are themselves protective against future criminal conduct.²⁷ By directing courts to actively engage with the initial sentence type decision, along with broadening the availability of alternative sanctions

²⁵ Kevin Wolff & Michael T. Baglivio, [Priority Letter to USSC](#) at 1 (July 2025) (“A broad literature base demonstrates that incarceration, especially short-term custodial sentences, is less effective at reducing reoffending compared to structured community sanctions.”); Nat’l Rsch. Council, [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) 156 (2014) (“[T]he body of credible evidence on the effect of the experience of imprisonment on recidivism is small, that evidence consistently points either to no effect or to an increase rather than a decrease in recidivism. Thus, there is no credible evidence of a specific deterrent effect of the experience of incarceration.”); FWD.us, [Priority Letter to USSC](#) at 2 (July 18, 2025) (discussing “meta-analysis of 116 studies that compared people who were sentenced to jail or prison with people who received noncustodial sanctions like probation found that incarceration either has no impact on a person’s likelihood of committing a crime in the future or increases it.”).

²⁶ See, e.g., [Defenders’ 2025 Comment re: Drug Offenses](#) at 7 (Mar. 3, 2025) (noting how mass incarceration has “destabiliz[ed] families and communities—factors that are linked to *increased* crime and *increased* demand for drugs” (emphasis in original); [Defenders’ Letter to the USSC](#) at 26 (July 23, 2012) (encouraging alternatives to incarceration based upon criminogenic nature of imprisonment).

²⁷ See [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) at 152 (2014); see also Scottish Government, Justice Analytical Servs., [What Works to Reduce Reoffending: An Update of the Evidence on Imprisonment and Community Disposals](#) at 16 (June 2025) (A “review by the Sentencing Council for England and Wales found little evidence for effective or beneficial outcomes in respect of short term prison sentences . . . whilst studies . . . also highlight concerns about short sentences in particular.”) (citations omitted); Melissa Hamilton, [Priority Letter to USSC](#) at 5 (July 2025) (discussing failure of short imprisonment terms to rehabilitate and their exacerbation of reoffending); Youness Nafid et al., [The Role of Criminal Alternatives as a Future in Achieving Security](#), 19 Int’l J. Crim. Just. Sci. 552, 563 (2024) (describing criticisms of short-term incarceration as neglecting “rehabilitative and reintegrative aspects of punishment,” and contending it fails “allow for meaningful correction in [individuals] but tends to perpetuate criminal behavior.”).

under the Guidelines, the proposed amendment can promote recidivism reduction.²⁸

As we explained last month in the context of the proposed post-offense rehabilitation adjustment, since the adoption of the Guidelines, scientific developments have shed light on the dynamic nature of a person’s risk to re-offend.²⁹ In short, people change. Dynamic risk factors fluctuate over time and are receptive to intervention.³⁰ And a growing body of literature recognizes the importance of protective factors, which can decrease the likelihood of reoffending.³¹ A modern-day understanding supports interventions available via probationary sentences as recidivism prevention, such as the Risk-Need-Responsivity model of tailoring sentencing interventions to individual need.³² The proposed amendment provides an important opportunity to incorporate these developments into the Guidelines, as directed by § 991(b)(1)(C).

And despite outdated misconceptions, probation is not simply rehabilitative; it is also highly punitive.³³ The Supreme Court has

²⁸ § 3553(a)(2)(C).

²⁹ [Defenders’ Comment on the USSC’s 2026 Post-Offense Rehabilitation Proposed Amendments](#) at 2-4 (Feb. 10, 2026); *see also* [Hamilton 2025 Priority Letter](#) at 11 (“Incorporating dynamic factors into sentencing promotes proportionality (by aligning the severity of punishment with actual risk), fairness (by recognizing human capacity for change), and public safety (by targeting interventions to address criminogenic needs).”).

³⁰ [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 2-3.

³¹ *Id.*

³² [Wolff & Baglivio 2025 Priority Letter](#) at 1 (discussing risk-need-responsivity framework); *see also* Devon L. L. Polaschek, *Desistance and Dynamic Risk Factors Belong Together*, 22 Psychol., Crime & L. 171, 179 (2016) (discussing the Risk-Need-Responsivity model); James Bonta & Donald A. Andrews, *The Psychology of Criminal Conduct* at 19 (6th ed. 2017) (noting that “Risk-Need-Responsivity (RNR) model of [individual] assessment and rehabilitation . . . has become the premier model to guide applications in corrections and criminal justice.”).

³³ § 3553(a)(2)(B); *see also, e.g.*, Fiona Doherty, [Obey All Laws and Be Good: Probation and the Meaning of Recidivism](#), 104 Geo. L. J. 291, 294, 354 (2016) (examining probation systems across the country, which “wield an almost farcical level of control over people’s lives” and concluding that “although probation is often invoked as a solution to the problem of overincarceration, it should instead be analyzed as part of the continuum of excessive penal control.”); Cecelia Klingele,

acknowledged that federal supervised probation is punishment, and that its many conditions “substantially restrict” one’s liberty.³⁴ Especially with taxing conditions such as intensive supervision or electronic monitoring, probation operates as a form of intrusive and punitive control over almost every aspect of an individual’s life.³⁵ And the lived experience of those being supervised confirms that even the forms of supervision not intended to be punitive, such as supervised release and home confinement, can prove to be onerous and a

[*Rethinking the Use of Community Supervision*](#), 103 J. Crim. L. & Criminology 1015, 1065 (2013) (discussing the connection between the rise in probationers and the rise in incarceration and arguing that by “limiting the use, duration, and conditions of probation and post-release supervision, lawmakers can succeed in reducing unnecessary revocation while also ensuring the continued legitimacy of community sanctions.”); *see also* Vera Inst. Just., [*The Perils of Probation: How Supervision Contributes to Jail Populations*](#) at 1 (Oct. 2021) (contending “[p]robation has been considered an alternative to incarceration, but it has become more common and more punitive over time.”).

³⁴ *Gall v. United States*, 552 U.S. 38, 48 (2007) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)) (People “on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.”). The statute on probation conditions lists nine mandatory conditions and 23 discretionary conditions. 18 U.S.C. § 3563(a), (b).

³⁵ Michelle S. Phelps et al., [*Beyond “Pains” and “Gains”: Untangling the Health Consequences of Probation*](#), 10 Heath & Just. 29, 16 (Oct. 2022) (finding “probation provides both pains and gains, connecting people to services and providing a form of coercive motivation, while also burdening precarious adults with significant demands and new legal risks”); U.S. Courts, [*Post-Conviction Supervision*](#) (describing common supervision strategies of federal probation officers of regular monitoring; restrictions such as curfews or abstinence; interventions and required treatments; and contact with family, friends, and employers); Marina Richter et al., [*Punitiveness of electronic monitoring: Perception and experience of an alternative sanction*](#), 13 European J. of Probation 262, 275 (2021) (exploring literature and concluding the punitiveness of electronic monitoring may depend on how it is used and noting how electronic monitoring “as a means of controlling people on parole turns it into an additional punishment because it substantially restricts freedom of movement and deprives people of the dynamics of family, work and life in general.”); *see also* Carmen L. Diaz et. al, [*A retrospective study of the role of probation revocation in future criminal justice involvement*](#) 93 J. Crim. Just. 102225 (Jul.-Aug. 2024) (“Revocation broadly does not appear to influence future criminal justice contact. Instead, revocation seems to indicate that an individual is already following a trajectory of misconduct. Among low-risk probation clients however, technical violations are particularly harmful.”).

potential trapdoor into prison.³⁶ Further, unlike with supervised release, probation violations are potentially subject to a full resentencing, meaning that probation violations carry the risk of even greater punishment through incarceration.³⁷ In the federal system, probation gives individuals an opportunity at rehabilitation that they would not receive in prison, but that does not take away from the fact that it is also deeply punitive.

III. The Commission should adopt the proposed amendments, with modifications.

Defenders support the Commission’s proposal, which directs courts to contemplate sentence type before sentence length and increases sentencing options for more individuals by expanding Zones B and C. As discussed above, noncustodial and alternative sentences are far too rare despite being statutorily available. And Congress did not mandate this result; the inaugural Commission chose it. The proposed amendment helps this Commission correct course. We urge the adoption of both Parts of this amendment, and below we suggest modest modifications that could help the proposal better promote the statutory purposes of sentencing.

A. Part A

Defenders urge the Commission to adopt, with slight modifications, both Part A’s proposed introductory commentary and the new proposed guideline, §5A1.1.³⁸ For years, stakeholders have asked the Commission to provide more guidance on the threshold question of sentence type.³⁹ For the

³⁶ See [Statement of Rita Gray](#) to USSC on Supervised Release at 1 (March 13, 2025) (discussing supervision restrictions that led to missing child’s graduation, losing professional opportunities, and missing housing opportunities); [Statement of Eric Hicks](#) to USSC on Supervised Release at 4 (March 3, 2025) (discussing loss of travel ability, agency, and privacy rights); [Statement of Daniel Varley](#) to USSC on Supervised Release at 4 (March 3, 2025) (“Being on supervised release added another layer of challenge to an already difficult time.”).

³⁷ See 18 U.S.C. § 3565; see also U.S.S.G. §7B1.3 (advising revocation for Grade A and B violations of probation).

³⁸ See [Issue for Comment 1](#) (Part A).

³⁹ See Section I.B., *supra* (summarizing early critiques); Defenders’ 2025 [Priority Letter](#) at 3, 8 n.28 (suggesting that the Commission “remodel the first three parts of Chapter Five and incorporate a new guideline that gives judges guidance on the “in/out” decision and on *all* sentencing options available by statute” and collecting

first time in four decades, Part A of this amendment creates such guidance. We appreciate that this Commission has heeded the call to recalibrate the current sentencing process, which overwhelmingly favors incarceration and obscures other available sentencing options. The Commission should adopt both the new introductory commentary and the new guideline.

Below, we further suggest that, in adopting Part A, the Commission should also:

- modify the Chapter Five Introductory Commentary to highlight the importance of the sentence-option choice;
- add language to the Chapter Five, Part A Introductory Commentary to remind courts that imprisonment is not an appropriate means of rehabilitation;
- change language throughout §5A1.1(a) referring to “authoriz[ed]” sentences within certain zones to “recommend[ed]” sentences;
- consider the inclusion of factors in §5A1.1(b) to provide courts with guidance on selecting a sentencing option; and
- keep the bracketed language in §5A1.1(d) reminding courts that they may determine that a sentencing option authorized by statute, but not by the Guidelines, is appropriate.

sources); *see also* [*Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*](#), 51 Hous. L. Rev. at 1324 (“The Commission should jettison its prison-by-default ideology and start anew with the philosophy that giving direction on the full range of types of sentences is at least as important as guidance on the length of imprisonment.”).

1. Chapter Five Introductory Commentary

Defenders support adding the proposed introductory commentary to Chapter Five, and Part A with one suggested change. In keeping with the spirit of this amendment, Defenders believe that the introductory commentary to Chapter Five should read as follows:⁴⁰

Introductory Commentary

Chapter Five sets forth the steps used to determine the applicable sentencing **range options** and sentencing **range options** based upon the guideline calculations made in Chapters Two

This reversal of words accurately reflects the order of operations contemplated in the SRA and the Commission’s organic statute,⁴¹ while also reinforcing the principles in §5A1.1—namely that the court, in the first step of the sentencing process, should consider the *kinds* of sentences available before turning to sentence length.⁴²

2. Chapter Five, Part A Introductory Commentary

Defenders welcome the new introductory commentary to Chapter Five, Part A, titled “Determination of Type of Sentence and Sentencing Range.” This commentary rightfully emphasizes the Commission’s responsibility to provide guidance for courts when making their threshold sentence-type decision by citing the SRA’s legislative history. It also stresses that Congress did not intend to establish a presumption of any sentence, and the need for individualized consideration in each case.

⁴⁰ The text of the introductory commentary, including proposed language, reads: “Chapter Five sets forth the steps used to determine the applicable sentencing **range** and sentencing **options** . . .” [2026 Proposed Amendment: Sentencing Options](#) at 5 (emphasis added). Our changes are in red.

⁴¹ See § 3553(a)(3) and (a)(4); 18 U.S.C. § 3582(a); § 994(a)(1)(A) and § (a)(1)(B).

⁴² Thomas W. Hillier, II, *Linking Judicial Sentences to Congressional Purposes*, 8 Fed. Sent. Rep. 24, 24 (1995) (discussing that judges, lawyers and commentators “have criticized the guidelines since inception for ignoring the Congressional directive that judges fully consider the crime, [individual], possible punishments and purposes of sentencing *before* applying the guidelines.”).

We also support including the bracketed text at the end of the introductory commentary, with modification.⁴³ The language could go further by reminding courts that an individual’s access to programming and resources can vary dramatically,⁴⁴ and no one should be incarcerated simply because programming in the community is unavailable or may prove challenging to implement.⁴⁵ To ensure that lack of access to resources and other structural disadvantages are not used against individuals at sentencing, we propose adding the text in red:

⁴³ The bracketed text reads: “[As the criminal justice system continues to develop more advanced tools to assess and respond to individual defendants’ unique risks and needs, the court should consider the resources available to address the defendant’s needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option.]” [2026 Proposed Amendment: Sentencing Options](#) at 6.

⁴⁴ See [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 1, 12-13 (requesting modifications to proposed amendment to “ensure that those who lack access to resources or formal programming either in detention facilities or in the community can still qualify for the reduction;”); [CLC Comment on the USSC’s 2026 Post Offense Rehabilitation Amendment](#) at 9 (Feb. 10, 2026) (noting that rehabilitation opportunities “could vary widely depending on . . . what resources might be available in their institutions (for those detained) and in their communities (for those released)”).

⁴⁵ See [Defenders’ 2026 Comment re: Post-Offense Rehabilitation](#) at 17 (describing access barriers); see also § 3582(a) (recognizing that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

As the criminal justice system continues to develop more advanced tools to assess and respond to individual defendants' unique risks and needs, the court should consider the resources available to address the defendant's needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option. **However, the court may not choose imprisonment over probation or intermediate forms of punishment because an individual lacks access to such resources. See 18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319 (2011) (holding that a sentence of imprisonment is not an appropriate means of promoting rehabilitation, and rehabilitation therefore cannot justify lengthening a sentence).** The Commission intends for §5A1.1 (Determination of Type of Sentence) to support the court's "full exercise of informed discretion in tailoring sentences to the circumstances of individual cases." S. Rep. No. 225, 98th Cong., 1st Sess. 91 (1983).

3. Section 5A1.1

Overall, Defenders support §5A1.1 and its structure, which directs courts to consider available sentence type options and select the appropriate sentence type prior to making the determination of sentence length.⁴⁶ We also appreciate that Part A moves the Sentencing Table from its prominent placement at the beginning of Chapter Five to §5A1.2.⁴⁷ And we appreciate that §5A1.1(a) clearly sets out the descriptions of the zones with cross-references. The zones are currently scattered throughout Chapter Five; recapping them in §5A1.1(a) will make it easier for judges and practitioners to view them together in one place. That said, we have three suggestions to

⁴⁶ See [2026 Proposed Amendment: Sentencing Options](#) at 6-8. See Section I.A., *supra* (discussing statutory scheme); see also Defenders' 2025 [Priority Letter](#) at 5 (discussing the two distinct decisions of sentence type and amount contemplated by statutory scheme).

⁴⁷ [Federal Alternative Sentences: A Critically Endangered Species](#) (recommending that Commission create a new sentencing options guideline that "could come at the start of Chapter Five and prompt sentencers to contemplate sentence type before sentence amount"); Defender's 2025 [Priority Letter](#) at 4, n. 10 ("The choice to begin Chapter Five with the Table as Part A, coming before the Parts discussing terms of probation and imprisonment, also solidifies this default [of imprisonment].").

help the new guideline better accomplish the Commission’s goal of providing courts with effective guidance on this “critical decision.”⁴⁸

First, our global suggestion for §5A1.1 is that the guideline should not use the word “authorize[d]” when discussing what sentence types are included within specific zones.⁴⁹ Given the post-*Booker* advisory guidelines system, only the statutory scheme authorizes sentences. Thus, the Commission should use the word “recommend” throughout instead (such as “Zone A **recommends** a sentence of probation”) to avoid suggesting that the Zones are mandatory.

Second, we appreciate §5A1.1(b), which requires courts to determine the appropriate sentencing option(s) before considering the length of any such sentence.⁵⁰ Defenders would support subsection (b) as written, but we suggest expressly reminding courts of the specific relationship between § 3553(a) and the determination of the appropriate sentence type.⁵¹ As for

⁴⁸ [2026 Proposed Amendment: Sentencing Options](#) at 4. We do have concerns regarding §5A1.1(a)’s reliance on guideline ranges (still measured in months of imprisonment) because of the cognitive anchoring effect of the range, which could inadvertently continue to promote imprisonment as the norm. *See* Defender’s 2025 [Priority Letter](#) at 4. But such concerns are tied to the persistence of the table’s use of months of imprisonment as its unit of measurement and Chapter Five’s continued characterization of guideline ranges as being measured in months of prison as well. In the future, the Commission might explore adding a table providing ranges for alternative sentences. *See* [Federal Alternative Sentences: A Critically Endangered Species](#) (discussing alternatives tables).

⁴⁹ *See* [Defenders’ Comment on the USSC’s 2025 Simplification Amendment](#) at Appx. 11 (Feb. 3, 2025) (“Defenders identified additional language in tension with the post-*Booker* advisory guidelines system—that is, language suggesting certain Commission guidance is mandatory.”).

⁵⁰ As explicit consideration of the punishment type decision is likely new to many courts and practitioners, it makes sense to break this process into distinct steps to ensure courts fully contemplate this decision at the beginning of the sentencing process.

⁵¹ If the Commission adopts the list of factors in Issue for Comment 2, we do not believe it is necessary to explicitly include particular § 3553(a) factors in the list, given that courts must already consider them. *See* § 3582(a) (courts should “consider the factors set forth in § 3553(a) to the extent that they are applicable”). *See also* *Pepper v. United States*, 562 U.S. 476, 488 (2011) (finding that courts can consider the “widest possible breadth of information,” ensuring the court is in

including certain additional factors, as suggested in Issue for Comment 2, these could assist courts in determining the appropriate sentence option.⁵² If the Commission adopts these additional factors, Defenders suggest that the Commission specify that any factors that are drawn from § 994(k) can be taken into consideration only for non-custodial or intermediate sentences.⁵³ Sentencing courts are statutorily prohibited from using these factors to impose or lengthen a term of imprisonment.⁵⁴

Finally, we support the proposed §5A1.1(d), including the proposed bracketed language.⁵⁵ This subsection, including the bracketed language, is outcome-neutral and does not suggest a policy choice by the Commission. It simply reflects the two-step process for sentencing,⁵⁶ along with the law under *Booker* and its progeny that allows a sentencing court to impose any sentence within statutory limits based on appropriate consideration of all the factors listed in § 3553(a). By setting forth the relevant legal framework of §3553(a), the bracketed language in §5A1.1(d) serves to remind sentencing courts of their ability to consider the “widest possible breadth of information”

“possession of the fullest information possible concerning the defendant’s life and characteristics”) (citation omitted)).

⁵² Defenders have asked the Commission for this sort of guidance in the past. See [Joint Statement of Thomas W. Hillier II and Davina Chen on behalf of Defenders to USSC in Stanford, CA on “The Sentencing Reform Act of 1984: 25 Years Later”](#) at 4, 11 (May 27, 2009) (asking the Commission to provide evidence-based guidance for courts making the threshold sentencing options decision); *Linking Judicial Sentences to Congressional Purposes* at 24 (discussing lack of guidance on punishment type).

⁵³ See [Issue for Comment 2](#) (including as a factor for §5A1.1(b): “[w]hether the defendant is in need of educational or vocational training, medical care, or other rehabilitative or correctional treatment, and the setting in which any such treatment would be most effectively provided.”); see *Tapia v. United States*, 564 U.S. 319 (2011) (holding that a sentence of imprisonment is never an appropriate means of rehabilitation, and rehabilitation therefore cannot justify lengthening a sentence).

⁵⁴ See *Tapia*, 564 U.S. at 332.

⁵⁵ The bracketed language reads: “[The court may determine that a sentencing option that is authorized by statute, but not by the guidelines, is appropriate based on the consideration of these sentencing factors.]” [2026 Proposed Amendment: Sentencing Options](#) at 7.

⁵⁶ See USSG §1A1.1 cmt. (citing *Gall*, 552 U.S. at 49-51) (internal quotations omitted); see also USSG §1B1.1, Application Instructions (laying out the two-step sentencing process).

about an individual,⁵⁷ and that courts' sentencing discretion is constrained only by statutory limits.⁵⁸

B. Part B

Defenders support the proposed expansion of Zones B and C. We believe these changes, along with the proposals in Part A, will remind courts of the additional sentencing options available to them and encourage them to utilize those options. We note below that if the Commission wanted to take additional action, it would make sense to broaden the expansions for individuals in CHC I to include individuals in CHCs II and III.

Coupled with the guidance in Part A, the proposed expansion of Zones B and C in Part B is a step toward meaningful change. Defenders have criticized zones in the past as overlooked and confusing. Under the current Manual, the vast majority of individuals fall within Zone D, and even when individuals fall within the lower zones, they frequently receive imprisonment sentences.⁵⁹ But the addition of the new guidance in §5A1.1 addresses some of these concerns by cementing the importance of the sentence-type decision. Defenders support any expansion of Zones B and C, which will promote alternative sentences for our clients.⁶⁰

⁵⁷ See *Pepper*, 562 U.S. at 488.

⁵⁸ See *Concepcion v. United States*, 597 U.S. 481, 494 (2022) (“The only limitations on a court’s discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.”). Including the bracketed language would also track the Commission’s policy statement on whether to impose a term of supervised release following a term of imprisonment. See USSG §5D1.1. This recently amended policy statement instructs courts to impose terms when required by statute, but “[w]hen a term of supervised release is not required by statute,” it guides courts to “order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision.” See *Id.* (including commentary reminding courts of the statutory factors supporting the individualized assessment determination); see also USSC App. C, [Amendment 835](#) (Nov. 1, 2025).

⁵⁹ Defenders’ 2025 [Priority Letter](#) at 13.

⁶⁰ We have supported expansion of Zones B and C in the past. See [Defenders’ Comment on the USSC’s 2017 Proposed Zone Expansion Amendment](#) at 14 (Feb. 20, 2017).

In particular, the proposed expansion of Zones B and C for individuals in CHC I makes sense as it ameliorates the table's prison-default for many individuals with negligible criminal history, which runs afoul of the statutory directive in § 994(j).⁶¹ By including more individuals with the lowest criminal history category into the expanded zones, the Commission is making progress toward effectuating that mandate.⁶²

We note that the proposed amendment (with or without the additional expansion we suggest) is not one of leniency; it simply expands the punitive *options* available under the Guidelines for certain people. As before, imprisonment is still an option in every cell of the table, which continues to carry the unit of measurement of “months of imprisonment.” While Defenders lament that the proposed amendment does not expand Zone A (the only zone that does not recommend some minimum term of confinement), the expansion of Zones B and C will move the Manual in the right direction, and sentencers will retain judicial discretion to tailor the sanction type to the case at hand.

Finally, while Defenders applaud the Commission's expansion of Zones B and C for certain individuals in CHC I, it could go even further. Additional support for the expansion of Part B to include more individuals in CHC II and CHC III comes from racial disparities baked into criminal history scoring,⁶³ particularly with respect to low-level offenses.⁶⁴ Broadening the

⁶¹ § 994(j) (Guidelines should “reflect the general appropriateness of imposing a sentence other than imprisonment in cases” involving a “first offender who has not been convicted of a crime of violence or an otherwise serious offense”).

⁶² This proposal also builds on the Commission's previous work toward effectuating the § 994(j) mandate. See [Statement of Jami Johnson](#) at 18 (comparing breadth of § 994(j)'s mandate to 2023 proposal).

⁶³ See, e.g., Defenders' [Priority Letter to USSC](#) at 12 (May 15, 2024) (urging Commission to “criminal history rules that perpetuate harmful racial disparities”); Defenders' [Priority Letter to USSC](#), at 14 & n.64 (Oct. 17, 2022) (discussing scholarly and legal consensus that Black people are more often the targets of law enforcement stops, searches, arrests, and prosecutions than white people).

⁶⁴ [Statement of Jami Johnson](#) at 11-16 (March 8, 2023) (discussing racial disparities in municipal and juvenile systems); see also R. R. Dunlea & Pauline K. Brennan, [Evidence of Cumulative Disadvantage and the Liberation Hypothesis in Court Cases Involving Resisting Arrest](#), 101 J. Crim. Just. 102513 (2025) (summarizing findings that sociodemographic disparities result from cumulative disadvantage that are observed more often in less serious cases where discretion is

availability of alternative sentencing options could therefore be a step toward alleviating documented racial disparities in who receives alternative sentences.⁶⁵

We recognize that the Commission's data briefing indicated that rearrest rates are higher for many U.S. citizens who received a term of probation at higher criminal-history scores.⁶⁶ But the data briefing leaves many questions unanswered about those findings,⁶⁷ and rearrest is an especially expansive outcome measure.⁶⁸ And as we have stressed before, the

greater); C. Clare Strange et al., [Rewriting the Record: A Qualitative Analysis of Race, Criminal History, and Sentencing Policy Reform in Pennsylvania](#), 16 Race & Just. 191, 193 (2026) (contending that differential policing patterns in minority neighborhoods result in more arrest for low-level crimes).

⁶⁵ See [Alternative Sentencing in the Federal Criminal Justice System](#) at 16 (noting that “Black and Hispanic [individuals] consistently were sentenced to alternatives less often than White [individuals]” and pointing to “differences in criminal history and offense severity,” noting that “Black [individuals] had more serious criminal history scores compared to the other groups.”). And among all U.S. citizens sentenced in fiscal year 2024, Black individuals made up 25% of those within CHC I, but made up 39% of CHC II, and 47% of CHC III. The data for these analyses were extracted from the USSC [“Individual Datafiles”](#) spanning fiscal years 2020 to 2024. The dataset is publicly available for download on its [website](#).

⁶⁶ USSC, [Public Data Briefing on Sentencing Options](#) at 9.

⁶⁷ More granular information would be valuable and was not included. In particular, separating arrests for supervision or probation violations from arrests for new offenses, clarifying whether individuals received terms of straight probation or probation in combination with confinement, distinguishing minor from serious new conduct, identifying supervision status and intensity of supervision at the time of rearrest, providing demographic information with rearrest rates, and reporting reconviction and resentencing outcomes would substantially clarify the practical meaning of the reported rearrest rates. Recidivism statistics for those who ineligible for probation but received a non-prison sentence nonetheless would also be helpful.

⁶⁸ While the briefing did not provide exact parameters, rearrest may include supervision violations, low-level conduct, or even arrests for behavior predating the sentencing event unless specifically excluded. See e.g., USSC, [Older Offenders in the Federal System](#) at 44 (2022) (reporting recidivism counted events such as DUI, probation/supervision violations, and public order offenses); [Urban Institute, “Whys” and “Hows” of Measuring Jail Recidivism](#) 4-5 (2006), (noting recidivism rates can be overstated if counting criminal history events that occurred prior to the commencement of the follow-up period). Further, while higher criminal history categories are often assumed to correspond with incrementally higher recidivism, the Commission's cell-level table does not exhibit a consistently monotonic pattern; certain higher criminal history cells reflect lower rearrest rates than lower adjacent

Commission should recognize the importance of exploring other, less outdated risk proxies, beyond the static criminal history score.⁶⁹

Finally, to the extent one supports the concept of incremental punishment,⁷⁰ it is consistent with a larger expansion of Zones B and C to incorporate more individuals in CHCs II and III. Data indicate that a substantial portion of people in CHCs II and III have had little, if any, previous extended incarceration, rendering prison-only sentences a potentially dramatic increase in severity.⁷¹ An additional expansion to include more people in CHC II and III would offer sentencers a greater range of recommended sentencing options, which would encourage more individualized sentencing for these individuals.

IV. Conclusion

Defenders welcome the Commission's proposal to mend a glaring gap in the Guidelines, which persists despite clear statutory mandates. We encourage the Commission to adopt both Parts A and B, with the modifications identified above. While more remains to be done to address the Guidelines' overreliance on incarceration, the proposed amendment is an important first step.

categories. These features suggest that the statistics are descriptive and should not be overgeneralized. See USSC, [Public Data Briefing on Sentencing Options](#) at 9.

⁶⁹ See [Defenders' 2026 Comment re: Post-Offense Rehabilitation](#) at I.A. (discussing dynamic risk and protective factors).

⁷⁰ It is unclear if increases based on previous criminal history serve the statutory purposes of punishment. See Rhys Hester et al., [Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences](#), 47 Crime & Just. 209, 242 (2018) ("The high cost and adverse effects of prior record sentence enhancements might be tolerable if they served important punishment purposes, but all of the potential justifications for these enhancements are weak."); see also Christopher Lewis, *The Paradox of Recidivism*, 70 Emory L.J. 1209, 1271 (2021) ("Rather than responding more severely to repeated wrongdoing than we do to first-time misconduct, they should do the exactly the opposite.").

⁷¹ Many people in CHCs II and III get there without a single, counted, three-point conviction (i.e. solely based on sentences of 13 months or less due either to sentence length or age of conviction). Nearly two thirds (63.2%) of people in CHC II had no three-point offenses, as did nearly half (47.5%) of people in CHC III. [Individual Datafiles](#), FY 2020 to FY 2025.

**Federal Public and Community Defenders
Supplemental Comment on Career Offender and
Circuit Conflicts
(January Proposals 2 and 3)**

March 18, 2026

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Federal Public and Community Defenders filed our initial comment March 2 so it could serve as a witness statement for last week's hearing but, at the time, we were able to provide only partial feedback on the Commission's proposed "crime of violence" definition. We were still working through problems we'd identified in that definition, so we did not get into specifics.

In this supplemental comment, we get into specifics. To summarize our more significant suggestions, if the Commission is moving away from the categorical approach as it has suggested, we urge it to:

- Reframe the proposed §4B1.2(a) prefatory language as something more like "step one" and "step two," rather than instructing judges that "crime of violence" "means" any listed offense and then instructing judges that "crime of violence" does *not* include some instances of the listed offenses. The current framing is confusing.
- For federal offenses, move forward with the listed-statutory-offenses approach but delete at least: involuntary manslaughter; bank burglary, larceny, and receipt; controlled-substance-related burglary; and possession of NFA firearms and explosive materials.
- For state offenses, adopt a version of Option 2 that defines a short list of heartland violent offenses (as proposed with unbracketed offenses), with definitions serving as minimum elements.
- Adopt a much higher minimum-prior-sentence exclusion, in line with some of last year's options: 5 years imposed and at least 3 years served (with defendants bearing the burden of proving sentence *served*). If the Commission adopts a minimum-sentence threshold this high, the other limitations become less troublesome; but the Commission should still require the government to prove that those limitations (which we'll call *exclusions*) do not apply, using Shepard documents.¹

We also respond to a few matters raised at the hearing, some of which relate to the "controlled substance offense" and circuit-conflict proposals.

¹ These are our big-picture suggestions. Throughout this comment, we also provide the Commission with other suggestions intended to clarify guideline language, and we further discuss the many bracketed options.

I. The crime of violence proposal could be workable with substantial modifications—including, most importantly, a *much higher* minimum-prior-sentence exclusion.

This year’s “crime of violence” proposal has two steps: inclusions and exclusions. The idea is that at the first step, inclusions grab entire statutory offenses that cover certain conduct (*e.g.*, murder, robbery), regardless of whether those offenses are overbroad—that is, regardless of whether they cover both violent and nonviolent conduct. Then at the second step, exclusions (styled in the proposal as one exclusion and three limitations) remove individual convictions that aren’t appropriate for the “crime of violence” label in the context of a three-strikes provision designed to trigger stat-max or near-stat-max sentences.

This two-step process, as a concept, is not necessarily objectionable; but the second step has to do real work. The first step is deliberately overbroad; we know that it will grab offenses encompassing conduct that isn’t properly labeled “crime of violence” simply because a particular statutory offense encompasses both violent and nonviolent conduct—although similar statutory offenses, in other jurisdictions, encompass only violent conduct. And as our witness said at last week’s hearing, with some of these offenses, in some states, *most* covered conduct could be overbroad; we would expect this to often be true with “aggravated assault” offenses (many of which encompass reckless, negligent, and even accidental conduct), and also with sexual-assault-related offenses (where there is tremendous variation among the states). But overbreadth exists with every offense: in some states, “robbery” encompasses shoplifting followed by even accidental assault²; in others, it encompasses pickpocketing.³ In many (but not all) states, “murder” or “manslaughter” encompasses controlled-substance-related deaths.⁴

² See, *e.g.*, *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (discussing how, under Cal. Pen. Code. § 211, someone could commit California robbery by “accidentally using force”).

³ See, *e.g.*, D.C. Code § 22-2801 (robbery statute prohibiting theft by “sudden or stealthy seizure or snatching”).

⁴ See, *e.g.*, Ala. Code § 13A-6-3(a)(3) (Manslaughter, which encompasses controlled-substance-related death); Alaska Stat. § 11.41.110(a)(6) (Second-degree murder, which encompasses controlled-substance-related death); Tenn. Code § 39-13-210(a)(3) (same).

Defenders understand that this self-conscious overbreadth is essential to the Commission's proposal, to avoid the categorical approach's complexity and anomalous results. And Defenders could be open to the idea—but only if the exclusions at Step Two are broad enough, and clear and simple enough, to actually capture and exclude all the overbreadth we'd expect to see and prevent career-offender numbers from increasing dramatically. Unfortunately, as written, the exclusions are not broad or clear or simple.

Indeed, the Commission's second and third limitations (regarding injury/harm and mens rea) appear impossible to prove. Regarding the second limitation, on bodily injury, how could a defendant prove that he did not *intend* injury or harm—much less that none of his confederates intended injury or harm? Defenders feel certain that in most districts, simply signing an affidavit saying as much would not suffice. A judge would be more inclined to trust a Shepard document or police report; but such documents are written as accusations against our clients, and they'd rarely—if ever—mention circumstances suggesting our clients were less culpable. We could subpoena witnesses and victims, perhaps, but in many cases that will be impossible.⁵ And where it is possible, it would result in mini-trials that no one wants—but which defense counsel would be obligated to trigger, to avoid draconian sentencing ranges.

On the third limitation, regarding mental state, how could a defendant prove he acted only recklessly or negligently? If the offense of conviction encompasses *only* reckless conduct, perhaps we could simply cite the statute of conviction. Even this situation is unclear, however, because the limitation is based on *conduct*. Might a prosecutor persuade a judge that even though the individual was convicted of some sort of reckless-endangerment offense (classified as “aggravated assault”), his conduct was *really* knowing? How might this be impacted by an earlier charge that would have required proof of intent (but was dismissed)? Moreover, with the much more common offenses encompassing *both* intentional *and* unintentional conduct, charging documents often do not specify the mental state, and whether conduct was knowing or reckless or negligent is largely a subjective call. The difficult,

⁵ The TIAG witness last week explained that this would be particularly true on Indian reservations, where a large proportion of federal crimes of violence are charged. See [TIAG Comment on the USSC's 2026 Proposed Amendments](#) at 5-7 (Mar. 2, 2026).

subjective nature of this call doubtless explains why legislators write statutes so that prosecutors—and jurors—do not have to choose between mental states. But it would be deeply problematic for a federal judge to decide in the first instance whether an individual’s conduct was intentional or reckless, years after the conduct at issue and after the person was fully punished for that conduct.

In short, Defenders fear both that these limitations will lead to mini-trials and that we will invariably lose those mini-trials—even when we should win them. And this situation gets more worrisome when we consider that the CLC has argued that the way to reduce litigation here is to ensure that the defense bears the burden, because defendants will choose to not pursue a limitation to avoid getting a higher sentence and even losing the acceptance-of-responsibility reduction or getting an obstruction enhancement.⁶ The notion that a defendant should be afraid to argue for a limitation related to a prior conviction (that he would know more about than anyone), to reduce litigation, should be sufficient to convince Commissioners that the current proposal is not workable as written.

After much discussion, debate, and analysis, involving defenders from around the country, Federal Public and Community Defenders have concluded that the key to making the Commission’s two-step scheme workable is the minimum-prior-sentence exclusion. Determining the length of a prior sentence is simple and easily understood; as discussed below, this is true even of sentence *served* (contrary to what some other stakeholders have suggested). And beyond simplicity, excluding offenses with shorter prior sentences is capable of teasing out minor offenses—including minor *federal* offenses, frequently committed on Indian reservations, which could create new disparities—and it’s also capable of excluding the most overbroad conduct that would otherwise have to be litigated via mini-trials (pickpocketing, reckless assaults, sex between teenagers).

⁶ See [CLC Comment to USSC on 2026 Proposed Amendments](#) at 9 (March 6, 2026). We disagree that a court is permitted to deny the “acceptance of responsibility” reduction in a case where the defendant accepts responsibility for his federal offense but disputes facts related to the legal classification of a prior offense. See §3E1.1. But we cannot assume that the caselaw would break our way on this, particularly since an organization of judges raised this possibility.

However, this is true only if the minimum-sentence exclusion is set at a sufficiently high threshold. And the current options on the table aren't even close; they would exclude almost (or if probation is chosen, literally) nothing. Indeed, even the threshold that Defenders suggested in our initial comment two weeks ago is not nearly high enough. After further consideration, Defenders urge the Commission to set the threshold at 5 years—with no less than 3 years served. This was presented as an option in last year's "crime of violence" proposal.⁷ It is consistent with our position last year.⁸ And Defenders are hopeful that it would be high enough to address the substantial overbreadth that we expect to see at Step One, which otherwise would likely result in a significant increase in the number of career offenders.

Below, we go through the Commission's proposal one subsection at a time. We engage with all parts of the proposal, addressing many more issues than just minimum prior sentence. But this comment is written with the understanding that a 5-year minimum-prior-sentence exclusion is the key.

A. 4B1.2(a)(1)—Step One prefatory language

Framing matters. As written, the proposed §4B1.2(a)(1) affirmatively states that "crime of violence" "means" certain listed offenses.⁹ Then, later the proposal offers an "exclusion" and "limitations," which can theoretically take something that was just defined as a "crime of violence" out of that category. This framing is confusing and, further, it conveys that the exclusion and limitations should be treated as rare exceptions although some offenses that are included at Step One may be profoundly overbroad—perhaps only including a sliver of qualifying conduct.

In discussing the Commission's overall concept, this document has referred to "step one" and "step two," as we think this best conveys what the Commission is trying to do here. We recommend that the Commission use this sort of framing in the guideline text itself, so judges understand that

⁷ USSC, [2025 Proposed Amendments: Career Offender](#) at 8-10 (Dec. 19, 2024).

⁸ [Defenders' Comment on the USSC's 2025 Proposed Amendment: Career Offender](#) at 29-32 (Feb. 3, 2025).

⁹ USSC, [2026 Proposed Amendments: Career Offender](#) at 22 (Jan. 30, 2026).

whether something is a “crime of violence” depends on both parts of the proposal—inclusions and exclusions.

Here is how this might look:

(1)STEP ONE—INCLUSIONS.— The term “crime of violence” means any of the following offenses, if punishable by imprisonment for a term exceeding one year,¹⁰ unless an exclusion at step two (subsection (a)(3)) applies.

This sort of language could both mirror and contrast with prefatory language later used in subsection (a)(3), which might look like this:

(3)STEP TWO—EXCLUSIONS.— The term “crime of violence” does not include any offense where any one of the following exclusions applies.¹¹

B. 4B1.2(a)(1)(A)—Listed federal offenses

Defenders agree with the Commission and most other stakeholders that the best way to identify federal crimes of violence is simply to list statutory offenses. With a list, everyone knows the score. And instant offenses will always be federal, so a clear list of federal crimes permits all parties to know at a glance whether a case might implicate—or definitively does not implicate—the career-offender guideline.

As for the proposed list of offenses, the DOJ has reasonably argued that, to some extent, the list is underinclusive: it does not include all federal murder offenses.¹² And a couple of offenses that are listed as bracketed

¹⁰ Defenders include the “punishable by” limitation in this initial prefatory language so that it clearly applies to both the federal and state subsections. The Commission’s proposal includes this limitation only in the state subsection, which inaccurately suggests that the limitation does not apply in the federal context. *See* [2026 Proposed Amendments: Career Offender](#) at 22-23. This limitation is just as important in the federal context, as some of the proposed listed federal statutes include misdemeanors. *See, e.g.*, 18 U.S.C. §§ 113(a)(4) & (a)(5), 2113(b) & (c).

¹¹ Because Defenders urge the Commission not to place the burden of proving limitations on the defense (other than sentence served), in this mock-up, we assume that the Commission would collapse (a)(3) and (a)(4) into a single section.

¹² *See, e.g.*, 18 U.S.C. §§ 351 (murder, kidnapping, or assault of member of Congress, the Cabinet, or the Supreme Court); 930(c) (killing in the course of an attack on a federal facility); 1114 (murder of officer or employee).

potential offenses in the proposal's state-offense section would seem far more appropriate for the federal section.¹³ The DOJ has said it will provide the Commission with a longer list of federal offenses; Defenders would appreciate an opportunity to provide feedback on any such list, to ensure that the Commission does not over-correct.

But the list of federal offenses is not only under-inclusive; it is also over-inclusive. We do not focus here on misdemeanor offenses that can be omitted via prefatory language. Nor do we focus on offenses that are internally overbroad, since this can theoretically be addressed via exclusions (so long as the exclusions are up to the task, as discussed).¹⁴ Rather, the Commission's proposed subsection (a)(1)(A) includes some distinct offenses that should not make the list in the first place. We object to the following:

Involuntary manslaughter. The career-offender guideline has long covered voluntary manslaughter but not involuntary manslaughter.¹⁵ And Defenders agree with the DOJ that the Commission should not change its policy here.¹⁶ Under § 1112, voluntary and involuntary manslaughter are distinct criminal offenses.¹⁷ So, the Commission's citation to § 1112 should expressly exclude involuntary manslaughter.

Bank burglary, larceny, and receipt. The career-offender guideline currently covers bank robbery under 18 U.S.C. § 2113(a) and at least potentially covers bank assault under § 2113(d); but, as far as we know, it's never covered bank burglary under the second paragraph of sub. (a), bank

¹³ See 18 U.S.C. §§ 924(c) and 2332a ("using weapons of mass destruction"). As noted below, these offenses are not appropriate for the state-offense subsection, since most states have no analogs for them.

¹⁴ Although the proposal's exclusions and limitations are presented as part of "Option 2 for Definition Applicable to State Offenses," we read the proposal's exclusions as clearly applying to both federal and state offenses. See [2026 Proposed Amendments: Career Offender](#) at 24-25. And this understanding is essential to our position objecting to only five federal offenses, since many of the listed federal offenses are overbroad, including, notably, aggravated assault, which is a common offense in Indian Country and frequently committed by reckless conduct.

¹⁵ See §4B1.2(a)(2).

¹⁶ [DOJ Witness Statement of Robert Zauzmer](#) at 2 (Mar. 9, 2026).

¹⁷ See 18 U.S.C. § 1112 (providing a 15-year penalty for voluntary manslaughter and an 8-year penalty for involuntary manslaughter).

larceny under sub. (b), or receipt of stolen bank property under sub. (c).¹⁸ As with manslaughter, these are distinct offenses.¹⁹ Thus, the list of federal crimes should refer more specifically to “§ 2113(a) excluding bank burglary” and “§ 2113(d).”

Controlled-substance-related burglary. The situation with 18 U.S.C. § 2118 is similar to bank burglary. Section 2118(a), robbery related to controlled substances, is reasonably identified as a crime of violence; but § 2118(b), burglary related to controlled substances, is not. The Commission’s list should thus refer more specifically to § 2118(a).

Possession of NFA firearms and explosive material. These are objections to offenses that *currently* count: possession of a firearm described in 26 U.S.C. § 5845(a) (“NFA firearms”); and possession of “explosive material.” Both NFA firearms and explosive material are legal to possess, with a permit and a \$200 payment.²⁰ In 2004, the Commission added NFA firearms to §4B1.2, saying that Congress had identified these as “inherently dangerous and when possessed unlawfully, serve only violent purposes.”²¹ But that was based only on the fact that Congress had made them subject to registration and a special tax.²² In 2016, during the special session dealing with *Johnson*, the Commission removed “use of explosives” and added

¹⁸ Until 2016, §4B1.2 covered only burglary “of a dwelling”; and since 2016, it has not covered even that variety of burglary. See USSG App’x C, [Amend. 798](#) (2016).

¹⁹ See 18 U.S.C. § 2113(a), (b), (c), (d); see also, e.g., *United States v. Jordan*, 96 F.4th 584, 590 (3d Cir. 2024) (“Section 2113(a)’s first and second paragraphs are also divisible. . . . So not only is § 2113(a) divisible from § 2113(b), but § 2113(a) is also internally divisible.”).

²⁰ See ATF, [National Firearms Act](#); see also 18 U.S.C. § 843 (regarding “user permits” for explosive material).

²¹ USSG App’x C, [Amend. 674](#) (Reason for Amendment) (2004); see also USSG App’x C, [Amend. 798](#) (Reason for Amendment) (2016) (explaining the decision to maintain this as a crime of violence post-*Johnson*, using the same explanation).

²² *Id.* All guns are deadly. But most guns—including many military-style ones—are not subject to the NFA’s registration requirements. Instead, the NFA covers a hodgepodge of especially dangerous weapons as well as collectible and obscure weapons and accessories, some of which cannot expel a projectile on their own (e.g., firearm silencer or muffler). See ATF, [National Firearms Act Handbook: What are “Firearms” Under the NFA](#) 15 (Rev. Apr. 2009).

“possession . . . of explosive material”—without explanation.²³ Notably, the question originally presented in *Johnson* was whether possession of an NFA firearm fit within ACCA’s residual clause, and justices found it so impossible to decide whether this offense was especially risky that it gave up on the endeavor and struck down ACCA’s residual clause.²⁴

Beyond these substantive concerns, deleting these two offenses would promote simplification: they do not describe specific offenses—rather, they describe a class of offenses, which would have to be identified either categorically or based on conduct. And also, they are rare as instant offenses in career-offender cases.²⁵ Defenders do not know why the Commission didn’t delete reference to NFA firearms post-*Johnson*, nor why the Commission added possession of explosive materials then. But it should delete both offenses now.

C. 4B1.2(a)(1)(B)—Specified state offenses

For state offenses, the proposal offers two options: the first is based on labels, the second on definitions borrowed from federal offenses. The viable concept here is Option 2—what we understand as the “definitions” approach. The idea of using labels is facially appealing but, if it is intended (as the Commission has said) to ultimately cover all listed offenses “by whatever name they are known under state law,”²⁶ it presents the worst possible

²³ [Amend. 798](#) (Reason for Amendment) (noting this change in the same sentence as it noted the continued inclusion of NFA firearms but then explaining only the NFA firearms, not the possession of explosive materials).

²⁴ *Johnson v. United States*, 576 U.S. 591, 600, 606 (2015); *see also id.* at 607 (Kennedy, J., concurring) (disagreeing with the Court’s void-for-vagueness holding but finding that possession of a sawed-off shotgun did not inherently “present[] a serious potential risk of physical injury to another”); *id.* at 607-609 (Thomas, J., concurring) (same).

²⁵ Over the past five fiscal years, we count 14 career-offender cases in which the instant offense included possession of NFA firearms (citing 26 U.S.C. §§ 5845 and 5861(d)). This datum was extracted from the Commission’s publicly available “Individual Datafiles” datafiles spanning fiscal years 2020 to 2024. USSC, [Commission Datafiles](#). We aren’t sure how to identify relevant data regarding possession of explosive material, but in our experience, such cases are exceedingly rare (if they exist).

²⁶ [2026 Proposed Amendments: Career Offender](#) at 38.

overbreadth scenario.²⁷ The only way a labels-based scheme could cover every state offense of a particular type, without covering myriad dissimilar offenses that happen to have the same name, would be for the Commission to *define* the offense type—which gets us back to definitions.

Option 2, the definitions approach, focuses on statutory offenses, rather than conduct (like last year). But it is simpler than the traditional “categorical approach” because it is self-consciously overbroad: the statute of conviction must include the elements of the defined conduct, but its elements need not be as narrow as the definition. So, a state robbery offense proscribing taking property by use or threat of force is “robbery,” even if it also captures additional conduct. The statutory analysis is over. But while Option 2 accepts overbreadth, it is not a free-for-all; there *is* a minimum statutory definition. So we aren’t worried that a freestanding pickpocketing statute would get labeled as “robbery.”

At least, we aren’t worried about that freestanding pickpocketing offense so long as sub. (a)(1)(B)’s prefatory language makes clear that the provided definitions represent a minimum set of elements. To that end, Defenders prefer the first bracketed option, but replacing “*meets* each of the elements” with “*includes* each of the elements,” since the verb “meets” does not agree with “statute of conviction,” which creates ambiguity. We also suggest that the Commission delete the word “such” before “elements” in the parenthetical, as this also creates ambiguity.²⁸

²⁷ POAG has said that it prefers a labels-based approach, even if the list of qualifying labels gets very long. [POAG Witness Statement to USSC on 2026 Proposed Amendments](#) at 4. But POAG seems not to appreciate that a label like “sexual assault” can attach to entirely different offenses across jurisdictions or even within the same jurisdiction. *Compare, e.g.*, Wis. Stat. §940.225(1) (“first degree sexual assault,” a 60-year-max felony covering forcible rape), *with id.* at sub. (3m) (“fourth degree sexual assault,” a misdemeanor covering unwanted sexual contact that can occur over clothing).

²⁸ [2026 Proposed Amendments: Career Offender](#) at 23 (“ . . . regardless of whether the statute of conviction includes additional elements (or means of committing any *such* elements) that are broader than those of the offense” (emphasis added)).

The DOJ has suggested altering this prefatory language to go the other way—clarifying that the listed definitions are *not* a minimum.²⁹ The Commission should reject this suggested revision. Perhaps the DOJ is making this suggestion due to concerns about how some of the definitions will work in practice, as some of the federal offenses that serve as definitions have internally complicated elements. The first offense, murder, is an example: The Commission proposes to define murder with reference to 18 U.S.C. § 1111, which centers on “malice aforethought,” a concept that is no longer used in many states and thus could get confusing.³⁰

But this is not a reason to throw out the idea of minimum elements. The Commission could clarify confusing terminology by simply enumerating definitions within guideline text—based on the cross-referenced statutes but using plain language. Sticking with the “murder” example, the Commission might restate § 1111 as follows: “Killing another human being intentionally, knowingly, or with extreme recklessness; or causing the death of another human being with intent to inflict grievous bodily harm or with intent to commit another dangerous felony.”³¹ This definition tracks § 1111 but with clearer, more administrable language. An additional benefit of using plain-

²⁹ See [DOJ Witness Statement](#) at 4-5. The DOJ would have the Commission instruct judges that a state offense need only “proscribe[] at least some conduct that could establish . . .” the definitional elements. *Id.*

³⁰ See Wayne R. LaFave, 2 Subst. Crim. L. § 14.1 (3d ed. Oct. 2025) (noting that “‘malice aforethought,’ in modern times . . . does not even approximate its literal meaning” so “it is preferable not to rely upon that misleading expression for an understanding of murder but rather to consider the various types of murder (typed according to the mental element) which the common law came to recognize and which exist today in most jurisdictions”); see also [Hon. Andrew S. Hanen Comment on the USSCs 2015 Proposed Amendments](#) at 3 (suggesting that the Commission rethink its “use of the term ‘malice aforethought’ in the definition of murder,” because in many states “‘malice aforethought’ is not a concept currently in use”).

³¹ See § 1111; see also *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010) (in the context of discussing § 1111, noting that “in modern criminal law, malice aforethought covers four different kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless indifference); and (4) intent to commit a felony.”); *Malice aforethought*, Black’s Law Dictionary (12th ed. 2024) (“The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called ‘abandoned and malignant heart’), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).”).

language definitions is that the Commission can omit (and improve) discrete provisions in statutory definitions; and here we'd recommend omitting extreme recklessness and felony murder.³² But the point is that most, or even all, of the listed offenses could be simplified in this way, as needed—without compromising on minimum elements.

Turning to the specific offenses that get listed and defined, most importantly, the Commission should list only the unbracketed offenses and not include any of Option 2's bracketed offenses (or any others). One of the great benefits of the Commission's proposal this year is its focus on a relatively short, closed list of enumerated offenses that attempt to represent, as one Commissioner put it last week, *heartland* violent offenses—so long as the Commission does not go beyond the unbracketed offenses.

It is important to keep in mind that this list of defined state offenses relates only to prior offenses—past conduct, which has already been punished. Federal judges will be punishing instant *federal* offenses.³³ And when judges rail against anomalies related to the categorical approach, they are generally talking about heartland violent offenses—*e.g.*, murder, robbery. They are not talking about the sorts of offenses that are bracketed in the Commission proposal—*e.g.*, coercion, production of child pornography. Also, judges criticizing the categorical approach are criticizing complexity; and a longer list of offenses increases complexity. Courts can—and do—account for violent conduct in their § 3553(a) analyses, regardless of the statutory offense of conviction. So if the Commission tried to exhaustively catalog all the offenses that in one state (but not another) might sometimes signify violence, it would only make things more complicated, with no corresponding benefit.

Beyond these general concerns, there are also specific problems with some of the bracketed options. The defined, bracketed terms “child abuse,” “coercion,” “domestic violence,” and “human trafficking” simply do not work

³² Extreme recklessness is being actively litigated right now in the courts (as to whether it's a “crime of violence”), and states' approaches to felony murder vary wildly—some treat it as a distinct crime, others abolished it entirely, and those that retain it differ on which felonies qualify (ranging from *any* felony to only dangerous or enumerated felonies). See *United States v. Vederoff*, 914 F.3d 1238, 1247 (9th Cir. 2019) (discussing variations among states' treatment of felony murder).

³³ [Defenders Initial 2026 Comment on Career Offender](#) at 7 (discussing judicial criticism of crimes of violence that trigger career-offender status and related data).

under the proposed approach because their definitions either (i) do not read like statutes, creating a confusing minimum-elements baseline that could encompass many distinct offenses with unknown elements and applications; or (ii) refer to idiosyncratic laws that exist in some states but not many others. At best, including these offenses would create disparities; likely, it would be a litigation nightmare.

There are three bracketed offenses that might be acceptable on the federal list but do not belong on the state list: aircraft piracy (49 U.S.C. § 46502), firearms possession and use (18 U.S.C. § 924(c)), and using weapons of mass destruction (18 U.S.C. § 2332(a)). These are distinct federal crimes without uniform state analogs.

Finally, while arson (18 U.S.C. § 844(i)) and extortion (18 U.S.C. § 1951(b)(2)) have long been enumerated as crimes of violence, we commend the Commission for bracketing them. These offenses are typically non-violent, particularly in state prosecutions, and do not belong on the list of offenses that are presumptively treated as crimes of violence.³⁴

D. 4B1.2(a)(2)—Inchoate offenses

As Defenders have said before, the definition of “crime of violence” (as with “controlled substance offense”) should not include inchoate offenses.³⁵ Inchoate offenses—especially conspiracy offenses—are not equivalent in

³⁴ See [Defenders’ Comment on the USSC’s 2015 Proposed Career Offender Amendment](#) at 11-12 (discussing circumstances under which clients had received enhancements for offenses deemed “arson” although they “could not reasonably be considered to have posed a threat to another”); see also [Witness Statement of Molly Roth on behalf of Defenders to USSC on 2015 Proposed Career Offender Amendment](#) at 16 (explaining that extortion “is commonly classified as an offense against property” and discussing statutes). If the Commission nonetheless decides to include these offenses, we would recommend the following definitions: (1) Arson – maliciously damaging or destroying any building by means of fire or an explosive (drawn from 18 U.S.C. § 844(i) but, consistent with the Commission’s proposal, limited to buildings); (2) Extortion – obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury (taken from the current definition found in §4B1.2(e)(2)).

³⁵ See, e.g., [Witness Statement of Juval O. Scott on behalf of Defenders on USSC’s 2023 Career Offender Amendment](#), at 28-30.

seriousness to completed offenses.³⁶ We addressed this issue in detail in 2023 and won't rehash our arguments here. But we continue to object to provisions that expressly include inchoate offenses—(a)(2) and (b)(2).

That said, Defenders are pleased that the Commission has situated the inchoate-offenses provision higher, at (a)(2), so that inchoate offenses (like completed offenses) are subject to exclusions. To further clarify this, assuming that the Commission retains this provision, Defenders recommend using language that echoes the prefatory language we recommended for (a)(1), related to the new two-step process:

(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, unless an exclusion at step two (section (a)(3)) applies.

E. 4B1.2(a)(3) and (a)(4)—Exclusion and limitations

As discussed at the outset of this supplemental comment, the second step of the Commission's new approach for assessing potential crimes of violence—exclusions—is critically important. Step One, inclusions, is deliberately overbroad; and some of these offenses will be *profoundly* overbroad. This overbreadth could only be workable if Step Two is up to the task of excluding offenses that are not serious and/or violent enough to be labeled “crime of violence” (in the context of a three-strikes provision calling for maximum or near-maximum sentences). We are not confident that the limitations relating to mens rea or bodily injury could ever be up to the task—even if perfectly written, and especially not as currently written. So again, the minimum-prior-sentence exclusion is the key.

1. Prior sentence

The minimum-prior-sentence exclusion is (by far) the most administrable way to deal with overbreadth. So long as the Commission sets the minimum high enough, it will exclude the great majority of cases involving non-violent conduct, making the more fact-intensive exclusions less impactful (and thereby reducing litigation). Defenders recommend a

³⁶ *Id.* at 28-29.

threshold of five years (and at least three years served, with the burden on the defense to show sentence served). This might look like this:

(3) STEP TWO—EXCLUSIONS.— The term “crime of violence” does not include any offense where any one of the following exclusions applies.

(A) SENTENCE LENGTH.—Where the offense resulted in a prior conviction,³⁷ the sentence imposed was either non-incarcerative (e.g., probation, fine, community service) or was a term of imprisonment less than 5 years; or the defendant establishes that he or she served less than 3 years in prison.

There are other ways the Commission could accomplish this, including by amending §4B1.2(c) in line with last year’s proposal.³⁸

This is a much higher minimum-sentence exclusion than the Commission’s current proposal contemplates and it’s even higher than we suggested in our initial comment just two weeks ago. It is essentially our position from last year, which selected from among the Commission’s options for a minimum-sentence proposal.³⁹ This year, the Commission’s options are much lower, and Defenders initially tried to stake out a position that was closer to the Commission’s newer proposal. But we have reverted to last year’s position after additional analysis and consideration based primarily on two factors: (1) likely impact on career-offender numbers and (2) likely impact on Native American clients.

Career-offender numbers. At first glance, one might think that because the proposed list of offenses largely mirrors already-enumerated offenses, the career-offender population could remain roughly constant. But that does not account for the significant impact the categorical approach

³⁷ The Commission’s proposed subsection (a)(3) does not clarify that the exclusion applies only to prior convictions. Our version clarifies this.

³⁸ [2025 Proposed Amendments: Career Offender](#) at 3, 8-10.

³⁹ Compare *id.*, with [Defenders’ Comment on the USSC’s 2025 Proposed Amendment: Career Offender](#) at 29-32.

(including generic definitions) has on career-offender application⁴⁰; nor does it account for the quantity of overbreadth the Commission’s proposal tolerates at Step One.

Our biggest concern is aggravated assault—a particularly common state offense and also a common federal offense in Indian Country—which can reach both very serious and not-serious conduct.⁴¹ With aggravated-assault offenses based on heightened bodily injury, a large proportion of states’ statutes do not currently satisfy the force clause or generic definition, including the federal offense.⁴² With aggravated assault based on a deadly weapon (ADW), many state statutes are presently excluded.⁴³ And beyond

⁴⁰ Generic definitions do not capture *every* enumerated state crime across jurisdictions, as the Commission seems to intend to do here; rather, they are designed only to capture the *majority* of jurisdictions. *See Taylor v. United States*, 495 U.S. 575, 589, 598 (1990) (A crime’s generic definition is what the term means as it is used “in the criminal codes of most States” and “roughly correspond[s] to the definitions of [the crime] in a majority of the States’ criminal codes.”); *Redacted v. Redacted*, 2022 WL 4546737, at *15-*16 (D.D.C. Aug. 29, 2022) (relying upon a consensus of 25 to 30 states to establish the generic definition of robbery).

⁴¹ See [Defenders’ Comment on the USSC’s 2025 Proposed Amendment: Career Offender](#) at 23 (discussing data showing that aggravated assault is the most common prior offense that the Commission enumerates as a crime of violence).

⁴² Many state aggravated-assault statutes are likely excluded from qualifying under the force clause and generic definition because they tolerate reckless conduct. *See, e.g., United States v. Schneider*, 905 F.3d 1088, 1094-95 (8th Cir. 2018) (surveying state laws and finding 18 aggravated-assault statutes “allow for convictions based on ordinary recklessness,” which means they cannot serve as §4B1.2 predicates); *United States v. Devereaux*, 91 F.4th 1361, 1363 (10th Cir. 2024) (holding that a federal conviction for assault resulting in serious bodily injury under 18 U.S.C. § 113(a)(6) was not a “crime of violence” under the guidelines because it tolerates reckless conduct). Some aggravated-assault statutes are excluded for other reasons, like criminalizing mental injuries. *See, e.g., United States v. Burris*, 912 F.3d 386, 396-400 (6th Cir. 2019) (finding part of Ohio’s aggravated-assault statute is not a §4B1.2 predicate because it criminalizes serious mental harms).

⁴³ *See, e.g., United States v. Gomez*, 165 F.4th 1199, 1210 (9th Cir. 2026) (California’s ADW statute, Cal. Penal Code § 245, is not a §4B1.2 predicate because it can be committed recklessly); *United States v. Barnes*, 855 Fed. Appx. 893, 894 (4th Cir. 2021) (D.C.’s ADW statute can be committed recklessly); *United States v. Frazier*, 48 F.4th 884, 887 (8th Cir. 2022) (Iowa’s intimidation with a dangerous weapon is not a §4B1.2 predicate because it requires only general intent); *United States v. Simmons*, 917 F.3d 312, 320-21 (4th Cir. 2019) (North Carolina ADW is not a §4B1.2 predicate because it can be committed with culpable negligence); *United*

these, many additional state ADW statutes (likely a majority) presumably don't qualify based on the statute's explicit mens rea,⁴⁴ or based on state case law.⁴⁵ And many excluded offenses are in populous states.

If the Commission's new approach at Step One includes all these offenses, and Step Two excludes only a small fraction of them, then based only on this one offense type, Defenders anticipate that career-offender numbers could explode. And of course, the Commission's proposal isn't just about aggravated assault.

Native American clients. TIAG presented compelling testimony last week that eliminating the categorical approach will have a disproportionate and negative impact on Native American clients.⁴⁶ And Commission data bears this out: the three districts with the highest percentage of cases

States v. Young, 809 F. App'x 203, 209 (5th Cir. 2020) (Louisiana aggravated assault with a firearm is not a violent felony because it can be committed with negligent conduct); *see also* Gov't Answer Br. in *United States v. Gonzalez*, No. 21-2022, 2021 WL 3236540 at *3-4 (10th Cir. July 21, 2021) (conceding that N.M. aggravated assault with a deadly weapon is not an ACCA predicate because it is a general intent crime).

⁴⁴ *See, e.g.*, Ala. Code § 13A-6-21(a)(3); Alaska Stat. Ann. § 11.41.200(a)(1); Colo. Rev. Stat. Ann. § 18-3-203(1)(d); Conn. Gen. Stat. Ann. § 53a-60(a)(3); Del. Code Ann. tit. 11, § 612(a)(2); Ky. Rev. Stat. Ann. § 508.025(1)(a); Me. Rev. Stat. tit. 17-A, § 208(1)(B); Neb. Rev. Stat. Ann. § 28-309(1)(b); N.H. Rev. Stat. Ann. § 631:2(I)(b); N.J. Stat. Ann. § 2C:12-1(b)(3); Or. Rev. Stat. Ann. § 163.165(1)(a); R.I. Gen. Laws Ann. §§ 11-5-2(a), 11-5-2.2; Tenn. Code Ann. § 39-13-102(a)(1)(B)(iii); Wash. Rev. Code Ann. § 9A.36.031(1)(d); *cf.*, *e.g.*, Ariz. Rev. Stat. Ann. § 13-1204(A)(2) (close analog of ADW, aggravated assault that occurs if person uses a deadly weapon when committing an assault as prescribed under § 13-1203, which tolerates reckless causation of injury); N.D. Cent. Code Ann. § 12.1-17-03 (close analog of ADW, reckless endangerment with firearm).

⁴⁵ *See, e.g.*, *Kelly v. State*, 552 So. 2d 206, 208 (Fla. Dist. Ct. App. 1989) (affirming a Florida ADW conviction under Fla. Stat. Ann. § 784.021(1)(a) by explaining that intent may be established “by proof of conduct equivalent to culpable negligence”); *Commonwealth v. Welch*, 450 N.E.2d 1100, 1102 (Mass. App. Ct. 1983) (explaining that Massachusetts ADW law, Mass. Gen. Laws Ann. ch. 265, § 15A(b), can be proven through “proof of a wilful, wanton and reckless act”); *State in Interest of McElhaney*, 579 P.2d 328 (Utah 1978) (stating that under Utah's aggravated ADW statute, “no culpable mental state is specified and thus . . . intent, knowledge, or recklessness shall suffice to establish criminal responsibility” (internal quotation marks omitted)).

⁴⁶ *See* [TIAG Comment](#) at 2-5.

sentenced under Chapter Two, Part A (crimes against a person) are Oklahoma East, South Dakota, and Oklahoma North—far from the urban centers that people might associate with violent crimes.⁴⁷

This is a direct consequence of federal jurisdiction over Indian Country: conduct that would ordinarily be handled in state court—bar fights, domestic altercations, and mine-run assaults—is instead prosecuted federally.⁴⁸ And the resulting sentences are much higher on average than state sentences.⁴⁹ Thus, Defenders have come to realize that a 13-month minimum-prior-sentence exclusion (the threshold we suggested in our initial comment) will not tease out relatively minor offenses—the “barroom brawls” that have never made sense as career-offender predicates⁵⁰—for a distinct racial group. The Commission should not attempt to ameliorate (to some extent) a racial disparity that mostly impacts Black men by exacerbating a different racial disparity impacting Native Americans—and certainly not when there is a better option.

Our data-based concerns about career-offender numbers and Native clients counsel for caution, and thus in favor of a high minimum-sentence exclusion. And these aren’t our only concerns; as we noted in our initial comment, in California, our nation’s most populous state, the lowest

⁴⁷ These data were extracted from the Commission’s publicly available “Individual Datafiles” datafiles spanning fiscal years 2020-2024. USSC, [Commission Datafiles](#). The Districts of North Dakota, Wyoming, and Montana, and the Eastern District of Washington, also make the top ten. *Id.*

⁴⁸ *United States v. Lasley*, 832 F.3d 910, 916-19 (8th Cir. 2016) (Bright, J., dissenting) (discussing this and the significant sentencing disparities it engenders).

⁴⁹ *Id.*; see also Desiree L. Fox, et al., [Over Incarceration of Native Americans: Roots, Inequities, and Solutions](#), MacArthur Foundation at 7 (Jan. 10, 2023) (“2008 sentencing data showed that AI/AN in South Dakota who were prosecuted for aggravated assault in federal court received sentences that were 62% longer than those prosecuted in state court for the same offense.”).

⁵⁰ USSC, [Criminal History Working Group Report](#) at 17 (Oct. 17, 1991) (noting that the “crime of violence” definition sometimes captured statutory offenses where the conduct involved was “less serious in nature than the conduct that one generally envisions as constituting a crime of violence[,]” like a “barroom brawl” or a “heated verbal dispute”); see also *id.* at 33 (suggesting that one option for the Commission was excluding the use of *two* lesser prior offenses as the two qualifying career-offender predicates—“e.g., two barroom brawls”).

incarcerative sentence possible for the lowest-level felony is 16 months.⁵¹ When shifting to a new system, we know there will be unforeseen—and unforeseeable—errors. The cost of errors in this context, though, are not symmetrical. If the threshold is set too high, little-to-no harm is done: people will be sentenced under otherwise-applicable guidelines, which account for aggravated conduct and criminal history. But if the threshold is too low, consequences could be catastrophic: the career-offender population could increase dramatically; sentences for a distinct, vulnerable ethnic group could explode; and the gulf between clients’ experiences in guideline-centric districts versus other districts could further widen. In the face of uncertainty with stakes this high, the Commission should err on the side of fewer career offenders. Once the Commission starts getting real-world data under the new scheme, it can consider further refinements.

At last week’s hearing, the DOJ witness suggested that prior sentence length is not a good proxy for offense seriousness.⁵² Defenders would not claim that sentence length is a perfect proxy; but it is the best option available and it’s certainly the best that is easy to apply. That’s why it serves as the foundation for Chapter Four’s scoring system: “Criminal history points”—based on sentence length—“represent the purest form in which the guidelines measure recidivism risk.”⁵³ Indeed, the Commission has suggested that the career-offender guideline—the part of Chapter Four that does not distinguish between offenses based on length of prior sentence—makes Chapter Four less predictive of recidivism risk than otherwise.⁵⁴

When the Commission decided to largely eliminate the categorical approach for §2L1.2 in 2016, it transitioned to a minimum-sentence system for gauging prior offense seriousness—distinguishing between sentences of at least 5 years, 2 years, 13 months, and others—after “conclud[ing] that the length of sentence imposed by a sentencing court is a strong indicator of the court’s assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in

⁵¹ See Cal. Penal Code § 1170(h)(1).

⁵² [DOJ Witness Statement](#) at 6.

⁵³ USSC, [Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines](#) at 7 (May 2004).

⁵⁴ *Id.* at 9, 37.

the Chapter Four of the *Guidelines Manual*.⁵⁵ Incidentally, the Commission also noted that using prior sentence length as a proxy for seriousness “would greatly simplify application of the guideline.”⁵⁶ And post-amendment study has proven that the Commission was right about that.⁵⁷

Finally, several stakeholders last week argued that the Commission should not amend §4B1.2 to turn on sentence *served* rather than sentence *imposed*. This opposition explains why Defenders are first asking for five years imposed, rather than going straight to sentence served, and also why—on this one issue (sentence served)—we accept the burden of proof.

But Defenders are truly baffled by the opposition.⁵⁸ Congress’s most recent recidivist enhancements rely on sentence served⁵⁹; and as noted in our initial comment, prosecutors continue to charge, and prove, those enhancements. Also, probation officers frequently have to determine when a person was released from prison to apply the look-back rule at §4A1.2(e)(1). These records *do* exist: In Defenders’ experience across myriad jurisdictions, state and local agencies that imprison our clients are required to keep records of that imprisonment.⁶⁰ To be sure, it is often harder to get records from jailors than from clerks of court; but defendants have the strongest possible incentive to persist in efforts to obtain these records. And defendants can begin the process of obtaining these records early in a case. Moreover, in the rare case in which a state agency is utterly unreachable, our clients are in a unique position to nevertheless prove their release date—with, *e.g.*, a bus ticket from prison, a lease agreement, work or school records, or even dated

⁵⁵ USSC App’x C, [Amend. 802](#) (2016) (Reason for Amendment).

⁵⁶ *Id.*

⁵⁷ USSG, [Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment](#) at 17-18 (2022).

⁵⁸ We find concerns about administrability to be particularly baffling given that the stakeholders who raised concerns about a defendant’s ability to prove sentence served did not raise concerns about defendants’ ability to prove that they did not intend bodily harm or acted recklessly (relating to prior offenses).

⁵⁹ *See* 21 U.S.C. § 802(58), (59).

⁶⁰ In ACCA cases, where predicates never time out, problems do arise, as it can be difficult or impossible to obtain old records from the pre-computer decades; this is true with court records (regarding sentence *imposed*) as well. But given timing rules, we almost never see career-offender predicates from the 1970s, 80s, or 90s.

photographs or emails. In contemporary life, anyone who is not incarcerated leaves a digital footprint of their daily activities.

To the extent that the concern is about concurrent sentences, there is an easy solution. At the hearing last week, the POAG witness said there could be confusion when a person served multiple sentences concurrently: Would §4B1.2’s assessment rely on the ultimate release date? Or an earlier date where the potential predicate was a shorter sentence?⁶¹ This is a legitimate question, but one that the Commission can simply answer, however it sees fit (either in guideline text or in commentary).

Beyond administrability, a substantive concern was raised—that relying on sentence served might create disparities, since people get released due to prison overcrowding or other circumstances unrelated to offense seriousness. But the primary reason to rely on sentence served is to *reduce* disparities. Because while federal prosecutors may not understand idiosyncratic state mechanisms for early release, state judges (and state practitioners who negotiate plea agreements) have to understand them. And idiosyncratic early-release systems (that are hard for federal practitioners to understand) fundamentally change the nature of imposed sentences. A judge who imposes a 3-year sentence without good time or parole is making a very different judgment than a judge who imposes a 3-year sentence where everyone expects release at 25% (9 months). Defendants should be permitted to prove hard-record-based facts that would cure this disparity.

2. Other limitations

As long as Step Two’s minimum-prior-sentence exclusion is set high enough—at five years; and at least three years *served*—Defenders’ otherwise serious anxieties about the more fact-intensive limitations dissipate. We would expect a sufficient minimum-sentence exclusion to exclude most cases where there was no serious bodily injury (and no attempt or threat of such injury), and also most cases involving a mens rea less than knowledge.

These limitations could still be important, though, in a small number of cases. As the Commission’s working group recognized back in 1991, it is “highly unlikely that Congress envisioned” reckless offenses like “involuntary

⁶¹ USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 2:15:00-2:15:20 (Mar. 9, 2026).

manslaughter or vehicular manslaughter (typically in connection with driving under the influence of alcohol or controlled substances)” when it “referred to crimes of violence.”⁶²

Our primary concern with these more fact-intensive limitations is that the burden of proving relevant facts remains on the government. That is, “[a]ny difficulty in proving the facts underlying a past conviction” should inure to the benefit of the defendant, such that a defendant’s “career-offender status” could never be based a failure of “record-keeping.”⁶³ We understand the CLC’s concern that conduct-based inquiries could result in increased litigation, but that problem should be addressed by adopting a much higher threshold for the minimum-prior-sentence exclusion, which would limit the role of fact-based limitations—not by making defendants afraid to argue for limitations. And in meeting its burden, the government should be restricted to Shepard documents, as the Commission proposed last year.⁶⁴

Turning to the specifics of the Commission’s second limitation, the injury/harm limitation, Defenders’ positions are as follows:

- The injury-focused option (as opposed to harm-focused) is the viable option. The harm-focused option could resurrect the uncertainty of the residual clause and could also nullify this limitation (regardless of burden) since nearly every criminal offense can be said to at least create a *risk* of injury to another.
- Within the injury-focused option, “serious bodily injury” is preferable; mere “bodily injury” sets the threshold too low. Courts have found the bodily-injury standard satisfied based on minimal injuries, involving conduct that is not meaningfully violent.⁶⁵ Also,

⁶² [1991 Working Group Report](#) at 32-33.

⁶³ *United States v. Burris*, 912 F.3d 386, 409 (6th Cir. 2019) (Thapar, J., concurring).

⁶⁴ [2025 Proposed Amendments: Career Offender](#) at 6-7; *see also* [Defenders’ Reply Comment on the USSC’s 2025 Proposed Amendments: Career Offender](#) at 2-3 (Feb. 18, 2025) (replying to a government argument for using additional evidence).

⁶⁵ *See, e.g., United States v. Blanco*, 27 F.4th 375, 383 (5th Cir. 2022) (“We have indicated that the bodily injury enhancement may apply even if the injury is not both painful and obvious and that the absence of bruising, swelling, or bleeding is not dispositive.” (cleaned up)); *United States v. Greene*, 964 F.2d 911, 911-12 (9th

“serious bodily injury” incorporates aggravated sexual abuse under § 2241, which the Commission intends to cover.⁶⁶

- The Commission should not exclude extortion and arson offenses from the limitation—if it includes them in the first place. Really, the fact that the Commission is contemplating a special rule here proves the point we made earlier: extortion and arson are usually nonviolent offenses. If the Commission chooses to include these offenses at Step One, it should at least focus on violent cases—by permitting the limitations to work in the ordinary way.
- Finally, Defenders recommend a non-substantive revision for clarity: replacing “acts for which the defendant is criminally liable” with “conduct comprising the offense of conviction.” We think the Commission intended its “criminally liable” language to capture a defendant who was convicted as an aider-abettor (or otherwise held accountable as a principal).⁶⁷ But some people thought it might refer to more complicated legal concepts or require comparing state law against some generic notion of liability.

Turning to the final limitation, related to mens rea, Defenders’ positions on the specifics are as follows:

- The limitation should refer not only to recklessness and negligence, but also to accidental conduct.
- The limitation should clarify that the relevant mens rea attaches to the violent conduct (or threatened violent conduct). As proposed, the reference to “defendant’s conduct during the commission of the

Cir. 1992) (slap in the face, causing pain, swelling, and redness); *United States v. Isaacs*, 947 F.2d 112, 114-15 (4th Cir. 1991) (slap in the face, causing red and puffy mark); *United States v. Fitzwater*, 896 F.2d 1009, 1012 (6th Cir. 1990) (pain caused where “a bank teller hit her head and hip on her teller’s drawer in the course of lying down on the floor during the robbery”). Even if it would make sense to call slapping a “crime of violence,” it certainly does not make sense to deem an *intent* or a *threat* to slap someone to be a “crime of violence.”

⁶⁶ USSG §1B1.1, cmt. note 1(L).

⁶⁷ See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (explaining that all states and the federal government have “expressly abrogated the distinction” among principals and aiders and abettors (citation omitted)).

offense” could be misinterpreted to mean that any intentional act—no matter how attenuated from the harm—defeats the limitation. The government has suggested clarifying this matter in the opposite direction, to indicate that essentially any knowing or intentional act relevant to an offense can defeat the limitation.⁶⁸ But that would nullify the limitation: “Every crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome.”⁶⁹ The Commission should reject the government’s suggestion and clarify that the relevant mental state is the one that accompanies the conduct related to the injury.⁷⁰

- Alternatively, for simplicity, the limitation could clarify that this limitation is based on the offense of conviction, rather than conduct, as POAG has suggested.⁷¹
- Finally, we urge the Commission to reject the bracketed language excepting “extreme recklessness” from the limitation. If the Commission excludes reckless conduct, but not extreme recklessness, there will be litigation over how to distinguish between gradations of recklessness—as applied to *conduct*. At bottom, extreme recklessness is still recklessness requiring a risk “far less than . . . substantial certainty.”⁷² And like ordinary recklessness, extreme recklessness operates on a continuum: the more unjustified the risk, the lower the risk needs to be. But there is no line marking where recklessness ends and extreme recklessness begins. That indeterminacy would create problems. If the Commission nevertheless decides to create an exception for

⁶⁸ [DOJ Witness Statement](#) at 8.

⁶⁹ *United States v. Woods*, 576 F.3d 400, 411 (7th Cir. 2009).

⁷⁰ Clarifying this nuance will better comport with *Borden* as well, which requires a purposeful or knowing “*application of force*,” not merely that the person engaged in volitional conduct that happened to produce the result. *See Redacted v. Redacted*, 2022 WL 4546737, at *4 (D.D.C. Aug. 29, 2022) (interpreting *Borden*); *United States v. Gomez*, 165 F.4th 1199, 1209 (9th Cir. 2026) (en banc) (finding California ADW is not a crime of violence under USSG §4B1.2(a)(1) because it “does not require the intentional application of force against another”).

⁷¹ [POAG Witness Statement](#) at 5.

⁷² Wayne R. Lafave, 2 Subst. Crim. L. § 14.4(a) (3d ed. Oct. 2025).

extreme recklessness, we strongly urge the Commission to base that exception solely on the statute of conviction (*not* conduct), to avoid protracted and uncertain litigation.

II. The Commission should proceed with substantially limiting “controlled substance offense”—most simply, by narrowing that definition to only the offenses in the directive.

This supplemental comment focuses on “crime of violence.” But three points were raised at last week’s hearing related to “controlled substance offense” that necessitate a brief response.

1. *Sentence served as applied to CSO*: Last week, CLC and POAG argued that the Commission should adopt a sentence-imposed cutoff with the CSO definition, because gathering records to establish sentence served would be too challenging. Defenders refer back to our discussion of sentence served in relation to “crime of violence,” above. In short, this does not present a serious challenge, and it’s certainly not an insurmountable one.

2. *Congressional intent*: No one has argued (yet) that removing state-drug priors from the CSO definition would violate 28 U.S.C. § 994(h). However, DOJ asserted that doing so could create “tension” with inferred Congressional intent because it would result in such a small number of drug-based career offenders.⁷³ First of all, statutory interpretation begins—and ends—with the text, “not by psychoanalyzing those who enacted it.”⁷⁴ And § 994(h)’s text unambiguously permits CSO Option 1: just comparing § 994(h)(2)(B) with (h)(1)(B) and (i) makes this clear (and there is additional textual support).⁷⁵ But also, there is no reason to think that Congress’s intent differed from text. As part of the new mandatory guideline system, § 994(h) called for what was likely the harshest mandatory minimum then in federal law.⁷⁶ So if one is going to engage in atextual psychoanalysis, the most

⁷³ [DOJ Witness Statement](#) at 8-9.

⁷⁴ *Carter v. United States*, 530 U.S. 255, 271 (2000); *see also Babb v. Wilkie*, 589 U.S. 399, 413 (2020) (“Where, as here, the words of a statute are unambiguous, the judicial inquiry is complete” (internal brackets and citations omitted)).

⁷⁵ *See* [Defenders’ Comment on the USSC’s 2023 Proposed Amendments: Career Offender](#) at 22-25 (Mar. 14, 2023).

⁷⁶ In 1984, the Controlled Substances Act’s recidivist provision elevated only the maximum sentence, not the minimum; and the various changes that Congress

natural inference is that Congress was focusing on serious federal drug-trafficking crimes—not on whatever trafficking conduct states might choose to prosecute.⁷⁷

3. *Circuit splits*: At the hearing, Vice Chair Wong asked if adopting the time-of-conviction approach follows from the Supreme Court’s decision in *Brown* and “why a disconnect . . . would not be problematic.”⁷⁸ As Defenders’ witness alluded, the Supreme Court in *Brown* distinguished the Guidelines from ACCA.⁷⁹ And both courts of appeals that have addressed the issue post-*Brown* recognized that *Brown* did not answer the Guidelines question (ultimately splitting on their answer to that question).⁸⁰ Moreover, in briefing in *Brown*, the government suggested that ACCA and the Guidelines should be interpreted differently on this question.⁸¹

made to the CSA in 1984 did not change that. See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502, 98 Stat. 1837, 2068 (1984) (Chapter V of Comprehensive Crime Control Act of 1984).

⁷⁷ See [2023 Defender Comment on Proposed Amendments: Career Offender](#) at 25. At the time, Congress thought that federal prosecutors would focus on “major” drug-trafficking. See [S. Rep. 98-225](#) at 20 (1983) (report accompanying the Comprehensive Crime Control Act of 1984) (in discussing the Bail Reform Act, portraying drug traffickers charged in federal court as major traffickers—explaining that they were involved in an “extremely lucrative” trade and had “substantial ties outside the United States” and thus “both the resources and foreign contacts to escape to other countries with relative ease”); *id.* at 23-24 (same).

⁷⁸ USSC, [Public Hearing](#) at 1:45:53-1:46:30.

⁷⁹ *Brown v. United States*, 602 U.S. 101, 120 n.7 (2024) (“[T]here is reason to doubt that the Guidelines practice [the time-of-sentencing approach] is relevant here . . . because Congress has expressly directed courts to apply the Guidelines ‘in effect on the date the defendant is sentenced’” and “ACCA contains no similar instruction.”).

⁸⁰ Compare *United States v. Minor*, 121 F.4th 1085, 1092 (5th Cir. 2024) (“Because ACCA and the Guidelines differ in key ways, as both the Supreme Court and government acknowledge, we understand that *Brown* does not dictate the outcome in the case before us.”), with *United States v. Nelson*, 151 F.4th 577, 583 (4th Cir. 2025) (“We do not read the *Brown* footnote to mandate the time-of-sentencing approach in the Guidelines context, leaving us free to decide between that approach and the time-of-conviction approach”; but ultimately finding that the time-of-prior-conviction approach was required by prior circuit precedent).

⁸¹ Brief for United States in *Brown*, 2023 WL 5411948, at *43 (Aug. 21, 2023) (“*Brown* is wrong to suggest that the ‘time-of-sentencing rule’ that provides ‘the ‘background sentencing principle’ in the Guidelines context’ should equally apply

III. A concluding note on the directive

Defenders have long viewed the categorical approach as the best of bad options for (inherently problematic) recidivist enhancements. In addition to the fact that the categorical approach is the best way to define a “conviction,” it also has the salutary effect of keeping career offender numbers down. And this should be a shared goal: the career-offender guideline produces unduly harsh sentencing ranges in most cases, which exacerbate and compound racial disparities, and which judges reject *en masse*.

If the Commission decides to eliminate the categorical approach, it must take care not to make a bad guideline worse. With “controlled substance offense,” directive text provides the best path: With a pen stroke, the Commission could remove state-drug priors from the analysis entirely, making the guideline fairer and less racially skewed and eliminating two circuit splits. If the Commission instead opts for a minimum sentence-length requirement, this could still be an improvement, but only if the threshold is high enough. For instance, if the Commission selected one of the lower cutoff options, and also resolved the circuit splits against defendants, we could easily see a *net increase* in the number of drug-only-pathway career offenders: Highly populated districts in the First, Second, Fifth, and Ninth Circuits currently exclude many state drug priors, so the number of newly captured individuals could easily exceed whatever a lower cutoff filters out.⁸²

With “crime of violence,” the directive is less prescriptive. But in the context of a provision calling for the harshest sentencing ranges in the Guidelines Manual—ranges that were conceived as mandatory—“crime of

here. . . . Congress has provided by statute for application of the Guidelines in effect at the time of a defendant’s federal sentencing. *See* 18 U.S.C. § 3553(a)(4)(A)(ii) . . . No similar textual mandate exists for the ACCA.”).

⁸² *See, e.g., United States v. Chaires*, 88 F.4th 172, 178 (2d Cir. 2023) (holding that prior New York drug convictions cannot serve as §4B1.2 predicates); *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (finding that an Arizona marijuana offense did not qualify as a §4B1.2 predicate); *United States v. Steele*, No. 22-cr-195, 2024 WL 1877072 (E.D. La. Apr. 23, 2024) (finding that a Louisiana cocaine offense did not qualify as §4B1.2 predicate); *cf.* USSC, [Data Handout on 2026 Proposed Circuit Conflicts Amendment](#) (Feb. 2026) (highlighting how circuits siding with the government on the circuit splits generally see more people qualifying as career offenders and also qualifying for enhanced BOLs under §2K2.1).

violence” connotes a high level of violence.⁸³ In other crime-of-violence contexts with high stakes (ACCA, § 924(c))—arguably lower stakes than § 994(h) as conceived—the Supreme Court has adopted an analytical framework that is “under-inclusive by design,” which “*expects* that some violent acts . . . will not trigger enhanced sentences.”⁸⁴ In this context, the goal has never been to capture every offense that might involve some modicum of violence. Rather, the term “crime of violence” is meant to “mark out a narrow ‘category of violent, active crimes’”⁸⁵—the worst of the worst.⁸⁶

The simplest way to focus on the convictions the directive was designed to reach, while avoiding state-based anomalies, is a high minimum-prior-sentence threshold—5 years, with at least 3 years served. As discussed in this supplemental comment, a lower threshold (even the 13 months Defenders previously tried to make work) is not enough to prevent career-offender numbers from increasing and it’s not enough to avoid creating a new racial disparity. Other limitations could still matter in edge cases, but the high prior-sentence cutoff is the key to a fair and administrable guideline.

In closing, Defenders again commend the Commission for its sustained attention to this most problematic of guidelines. Since hosting a roundtable in 2024, the Commission has contemplated amendments that would not only eliminate the categorical approach to address anomalous cases where the current §4B1.2 is seen as underinclusive (as some other stakeholders have asked for) but would also address bigger problems related to over-inclusiveness, which are starkly revealed by sentencing data. Defenders appreciate opportunities to participate in this process and we sincerely hope that the Commission is able to promulgate an amendment this year that finally, and effectively, addresses the big problems.

⁸³ *Borden v. United States*, 593 U.S. 420, 438 (2021) (“Ultimately, context determines meaning” (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010))); see also *id.* (“Were there any doubts about the elements clause’s meaning, context and purpose would remove it.”).

⁸⁴ *Id.* at 442 (emphasis in original).

⁸⁵ *Id.* at 438 (quoting *Johnson*, 559 U.S. at 139).

⁸⁶ See [128 Cong. Rec. 26517-18](#) (Sept. 30, 1982) (Senator Kennedy, explaining that the provision that would become § 994(h) targeted the “relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets”—that is, those “who stab, shoot, mug, and rob”).

**Federal Public and Community Defenders
Comment on Career Offender and Circuit Conflicts
(January Proposals 2 and 3)**

March 2, 2026

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Federal Public and Community Defenders appreciate the Commission's sustained attention to the career-offender guideline and efforts to improve it. From the start, the congressional directive requiring this guideline has interfered with the Sentencing Commission's ability to create guidelines that are rational and fair; and the career-offender guideline has called for overly harsh sentences and exacerbated racial disparities.

This comment has five parts. First, we set the stage by explaining that the existence of the career-offender guideline is itself a problem. Only Congress can fully solve that problem, since the career-offender guideline is based on a directive. But the Commission can make the guideline function much less badly by clarifying and substantially narrowing the definitions under USSG §4B1.2.

Second, we address the Commission's proposed new "crime of violence" definition. At this point, Defenders are able to share only general thoughts, as we are still carefully testing and analyzing application of the many interconnected parts of the proposal's various options. We will provide more specific feedback in a supplemental comment by the March 18 comment deadline. One issue, however, is already clear: every option proposed for the minimum-prior-sentence exclusion at §4B1.2(a)(3) is inadequate.

Third, we again urge the Commission to delete state drug priors from §4B1.2's "controlled substance offense" definition. The Commission's alternative proposal for a prior-sentence rule could work too, but only if the minimum sentence is long enough. We recommend five years, served.

Fourth, turning to §2K2.1, we explain why the Commission should cross-reference ACCA,¹ rather than a current set of definitions that no one likes. But the Commission will have to expressly exclude the defunct "residual clause," and we also suggest an additional clarification.

Finally, we briefly address Proposal 3, regarding controlled-substance-offense-related circuit splits. If the Commission eliminates state drug priors, that would resolve the splits without further action. Otherwise, the Commission should clarify that the Guidelines' references to "controlled substances" are to *federally* controlled substances, and that courts should apply the schedules that are in effect at the time of sentencing.

¹ "Armed Career Criminal Act," 18 U.S.C. § 924(e).

I. There can be no “good” career-offender guideline; but the Commission can use the authority it has to make the scheme better.

If a person started paying attention to federal criminal practice only recently, they would quickly discern that the career-offender guideline is a problem, but they might think the source of the problem is the so-called “categorical approach.” Since the Supreme Court began significantly narrowing the categorical approach around ten years ago, federal reporters have filled with jurists’ complaints about the approach.²

But the categorical approach is not the career-offender guideline’s big problem. The guideline, a three-strikes provision required by the Sentencing Reform Act,³ has *inherent* problems. Back before the Supreme Court had ever uttered “categorical approach” in a criminal case, practitioners struggled to apply the career-offender guideline to real-world convictions arising out of dozens of jurisdictions.⁴ And judges and other stakeholders were deriding the career-offender guideline as “unjust,” “excessive,” and overly dependent on distinctions between types of convictions that do not reflect meaningful sentencing considerations.⁵

One inherent problem is that the career-offender guideline “makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their prior convictions.”⁶ Courts

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

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

⁴ See USSC, [Mem. from Gary J. Peters to All Commissioners, et al., re Career Offender Guidelines](#) at 2 (Mar. 25, 1988) (“1988 Peters Memo”) (“Since the Career Offender guidelines have begun to be applied to actual cases . . . problems have arisen.”).

⁵ USSC, *Sent’g Guidelines for U.S. Courts*, 54 Fed. Reg. 9122-01, 9161 (Mar. 3, 1989) (1989 WL 296205) (describing seven distinct criticisms lodged against the career-offender guideline); see also [Tr. of Public Hearing on Proposed Amendments to the Sentencing Guidelines](#) at 127 (Apr. 7, 1989) (then-Commissioner Stephen G. Breyer, describing complaints from judges and others).

⁶ [1988 Peters Memo](#) at 13-14 (explaining that two people convicted of the same federal drug felony would be subject to the same career offender sanction, even if one was a “drug kingpin” and the other a “low-level street dealer” who received probationary sentences for their prior drug offenses); see also USSC, [Criminal](#)

have raised concerns about this problem in their opinions for *decades*.⁷ From the start, Commission data showed “extensive use of [downward] departures” in career-offender cases.⁸ And judges felt quite strongly: “Such departures were often accompanied by disparaging comments about the career offender provisions or about the Commission itself.”⁹

Post-*Booker*, judges have no need for vitriol. Now, they can impose a well-below-guideline sentence. And that is precisely what judges have done,

[*History Working Group Report*](#) at 48-49 (Oct. 17, 1991) (“1991 Working Group Report”) (describing the results of the guideline to be “draconian” and “inherently unjust” because it can be triggered by drug priors involving small quantities for which a person received short sentences, or a minor assault that the state classifies as a felony).

⁷ See, e.g., *Bridges v. United States*, 991 F.3d 793, 810 (7th Cir. 2021) (noting that district judges frequently recognize the career-offender guideline’s cutoffs are “arbitrary,” and that the “[t]he categorical approach grafts another arbitrary cutoff onto this *already problematic guideline*”) (emphasis added)); *United States v. Vasquez*, 796 F. Supp.2d 1370, 1371 (M.D. Fla. 2011) (criticizing the career-offender guideline “as a failed attempt to come up with a rule that applie[s] to all defendants in all circumstances, regardless of the actual offenses, their nature, or their timing”); *United States v. Whigham*, 754 F. Supp. 2d 239, 242 (D. Mass. 2010) (noting that the career-offender guideline is “frequently over broad, giving the same ‘score’ to individuals who are not remotely similar and ignoring critical differences between them (their role in the offense, their mens rea) that should bear on punishment.”); *United States v. Britzman*, 750 F. Supp. 388, 390 (E.D. Ark. 1990) (explaining that because of a prior conviction for purse-snatching, the defendant was “in no different position than he would have been had that ‘crime of violence’ been murder”); *United States v. Dixon*, 2016 WL 4492843, at *3 (M.D. Ala. Aug. 5, 2016) (criticizing the career-offender guideline in a drug-trafficking case involving one prior trafficking offense and one prior “crime of violence,” for “treat[ing] a wide range of offenses of varying severity as controlled-substance offenses and violent offenses, warranting” identical enhancement); *United States v. Qualls*, 373 F. Supp. 2d 873, 877 (E.D. Wis. 2005) (criticizing the career-offender enhancement, quoting, “The precipitous effect of a habitual offender statute with mandated additional penalties will seldom coincide with the more flexible scheme of presumptive sentences, and will introduce gross disparities into sentencing patterns and distortions into the policy objectives the sentencing agency is seeking to implement.” (quoting ABA Standards for Criminal Justice—Sentencing § 18-3.5 at 59-60 (3d ed. 1994))).

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

⁹ *Id.* at 356.

in increasing numbers, for 20+ years.¹⁰ But *Booker* does not nullify the career-offender guideline’s pernicious influence: the career-offender sentencing range still has a powerful anchoring effect.¹¹ And in some districts, even today, judges mostly impose career-offender-range sentences, causing disparities and resulting in life-shatteringly-long prison sentences for unfortunate individuals—mostly, Black men—in those districts.¹²

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

¹⁰ USSC, [Report to the Congress: Career Offender Sentencing Enhancements](#) at 22 (Aug. 2016) (“2016 Report to Congress”) (“During the past ten years, the proportion of career offenders sentenced within the applicable guideline range has decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014.”); see also USSC, [Proposed Amendment on Individuals Sentenced under §4B1.1 Career Offender: Public Data Briefing](#) at 8 (2026) (“2026 Data Briefing”) (noting that the percentage of within-career-offender-range sentences in 2024 was just 18 percent). Although judges have the authority to vary dramatically from the career-offender guideline range, they are nevertheless required to first correctly calculate that range under the complicated categorical approach. This would explain why judges these days spill more ink on the categorical approach (which they cannot get out of) than the fundamental unfairness of the career-offender guideline (which they can get out of, by imposing a below-guideline sentence). See *Bridges v. United States*, 991 F.3d 793, 810 (7th Cir. 2021) (“A district court finding that a [career offender] guideline definition is abstract, arbitrary, or arduous should ask itself, with the § 3553(a) factors in mind, why anyone should care how the answer comes out.”).

¹¹ See *Peugh v. United States*, 569 U.S. 530, 541 (2013) (“The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines. . . .”).

¹² The five districts that impose within-guideline sentences at the highest rates are: Northern District of Texas (57.1%), Southern District of Mississippi (55.3%), Southern District of Illinois (54.5%), Western District of Louisiana (54.3%), and Southern District of Georgia (54.7%). Compare these with the recent data briefing’s reported national within-range average: 18%. See [2026 Data Briefing](#) at 8. The district-specific data in this footnote were extracted from the Commission’s publicly available “Criminal History of Sentenced Individuals” datafiles spanning fiscal years 2020 to 2024. U.S. Sent’g Comm, [Commission Datafiles](#). See also [2026 Data Briefing](#) at 7 (demographic data).

¹³ USSG §4B1.1 (Background).

¹⁴ See *id.* (acknowledging that the Commission had modified § 994(h)’s definitions “to focus more precisely on the class of recidivist offenders for whom a

repeatedly expanded §4B1.2's definitions.¹⁵ This expansion continued even after the Commission in 2004 identified the career-offender guideline's application to drug-trafficking cases as one of two guideline applications associated with unwarranted racial disparities.¹⁶ And it continued post-*Booker*, although well-below-guideline-range sentences became the norm.¹⁷ The Commission did make positive changes in 2016 (deleting the residual clause and "burglary of a dwelling"), in response to the paradigm-breaking *Johnson v. United States*.¹⁸ Then it expanded definitions again in 2023.¹⁹ In recent years, it has been categorical approach caselaw (not the Commission) that has meaningfully limited the reach of §4B1.2's definitions.

As the Commission considers §4B1.2, Commissioners should be realistic: there can be no perfectly rational career-offender guideline. For all their flaws, the ordinary guidelines are designed to account for distinctions among offense conduct and prior convictions. The career-offender guideline, in contrast, is a blunt tool that's triggered by the mere fact of certain convictions. All the Commission can do is limit the reach of the career-offender guideline—by substantially contracting the definitions that trigger

lengthy term of imprisonment is appropriate" and avoid disparities). This background was added after some courts struck down §4B1.2's inclusion of drug conspiracies for going beyond § 994(h)'s terms without justification. USSC, App. C, [Amend. 528](#) (1995) (Reason for Amendment). In adding this background, the Commission did not suggest *how* or *why* it had determined that certain individuals beyond the terms of § 994(h) were "appropriate" for career-offender-level sentences.

¹⁵ See, e.g., USSC, App. C, [Amend. 433](#) (1991); USSC, App. C, [Amend. 461](#) (1992); USSC, App. C, [Amend. 568](#) (1997); USSC, App. C, [Amend. 642](#) (2002); USSC, App. C, [Amend. 674](#) (2004); USSC, App. C, [Amend. 795](#) (2015). In addition to these amendments, which added offenses to §4B1.2 or amended counting rules so that more offenses could be predicates, in 2003, the Commission also limited departures in career-offender cases. USSC, App. C, [Amend. 651](#) (2003).

¹⁶ USSC, *Fifteen Years of Guidelines Sentencing* at 131, 133-34 (2004) ("Fifteen Years Report"). The other most-racially-disparate guideline was the 100-to-1 powder-cocaine-to-crack ratio, see *id.* at 131-33, which has since been eliminated and is now understood to have been an unjust product of a less enlightened time.

¹⁷ [2016 Report to Congress](#) at 22.

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

¹⁹ USSG, App. C, [Amend. 822](#) (2023) (resolving a circuit split regarding inchoate offenses by moving the reference to inchoate offenses from commentary to guideline text, to ensure that such offenses would count, and expanding the definition of "robbery").

it, as much as possible under the directive. Some stakeholders might complain about certain people avoiding the career-offender guideline. But let's be clear: no one is getting a slap on the wrist. The regular guidelines call for significant prison sentences in essentially all cases relating to drug trafficking or violence.²⁰ And for someone with a serious criminal history—regardless of whether their priors fit within specified categories—sentencing ranges go up from there.

II. 4B1.2(a): The Commission should aim not just to clarify and simplify the “crime of violence” definition, but also to limit that definition.

Everyone agrees that the “crime of violence” definition presents an application problem. But it also presents a policy problem, often capturing offenses that do not warrant the label “crime of violence” and shouldn’t trigger draconian sentencing ranges. A working group back in 1988 advised the Commission that it could distinguish between minor and more serious offenses by changing §4B1.2’s definitions so that a prior conviction could count only if it had garnered an over-13-month sentence—not just for “controlled substance offense” but also for “crime of violence.”²¹ A working group in 1991 presented multiple additional ways of restricting §4B1.2’s definitions to serious offenses, again related to both definitions.²² But in the ensuing years, the Commission has never attempted to restrict §4B1.2’s definitions to the sorts of serious crimes that Congress intended the career-offender guideline to cover.²³

²⁰ See [Defenders’ Comment on the USSC’s 2015 Proposed Amendment: Career Offender](#) at 16 (Nov. 25, 2015) (describing sentencing ranges for violent crimes); see also USSG §2D1.1.

²¹ [1988 Peters Memo](#) at 15-16.

²² [1991 Working Group Report](#) at 32-36 (describing potential avenues for narrowing definitions); see also *id.* at 48-49 (noting that under the existing §4B1.2, a “prior conviction for a minor assault may trigger the career offender provision due to the state’s classification of such a crime as a felony,” although the same conduct would be a misdemeanor elsewhere).

²³ 128 Cong. Rec. 26517-18 (Sept. 30, 1982) (Senator Kennedy, explaining that the provision that would become § 994(h) targeted the “relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets”—that is, those “who stab, shoot, mug, and rob”).

In picturing cases where injustices arise, Commissioners should keep in mind that, in the career-offender context, “crime of violence” issues arise most frequently *not* in cases where the person recently committed a violent offense, but in drug-trafficking cases where violence appears only in the form of a prior conviction.²⁴ And judges understand that there’s a profound difference between a person who recently committed a violent act, and a person who recently committed only a nonviolent drug offense but has a prior conviction that’s labeled “crime of violence.”²⁵

What’s more, even in cases presenting an instant “crime of violence,” judges still overwhelmingly impose sentences below the career-offender range—in over 70% of cases.²⁶

²⁴ See [2016 Report to Congress](#) at 28 (noting that the vast majority (80.9%) of individuals in the mixed-pathway category had drug trafficking as their instant offense, with “crime of violence” relating only to one or more prior convictions). The recidivism rate for defendants in these cases is effectively identical to the recidivism rate for defendants in “drug trafficking only” cases. [2026 Data Briefing](#) at 11.

²⁵ See, e.g., *United States v. Baker*, 961 F.2d 1390, 1393 (8th Cir. 1992) (Bright, S.J., concurring) (complaining that the 236-month sentence for a cocaine offense was a “harsh result” for the 38-year-old defendant, dependent as it was on two robberies he committed when he was 19); *United States v. Bowser*, 941 F.2d 1019, 1025-26 (10th Cir. 1991) (affirming a downward departure in a drug-trafficking case where the career-offender guideline applied based on the defendant’s only two criminal convictions (both for robbery)); *United States v. Shoupe*, 929 F.2d 116, 121 (3d Cir. 1991) (Rosenn, J., dissenting) (criticizing the majority for requiring the district court to impose a 14-year sentence in a drug case, which the judge considered “fundamentally impractical, unsound, and unjust,” in part because the defendant “over fifteen years ago at the age of eighteen, was convicted of burglary and armed robbery”); *United States v. Leavitt*, 925 F.2d 516, 518 (1st Cir. 1991) (Coffin, S.J., concurring) (in a drug-trafficking case, explaining that the defendant’s “criminal history does not reveal the kind of ‘career offender’ that I believe should warrant an elevation of sentencing range from 27–33 months to 168–210 months,” where both COV predicates were from when the defendant was 21 years old); *United States v. Woody*, 2010 WL 2884918, at *1, *9-10 (D. Neb. July 20, 2010) (declining to apply the “excessively harsh” career-offender guideline where a drug-trafficking defendant suffering from addiction had one prior CSO and one prior COV, both related to addiction); *United States v. Patzer*, 548 F. Supp. 2d 612, 616-17 (N.D. Ill. 2008) (declining to apply the career-offender guideline based on one CSO and one COV, observing that “[a]lmost one-third of his life has passed since those crimes occurred and the court is struck by Patzer’s young age when he committed those offenses”).

²⁶ When career-offender cases are isolated to those with an instant offense that is *not* labeled as a drug-trafficking offense, sentences fall below the career-offender

The career-offender guideline calls for unduly harsh sentences in *all* cases; so the goal for amending the “crime of violence” definition should not be limited to simplification (which the Commission is seeking to accomplish by eliminating the categorical approach). The Commission should also aim to limit the “crime of violence” definition, to more substantially reduce the number of career offenders. The Commission could choose to limit the “controlled substance offense” definition more dramatically, since it presents an even starker policy problem. But limiting the CSO definition would not justify expanding the COV definition, as that would just redistribute the unwarranted and excessive punishment elsewhere.

This year’s “crime of violence” proposal offers a new framework for the career-offender definitions. Defenders read the proposal as striving to:

- eliminate the categorical approach as we know it, by eliminating complicated assessments of elements and means;
- provide clear, finite lists of offenses that count as predicates;
- require that a prior conviction meet a minimum threshold of seriousness via a prior-sentence rule; and
- offer defendants an escape hatch, where conduct was not sufficiently serious or violent to be deemed a “crime of violence.”

As we understand it, the idea is to expressly identify a closed list of violent offenses, accepting that many of those offenses are overbroad (meaning they cover both violent and nonviolent conduct) on the front end; but then to narrow that overbreadth via exclusions and limitations on the back end.

Again, Defenders approach this part of the Commission’s proposal with caution. As we have long said, the categorical approach should not be viewed as a “problem”; rather, “it is the Supreme Court’s *solution* to problems that arise when applying recidivist-based sentence enhancements that look to convictions arising out of 50+ distinct criminal jurisdictions.”²⁷ Moreover,

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

²⁷ [Defenders’ Comment on the USSC’s 2025 Proposed Amendment: Career Offender](#) at 2 (Feb. 3, 2025).

because the categorical approach is “under-inclusive by design,”²⁸ it has the salutatory effect of limiting the number of offenses categorized as “crime of violence”—a feature, not a bug, given that the guideline calls for sentencing ranges that are too high in nearly all cases.²⁹

The current proposal gives us pause for at least two reasons. First, it tolerates overbreadth on the front end, with narrowing mechanisms at the back end. And we are uncertain how the limitations would work in practice; we are continuing to think through this problem. Second, we have little information on potential impact. The Commission’s public data briefing provides some information on the prior convictions of individuals convicted of an instant federal “crime of violence”; but as discussed, “crime of violence” questions usually arise in drug-trafficking cases, and the report contains no information on prior convictions in those cases.³⁰ And we lack data on the big question: How many people would have two qualifying priors under any potential definition? We have pulled some data suggesting that the Commission’s proposal (even if limited only to unbracketed offenses) could result in significantly higher numbers of career offenders, but we lack confidence in it.³¹ We will continue to explore data through at least March 18, but it may be that there is no reliable way of measuring impact.

All that said, Defenders intend to engage more fully with the Commission’s proposal. We had hoped to do that by the witness-statement

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

²⁹ *See supra* note 26.

³⁰ [2026 Data Briefing](#) at 15.

³¹ Defenders reviewed Commission data (including the main sentencing files and criminal history files) from the last five fiscal years to explore how many individuals might meet the proposed criteria based on observable offense and criminal history information. Our preliminary review suggested that the amendments could materially expand the number of individuals qualifying as career offenders—potentially by a substantial margin—but the structure of the available data does not permit a reliable numerical estimate. The public datasets do not identify which specific offense within a multi-count sentencing event triggered the criminal history points associated with career offender status, and the criminal history files do not contain a full account of past sentencing events to justify the total criminal history points assigned. As a result, any estimate would necessarily rely on proxy measures and methodological assumptions rather than directly observable designations. The Commission’s data briefing on this amendment likewise did not identify the number of individuals who could be affected.

deadline (that is, in this document) but, unfortunately, we cannot yet speak to specifics. The “crime of violence” proposal has numerous moving parts, and we think many of those parts will not function as intended—at least not without significant litigation to sort out their meaning. Each part of the proposal has ripple effects; and each time we contemplate proposing alternative language for one part, we have to analyze all the ripple effects of that language. Also, at the upcoming hearing, we hope to learn more about Commissioners’ and other stakeholders’ concerns, which should help us finalize our analysis in a way that is actually helpful. Again, that analysis will be provided by the March 18 comment deadline.

Already, though, at least one thing is crystal clear: the minimum-prior-sentence exclusion at subsection (a)(3) is woefully inadequate as written (under all proposed options). This would be true irrespective of whether the Commission makes the list of federal offenses at (a)(1) longer or shorter, or chooses Option 1 or Option 2 (or any sub-option) for state offenses. Indeed, if the Commission decides not to move forward with a new analytical approach for “crime of violence” this year, the exclusion proposed at subsection (a)(3) would be a great addition to the current definition; and even then, the proposed options would be inadequate.

A minimum-prior-sentence exclusion is the simplest way to limit the “crime of violence” definition to more serious offenses. But that works only if the exclusion sets the threshold at *at least* 13 months (that is, excludes any offense that does not garner three points under §4A1.1(a)). An exclusion with a threshold that’s at least this high would ensure that a prior offense not only *was capable* of garnering a felony-level sentence but also *received* a felony-level sentence. This would be meaningful (albeit imperfect) evidence that the offense may have been serious enough to warrant the label “crime of violence.”³² And it would finally prevent individuals who have never before served a prison sentence from receiving a career-offender sentence.

But the Commission must actually exclude probationary sentences and short jail sentences. And unfortunately, the proposal as written does not accomplish this; indeed, it suggests that a probation sentence without even

³² Even 13 months is lower than ideal. In at least one state, California—our nation’s most populous state—the lowest incarcerative sentence possible for a low-level (unclassified) felony is 16 months. *See* Cal. Penal Code § 1170(h)(1).

conditional jail time might be enough to make this exclusion inapplicable. This would make (a)(3) toothless. In Defenders' experience, state judges impose (supervised and unsupervised) probationary sentences in even the most minor cases. Further, the length of a probationary term is largely related to the state of conviction, with a report showing that probationary terms average just 9.3 months in Kansas but 52.4 months in New Jersey.³³ And these averages include misdemeanor probation (which in most states can last *years*).³⁴ Further, it is easy for judges to impose lengthy probation sentences since, in many jurisdictions, they can reduce them later.³⁵ In sum, whether a probationary term lasts one, three, or five years, or is supervised or not, reflects local sentencing practices more than the seriousness of the underlying offense. A probation-only sentence—of any length—is a clear indication that the offense is not really a “crime of violence.”

Further, a sentence of just 30 or 60 days is too short to reflect offense seriousness or recidivism risk. Most likely, it will reflect nothing more than time served in pretrial detention before the person was offered a plea deal for release, which means that the length of sentence often has more to do with a person's financial ability to make bail than with the seriousness of their offense.³⁶ Again, this sort of sentence is an indication that the offense is not fairly labeled a “crime of violence.”

Back in 1988, a working group advised the Commission that it could focus on more serious offenses by limiting §4B1.2's definitions to prior convictions that meet the threshold of §4A1.1(a)—*i.e.*, require an imprisonment sentence exceeding 13 months.³⁷ This was meant to

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

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

³⁵ *Id.* at 15-16 (showing that in most states, the court has authority to terminate probation early, and in many there is a mandated review for early discharge).

³⁶ *Cf.* Kimberly Kessler Ferzan, *The Trouble with Time Served*, 48 B.Y.U. L. Rev. 2001 (2023) (arguing that “time served” sentences reflect only the inability to get released pretrial and not actual case-specific factors, and that they present a serious problem in our nation's justice systems).

³⁷ [1988 Peters Memo](#) at 15-16.

“distinguish[] between career offenders who have committed serious prior offenses and those whose prior offenses were relatively minor[.]”³⁸ Also, a 13-month threshold would help “ameliorate the prison impact potential of this guideline” and would promote more rational scaling of punishment: a person “who received only probationary sentences may well need a prison sentence to deter him from future criminal conduct, but not a sentence of 210 months[.]”³⁹ It’s never too late to take good advice.

III. 4B1.2(b): It is essential that the Commission (without further delay) substantially narrow the definition of “controlled substance offense”—ideally via Option 1.

Defenders urge the Commission to adopt the narrowest possible definition of “controlled substance offense” (CSO) consistent with its statutory obligations in § 994(h). Here, that means adopting Option 1, without the bracketed language. If the Commission goes with Option 2, it should choose the longest possible prior-sentence limitation.

A. The career-offender guideline has failed in drug cases.

It is beyond debate that the career-offender guideline as applied in drug cases is a failed experiment. The guideline’s flaws are especially pronounced with drug-trafficking offenses “because of the higher statutory maximum penalties for those offenders[.]”⁴⁰ For decades, federal judges have complained about the career-offender guideline treating drug-trafficking offenses (instant and prior) the same as violent offenses.⁴¹

³⁸ *Id.*

³⁹ *Id.* at 16.

⁴⁰ See [2016 Report to Congress](#) at 3.

⁴¹ See, e.g., *United States v. Henshaw*, 2018 WL 3240982, at 7 (S.D. Ill. July 3, 2018) (finding “that the Career Offender Guidelines’ categorical treatment of drug trafficking only offenders as severely as those who have a history of violence is unjust” and that it “fails to promote the goals of sentencing”); *United States v. Valdez*, 77 F. Supp. 3d 1115, 1145 (D.N.M. 2014) (finding the career-offender range excessive in a drug-trafficking-only case, where one predicate was “at most a few years from being stale,” and where the defendant was “nonviolent” and “appear[ed] to deal drugs to support his own habit” rather than as part of “a sophisticated or violent criminal organization”); *United States v. Newhouse*, 919 F. Supp. 2d 955, 980 (N.D. Iowa 2013) (complaining about the “many low-level, non-violent drug addicts

But we need look no further than data, which conclusively establish that courts overwhelmingly reject career-offender ranges in drug-trafficking cases.⁴² Data also establish that inclusion of drug-trafficking offenses in the career-offender guideline exacerbates unwarranted racial disparities.⁴³ And indeed, the Commission has itself questioned whether including these offenses in the career-offender enhancement promotes any purposes of sentencing, making the racial disparities associated with it especially pernicious.⁴⁴

serving sentences grossly disproportionate to their role and culpability”); *United States v. Moreland*, 568 F. Supp. 2d 674, 688 (S.D. W. Va. 2008) (declining to apply the career offender guideline where “[t]wo relatively minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison, vaulted this [individual] into the same category as major drug traffickers engaged in gun crimes or acts of extreme violence”).

⁴² When career-offender cases are isolated to those with instant drug-trafficking offenses, the within-guideline-range rate is just 17.5%, with 82.1% of cases getting a below-range sentence. As noted above, all *other* career-offender cases have a still very low (but higher) within-range rate of 27.2% and a below-range rate of 70.4%. [Individual Datafiles](#), FY20-24.

⁴³ See [Fifteen Years Report](#) at 133-34 (discussing the disproportionately high number of Black individuals who are labeled “career offender” based on drug-trafficking convictions that are themselves impacted by race); see also [2026 Data Briefing](#) at 7 (showing that for fiscal year 2024, 59% of career offenders were Black, compared with 24% of all federal cases). Even the DOJ has acknowledged that “[d]ecades of research show that the career offender guideline produces a clear racial disparity in application.” [DOJ Comment on the USSC’s 2023 Proposed Amendments](#) at 27 (Feb. 27, 2023).

⁴⁴ See [Fifteen Years Report](#) at 134. This report highlighted the disconnect between career-offender sentences, as applied to drug-trafficking offenses, and the goals of protecting the public and deterring crime. As for protecting the public, “[i]ncapacitating a low-level drug seller”—even if for a very long time—“prevents little, if any, drug selling; the crime is simply committed by someone else.” *Id.* As for deterrence, “[t]he recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual*.” *Id.* The Commission has also long known that the career-offender guideline is not aligned with notions of just punishment, either: In an ambitious public survey that the Commission published in 1997, Americans who were asked what sentence was appropriate for various street crimes (drug-trafficking, robbery, etc.) based their assessment on the nature of the instant offense far more than prior criminal record; to be sure, sentences went up as criminal history increased, but only “modest[ly]”—“even for the ‘four strike’ offender,” with

For anyone not intimately acquainted with the Sentencing Reform Act, this reality raises the obvious question: Why is the career-offender guideline tied to drug offenses at all? But as Commissioners and stakeholders know, the answer is simple: § 994(h). If Congress had not directed the Commission to create a guideline calling for stat-max sentences based in part on the mere existence of drug-trafficking convictions, surely, the Commission would not have invented such a counterproductive guideline.

The Commission has the authority to make the guideline better, though, by substantially narrowing the definition of “controlled substance offense.” And Defenders are pleased that the Commission has presented multiple options for doing just that sort of narrowing this year.

B. The Commission should pick the option that does the least harm: Option 1 without the bracketed language.

The fact that the career-offender guideline’s inclusion of “controlled substance offense” has no penological justification—it exists solely because of a directive—makes clear what the Commission should do here: narrow the CSO definition to only what the directive requires. As discussed in this comment’s first section, the Commission defined “controlled substance offense” more broadly than required by the directive from the start, and it has expanded that definition many times over the years. The result: a “controlled substance offense” definition that advances no penological purpose and yet encompasses every conceivable offense related to drug-trafficking, with no escape—other than, potentially, the categorical approach. But the good news is that this is a definition the Commission can—and should—scale back substantially.

The easiest and most straightforward way to accomplish this would be to adopt Option 1 without the bracketed language. Congress set a narrow baseline, requiring only the following felony drug offenses to be included:

sentencing decisions focused on injuries to victims. See USSC, [Survey of Public Opinion on Sentencing Federal Crimes](#) at 96 (1997). Beyond protection of the public, deterrence, and just punishment, there is one additional penological goal—rehabilitation, see § 3553(a)(2)(D)—but long prison sentences cannot serve this purpose. See 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).

an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46[.]⁴⁵

The Commission could satisfy this directive by simply stating:

The term ‘controlled substance offense’ means an offense, if punishable by imprisonment for a term exceeding one year,⁴⁶ under 21 U.S.C. §§ 841, 952(a), 955, or 959; or 46 U.S.C. §§ 70503(a) or 70506(b).

Defenders urge the Commission to do precisely that. The Commission is seeking to limit the CSO definition and nothing more is needed. We further suggest that the Commission also limit the CSO definition such that, as with the new COV definition, a prior conviction for one of these offenses does not count if it garnered a sentence of 13 months or less (*e.g.*, did not get three points under §4A1.1(a)). This minimal prior-sentence limitation would not impact many cases. But at least it might exclude low-level trafficking, which is perhaps most likely on tribal nation lands (where drug convictions are frequently federal).

To the extent that anyone might suggest the directive requires the Commission’s CSO definition to cover state drug-trafficking priors, Defenders refuted this hypothetical argument in a prior comment.⁴⁷ If the Commission eliminates state drug priors from the CSO definition, Defenders are hopeful that the DOJ would not challenge this decision—both because the text of the directive would not support such a challenge and because it would be good policy for the career-offender guideline to focus more on serious violent

⁴⁵ 28 U.S.C. § 994(h)(2)(B).

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

⁴⁷ See [Defenders’ Comment on the USSC’s 2023 Proposed Amendments: Career Offender](#) at 22-25 (Mar. 14, 2023). Prior cases interpreting the directive focused on whether the Commission *may* include offenses beyond those identified in the directive, not whether it was *required* to do so. See, *e.g.*, *United States v. Knox*, 573 F.3d 441, 449 (7th Cir. 2009) (recognizing that “nothing in the text of § 994(h) requires the Commission” to go further than the directive, so any additional offenses “reflect[] an exercise of discretion”).

offenses and less on drug offenses. But if the DOJ chooses to litigate this issue, Defenders are ready for that fight.

There is no reason to include the bracketed federal offenses going beyond the directive. In last year's comment, Defenders went through each of these offenses to show that there was no policy justification for adding them and there's no need to retain them now.⁴⁸ Three of the bracketed offenses aren't even trafficking offenses per se; they are merely *related to* trafficking.⁴⁹

Last year, the Commission proposed eliminating state drug priors from the CSO definition in precisely the same way as Option 1 this year. And although Defenders, many judges, and others, supported this proposal, POAG and DOJ suggested that eliminating state drug priors would create an unwarranted disparity.⁵⁰ The idea was that there are some state drug offenses that are as serious (or even more serious) than some federal drug offenses—at least in places like New York City.⁵¹ Thus, eliminating state drug offenses from the CSO definition would create a disparity among people who committed serious drug crimes based on the jurisdiction of conviction.

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

⁴⁹ See 21 U.S.C. §§ 843(a)(6) (possession of drug-manufacturing paraphernalia), 843(b) (use of a communication facility to commit any felony offense under the Controlled Substances Act, which includes non-trafficking offenses), and 856 (maintaining a premises for various purposes, including mere storage or use of a controlled substance). With offenses like these, the Commission has ensured that every federal instant offense with any relationship to trafficking triggers a career-offender analysis. That never should have been the goal: in 1988, the Commission's career offender working group recommended that the Commission adopt ACCA's "serious drug offense" formulation in part because the alternative definition "would include drug offenses often used for peripheral defendants (*e.g.*, telephone counts) and might go well beyond the intent of the [career-offender directive]." [1988 Peters Memo](#) at 23. Less than 10 years later, the Commission affirmatively, expressly added telephone counts under § 843(b) (and other, similar offenses) to the guideline, ensuring that "peripheral defendants" would have no escape from a guideline that was meant for the worst of the worst. USSG, App. C, [Amend. 568](#) (1997).

⁵⁰ [POAG Comment on the USSC's 2025 Proposed Amendments](#) at 4-5 (Feb. 3, 2025); [DOJ Comment on the USSC's 2025 Proposed Amendments](#) at 14 (Feb. 3, 2025).

⁵¹ See [Tr. of 2025 Hearing on Career Offender](#) at 37-39 (testimony of Saritha Komatireddy, Deputy Chief of Appeals at the U.S. Attorney's Office for the EDNY, discussing major narcotics cases out of NYC).

First of all, the career-offender guideline *inherently* creates jurisdiction-related disparities. Low-level drug activity might trigger a full-blown undercover operation in a smaller city although it wouldn't warrant attention in a larger one. One county might routinely allow young people to plead to possession offenses while another would throw the book at them. Many states continue to criminalize marijuana but a growing number do not. And as the Commission observed back in 2004, race is relevant here: "Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods, which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers."⁵² As we have said before: The career-offender guideline "is an unwarranted-disparity-creating machine."⁵³

Secondly, a person who escapes the career-offender guideline although his state drug-trafficking offenses were for unusually aggravated conduct is not, as discussed, getting a slap on the wrist. That person would only "escape" to §2D1.1 and to the ordinary operation of Chapter Four's criminal-history rules, which famously—notoriously—result in high sentencing ranges. Most courts find §2D1.1-based ranges to be too high for most drug-trafficking defendants.⁵⁴ Indeed, if the career-offender guideline captured fewer drug-trafficking defendants based on their state priors, perhaps we'd see a higher percentage of within-range sentences under §2D1.1.

Finally (and most importantly), the potential disparity between individuals convicted of federal drug-trafficking offenses and individuals convicted of state drug-trafficking offenses for aggravated conduct is looking at this from the wrong side: people unfairly *excluded*, rather than people unfairly *included*. As discussed, ideally, the Commission would exclude *all* drug-trafficking cases from the career offender guideline. There is no penological justification for their inclusion, which both results in unjust sentencing ranges and exacerbates racial disparities. But unfortunately,

⁵² [Fifteen Years Report](#) at 134.

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

⁵⁴ See USSC, [Proposed Amendment on Drug Offenses: Public Data Briefing](#) at 6-7 (2025) (showing that in FY23, the vast majority of individuals sentenced under §2D1.1 received a well-below-guideline-range sentence).

§ 994(h) does not permit the Commission to exclude federal drug-trafficking cases; the Commission can only exclude state cases.

This presents a unique trolley problem. Unlike in the classic philosophical problem, this trolley is certain to go off a cliff. The (remote) driver cannot save everyone; many passengers are locked into their seats. But the driver can slow down long enough to let the not-locked-in passengers off. One could complain that it would be irrational or unfair to let *any* passengers off, when some of the passengers who would escape are similarly situated to the ones still trapped on the trolley. But unlike in the classic trolley problem, the correct choice here is clear: the Commission should narrow the CSO definition to only what is required by the directive and save at least some individuals from careening off a cliff.

C. Option 2 is much better than nothing, but it is not preferable to Option 1.

Option 2 is not ideal, but it could be workable, if properly calibrated. Certainly, it is much, much better than the current situation. Among the alternatives, Defenders would slightly prefer 2C (over 2A or 2B), but we are not overly concerned with the precise mechanism for implementing a prior-sentence-length minimum. Our focus is on the length of that minimum, and we urge the Commission to set it as high as possible: 5 years—served.

The goal here is (or should be) to substantially reduce the number of qualifying drug-trafficking offenses; in other words, not just to exclude minor offenses, as with the COV exclusion at subsection (a)(3); but also to exclude garden-variety trafficking offenses that currently clog the career-offender guideline. So, one year is clearly inadequate.⁵⁵ And even three years is too low.⁵⁶ With drug-trafficking offenses, many states have mandatory

⁵⁵ Last year's data briefing reported that the great majority of prior drug-trafficking sentences were at least a year long. USSC, [Individuals Sentenced Under §4B1.1: Proposed Amendment Data Background](#) at 26 (2025). Also, as noted above, in California, the lowest incarcerative sentence possible for a felony is 16 months. See Cal. Penal Code § 1170(h)(1).

⁵⁶ Last year's data briefing indicated that with a three-year threshold, around half of all drug-trafficking priors would still qualify. [2025 Data Background](#) at 26.

minimums that impact sentencing.⁵⁷ Also, as discussed above, with state offenses, it is extremely common to see plea deals for “time served”—or for the numerical equivalent of “time served”—which means that the length of sentence isn’t really about the seriousness of the offense.⁵⁸ A modest prior-sentence minimum will not tease out these cases, particularly given states’ overburdened courts and indigent-defense systems.⁵⁹

As for sentence served (versus imposed), last year we explained a similar position; the bottom line is that focusing on sentence served avoids disparities related to parole, good time, and the like.⁶⁰ Some stakeholders claimed last year that there would be administrability problems with proving the length of sentence served. Defenders doubt this would present a real problem; now that § 851 enhancements require the government to prove time served,⁶¹ we haven’t noticed prosecutors having a hard time meeting their burden. But last year, Defenders said that, if the Commission sees this as a problem, we would be willing to take on the burden of proving sentence served.⁶² And although we prefer Option 2C over 2A or 2B, because it has just one step (rather than two or three), Option 2A could work, with the bracketed language: automatically exclude priors that don’t get three points under §4A1.1(a), but with the defense invited to prove that the defendant did not serve a significantly longer sentence.

⁵⁷ See, e.g., Fla. Stat. Ann. § 893.135 (providing mandatory penalties for drug offenses); Me. Rev. Stat. Ann. 17-A § 1125 (same); N.C. Gen. Stat. Ann. § 90-95(h) (same); see also Ram Subramanian & Ruth Delaney, Vera Inst. of Just., [Playbook for Change? States Reconsider Mandatory Sentences](#) at 5-8 (2014) (discussing states’ creation of mandatory minimums in the 1980s and 90s); The Sentencing Project, [How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It](#) at 1 (2024) (same).

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

⁵⁹ See, e.g., Kat Albrecht, et al., *Justice Delayed: The Complex System of Delays in Criminal Court*, 53 Loy. U. Chi. L.J. 747, 753 (2022); Emily Rose, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 Mich. L. Rev. 279 (2014).

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

⁶¹ See 21 U.S.C. § 802(58)(A), (59)(A).

⁶² See [Defenders’ Reply Comment on the USSC’s 2025 Proposed Amendments](#) at 3-4 (Feb. 18, 2025).

Commission’s Issue for Comment #7 asks whether Option 2 is consistent with the career-offender directive. Unfortunately, we can see how Commissioners might be concerned with setting a lengthy minimum-sentence requirement for federal drug-trafficking offenses that are enumerated in the directive.⁶³ Federal drug-trafficking offenses generally result in lengthy sentences, so this issue wouldn’t come up much; and we are hopeful that the DOJ would not ask courts to strike down this sort of amendment in deference to the Commission’s policy choices. But this potential concern is a reason for the Commission to choose Option 1 rather than Option 2. If Option 1 is off the table, there is a less-appealing alternative: attach the minimum-sentence requirement only to prior state offenses (and any bracketed federal offenses that the Commission includes). Because those predicates were added through the Commission’s discretionary authority, the Commission unquestionably retains the authority to limit them.

IV. 2K2.1: Cross-referencing ACCA is the simplest way to comply with the 1994 congressional directive that itself cross-references ACCA.

Although §4B1.2 is titled “Definitions of Terms Used in Section 4B1.1,” the section’s definitions apply (by cross-reference) to many other provisions—including the third-most-commonly applied Chapter Two guideline: 2K2.1.⁶⁴ That is, judges wrestle with the §4B1.2’s definitions more frequently in the §2K2.1 (firearms) context than in the career-offender context.

The Commission has proposed two options for dealing with §2K2.1’s cross-reference: (1) enshrining the current definitions of “crime of violence” and “controlled substance offense” in §2K2.1 commentary,⁶⁵ or (2) replacing

⁶³ We don’t see a similar concern about a 13-month (§4A1.1(a)) restriction for de minimus priors, as proposed related to Option 1.

⁶⁴ See USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 44-45 (tbl 20) (noting that §2K2.1 applies to the third-highest percentage of cases (at 13%)).

⁶⁵ Option 1’s proposed amendment to §2K2.1 commentary does not precisely accomplish this. It retains the cross-reference to §4B1.2(b), which would maintain the status quo only if the Commission either promulgates CSO Option 2 or does not take any action to limit the CSO definition. Defenders are advocating for CSO Option 1, under which a §2K2.1 cross-reference to §4B1.2(b) would not maintain the status quo. But the introduction to this proposal expressly says that Firearms Option 1 is intended to “maintain the status quo.” So, for the purpose of writing this

the definitional cross-reference to §4B1.2 with a definitional cross-reference to ACCA.⁶⁶ Defenders urge the Commission to choose the second option, which more faithfully adheres to a relevant congressional directive and would be easier to apply, but with at least one clarification (excluding the “residual clause”) and ideally one other (excluding burglary).

The career-offender directive does not apply to §2K2.1 but, as Commissioners know, there’s another relevant directive: the Violent Crime Control and Law Enforcement Act of 1994, which required the Commission to enhance penalties in cases where a defendant convicted under 18 U.S.C. § 922(g) has one prior conviction for a “violent felony” or a “serious drug offense,” and again where a defendant has two such convictions—using the ACCA definitions for these terms.⁶⁷ As Defenders said in our comment last year, we don’t think the Commission needs to be concerned about this directive.⁶⁸ But regardless, the Commission’s proposal to cross-reference ACCA is a good one, for three reasons:

First, cross-referencing ACCA’s definitions would put to rest any concerns about the directive; it would align §2K2.1 with the directive more closely than ever. And as a policy matter, Congress apparently wanted individuals who almost—but don’t quite—qualify for the ACCA enhancement to get tiered enhancements that move their sentencing ranges ever closer to the 15-year ACCA minimum. Relatedly, but from a guideline-structure perspective, the Commission added the recidivist-based base offense levels (before Congress had even enacted the relevant directive) to make §2K2.1 sentences more “proportional” to ACCA sentences for defendants whose

comment, we presume that if the Commission were to promulgate CSO Option 1, the proposal would be modified to maintain the current definitions (similar to how it proposes maintaining the “crime of violence” definition).

⁶⁶ There is a third option, as the Commission notes in IFC #10: maintaining §2K2.1’s current cross-reference to §4B1.2. And Defenders would not object to that. But we wouldn’t want the Commission to decline to significantly narrow §4B1.2’s definitions out of fear that it might run afoul of the §2K2.1-specific directive. With the ACCA cross-reference as a good option here, there is no need for the Commission to attempt to walk a tightrope between two distinct directives.

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

⁶⁸ [2025 Defender Comment on Career Offender](#) at 34.

criminal histories weren't all that different.⁶⁹ From either perspective, tiered enhancements moving toward an ACCA-length sentence make sense only if a person's criminal history might be moving toward an ACCA sentence, which works only if the definitions are aligned.⁷⁰

Second, cross-referencing ACCA's definitions would simplify things. To be sure, ACCA is the source of most Supreme Court caselaw regarding the categorical approach, which is not known for simplicity. But the fact that most categorical-approach caselaw addresses ACCA, and that Congress has not amended ACCA for 40 years, makes ACCA—in 2026—straightforward to apply. At this point, courts have addressed nearly every potential predicate and placed it on one side of the § 924(e) ledger or the other. Certainly, ACCA has long been easier to apply than the current §4B1.2 (*i.e.* Firearms Option 1), which triggers new waves of litigation every time it gets amended—often requiring debate over how it differs not just from its former incarnations and from ACCA but also from similar definitions at 18 U.S.C. §§ 924(c) and 16(b), and/or 21 U.S.C. § 802(44), (57), and (58). With ACCA, stakeholders generally know the score. Moreover, to the extent there are unsettled questions, courts will have to work out those questions in the ACCA context anyway.

Third, it just makes sense for the firearms guideline's recidivist provision to use definitions from the firearms chapter of the criminal code, which were designed specifically to apply to cases that §2K2.1 sets sentencing ranges for. Relatedly, Congress may well amend ACCA in the future; and surely, the Commission would want §2K2.1's recidivist provision to ride along with that amendment.

However, there is a potential deal-breaker: the residual clause.⁷¹ If §2K2.1 adopts ACCA's definitions without the residual clause—that is, the

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

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

⁷¹ 18 U.S.C. § 924(e)(2)(B)(ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another"); *see also Johnson*, 576 U.S. at 598-606 (2015) (striking ACCA's residual clause as void for vagueness; the "Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy"). In 2016, the

definitions as they work *in ACCA cases*—that would be simplifying. But if courts were to find that the cross-reference incorporates the residual clause, there would be chaos. To start, there’d be substantial litigation over whether the cross-reference had revived the defunct residual clause; certainly, it would be possible.⁷² And if courts answered this question affirmatively, we’d be back where we left off in June of 2015, struggling to apply a provision that the Supreme Court has called a “judicial morass that defies systemic solution” and “a black hole of confusion and uncertainty that frustrates any effort to impart some sense of order and direction.”⁷³

Defenders further suggest that the Commission expressly exclude “burglary”—for two reasons. First, the Commission already removed it once, after finding that burglary is not appropriately designated a “violent” offense.⁷⁴ And the Commission was right about that.⁷⁵ Relatedly, courts and practitioners are no longer used to accounting for burglary convictions in §2K2.1 cases, which could lead to errors. Second, if the Commission does not exclude burglary, it will create disparities. The Supreme Court’s definition of generic burglary is restrictive (more restrictive than generic definitions of other offenses), causing burglary offenses to be heavily litigated; the result is that, in Defenders’ experience, only a small percentage of states’ burglary offenses at this point count as ACCA “burglary.” So, in addition to removing a mostly nonviolent crime, excluding burglary would place defendants from around the country on more equal footing.

Putting these suggestions together, the relevant definitional note would read:

“Controlled substance offense” has the meaning given the term “serious drug offense” in 18 U.S.C. § 924(e).

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

⁷² See *Beckles v. United States*, 580 U.S. 256 (2017) (holding that *Johnson* did not apply to the U.S. Sentencing Guidelines, because the void-for-vagueness doctrine does not apply to advisory guidelines).

⁷³ *Johnson*, 576 U.S. at 605.

⁷⁴ USSG, App. C, [Amend. 798](#) (2016).

⁷⁵ See [Statement of Molly Roth on behalf of Defenders to USSC on Crime of Violence](#) at 33-38 (Nov. 5, 2015) (explaining why burglary should not qualify).

“Crime of violence” has the meaning given the term “violent felony” in 18 U.S.C. § 924(e), except that it does not include “burglary” and it also does not include § 924(e)’s residual clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”), which the Supreme Court struck from that statute in *Johnson v. United States*, 576 U.S. 591 (2015).

Beyond §2K2.1, there are a handful of other cross-references to §4B1.2, and the Commission has asked for comment on what to do about those (IFC #10). Each cross-reference appears in the context of some provision increasing sentence severity based on whether something is a COV or CSO. Ideally, the Commission would delete altogether the provisions in which the cross-references appear; each unnecessarily adds complexity and increases sentence severity based solely on offense type, regardless of individualized circumstances. If the Commission is not able to delete those provisions altogether this year, it can simply leave the cross-references in place for now and mark the provisions in which they appear for deletion in the future.

V. Proposal 3: If the Commission does not resolve the circuit conflicts by redefining “controlled substance offense,” it should resolve the conflicts by choosing Option 1 in both instances.

If the Commission eliminates state-drug priors—which is the right call—that would resolve both of Proposal 3’s circuit conflicts outright. Otherwise, it would have to confront both existing splits: whether CSOs incorporate only federal drug schedules or also state schedules, and whether the relevant schedule is determined at the time of the prior conviction or of the federal sentencing.

A. The Commission should clarify that “controlled substance” is limited to *federally* controlled substances.

If the Commission retains state-drug-offense predicates under §4B1.2 then, at a minimum, it should clarify that its definition of “controlled substance offense” is limited to substances identified in the Controlled Substances Act (Option 1). Defenders addressed this issue in detail in our

2023 comment and encourage the Commission to revisit that submission.⁷⁶ We briefly summarize three principal reasons here:

First, Option 1 reflects the principle, “do the least harm.”⁷⁷ Option 2 would define “controlled substance” in a way that has no limiting principle, creating an enhancement that neither Congress nor the Commission could control.⁷⁸ By limiting the definition to federally scheduled substances, Option 1 places control where it belongs: the federal government.

Second, limiting the CSO definition to federally scheduled substances in Option 1 advances the Guidelines’ goal of uniformity.⁷⁹ Option 2, in contrast, would make enhancements turn “on whatever substance is illegal under the particular law of the State where the [individual] was convicted.”⁸⁰ This would produce arbitrary results and unwarranted sentencing disparities: a defendant could have a career-offender sentence triggered by a

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

⁷⁷ As reflected in the [data handout](#) on the 2026 proposed circuit-conflicts amendment, circuits that count state drug priors involving substances not listed on the federal schedules (and that apply the time-of-conviction approach) generally see more people qualifying as career offenders and also qualifying for enhanced base offense levels under §2K2.1.

⁷⁸ There are real substances at issue here. For example, “kratom” is not federally controlled; but it is criminalized in some states and sold in gas stations in others. See Sophie Levine, [Kratom: The Biggest Drug You’ve Never Heard Of](#), Swift Currie (Fall 2023); Marquise Francis, [‘Gas-station heroin’ targeted in crackdowns by states and cities](#), NBC News (Aug. 17, 2024). Similarly, although not federally controlled, some states control “salvia”, a ceremonial herb, and “hemp,” an agricultural fiber. See [Statement of Michael Caruso on behalf of Defenders to USSC on Acceptance of Responsibility and Controlled Substance Offenses](#) at 31-32 (Mar. 7, 2023) (providing these and other examples with citations).

⁷⁹ *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (“construing the phrase in the Guidelines to refer to the definition of ‘controlled substance’ in the CSA—rather than to the varying definitions of ‘controlled substance’ in the different states—further uniform application of federal sentencing law”); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015) (rejecting what is effectively Option 2 because it “would conflict with *Taylor’s* vision for a uniform generic definition under federal law independent of the definition applied by any particular state”).

⁸⁰ *United States v. Townsend*, 897 F.3d 66, 70 (2d Cir. 2018) (internal quotation marks and citation omitted).

substance that's not controlled in any other state, while a defendant from another state wouldn't be subject to the same range.⁸¹

Third, Option 2 would represent a sharp and unjustified break from the Commission's promulgation history and policy judgments. The definition of "controlled substance offense" was originally modeled on ACCA's definition of "serious drug offense," which clearly includes only federally controlled substances; and although §4B1.2 has been amended numerous times, each iteration has always been anchored to federally controlled substances.⁸² Relatedly, other federal recidivist provisions triggered by drug offenses continue to relate only to federally controlled substances.⁸³

B. The Commission should adopt the time-of-sentencing approach.

With respect to the second circuit conflict, the Commission should adopt the time-of-sentencing approach in Option 1 (not the time-of-prior-conviction approach in Option 2).

Federal courts generally apply the Guidelines "in effect on the date the defendant is sentenced."⁸⁴ Congress codified this rule in the Sentencing Reform Act, 18 U.S.C. § 3553(a)(4)(A)(ii), and the Guidelines reiterate it at §1B1.11(a). There is no reason to carve out an exception to this rule for drug offenses in the career-offender context. After all, if §4B1.2 contained an enumerated list of CSOs—"marijuana, cocaine, and heroin"—and that list was later amended to exclude "marijuana," courts would apply the current version at sentencing, such that marijuana could not serve as a predicate. The Commission's choice to incorporate the Controlled Substances Act by reference—rather than specify drugs—should not alter that conclusion. Incorporation by reference is simply a more efficient way of identifying CSOs: the Commission avoids the need to engage in notice-and-comment each time

⁸¹ See *United States v. Jamison*, 502 F. Supp. 3d 923, 929 (M.D. Pa. 2020) ("The dictates of fairness and consistency compel a uniform standard, especially when such drastic differences result.").

⁸² See [2023 Caruso Statement](#) at 32-34.

⁸³ See 18 U.S.C. §§ 924(e)(2)(A) ("serious drug offense") and 3559(c)(2)(H) ("serious drug offense"); and 21 U.S.C. § 802(44) ("felony drug offense") and (57) ("serious drug felony").

⁸⁴ *Dorsey v. United States*, 567 U.S. 260, 275 (2012).

Congress updates the drug schedules and also ensures the Guidelines remain current with evolving scientific knowledge and legislative judgments.⁸⁵

Adopting a time-of-prior-conviction approach (Option 2) would have the opposite effect. It would freeze obsolete drug schedules in place, “prevent amendments to federal criminal law from affecting federal sentencing,” and “hamper Congress’ ability to revise federal criminal law.”⁸⁶ If the Commission were to adopt Option 2 for both circuit splits—*i.e.*, allowing state-controlled substances beyond the CSA to qualify as CSOs *and* adopting the time-of-conviction approach—the results could get even more absurd. A person could be subjected to enhanced penalties for conduct never criminalized by the federal government and no longer criminalized by any state. In other words, conduct that is presently *legal everywhere*.

VI. Conclusion

Two years ago, the Commission hosted a roundtable on the career-offender guideline and, since that time, there has been significant progress toward an improved guideline. Defenders are grateful that we’ve had opportunities to provide input throughout this process. We will continue to carefully analyze the Commission’s “crime of violence” proposal in preparation for submitting supplemental comments by March 18, and we look forward to hearing from Commissioners and other stakeholders at the upcoming hearing.

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

⁸⁶ *Bautista*, 989 F.3d at 703; see also *Gibson*, 55 F.4th at 166 (explaining that there is “no reason to believe that Congress, which required that federal drug schedules . . . be updated with appropriate additions, reclassifications, and deletions every year, would have intended that such changes in the federal substantive criminal law should be ignored in connection with controlled-substance-related principles of enhanced sentencing for a contemporaneous offense” (internal quotation marks omitted)).

**Federal Public and Community Defenders
Supplemental Comment on Human Smuggling
(January Proposal 4)**

March 18, 2026

The Commission’s March 9 hearing on the human smuggling proposal confirmed what Defenders said before: the proposal lacks empirical support. Commissioners repeatedly asked for data supporting the DOJ’s request for the enhancements—or even where such data might be found—but none was offered. Instead, DOJ’s witness relied on headlines and anecdotes from the specialized unit that prosecutes the most extreme smuggling cases.¹ And at the same time, the Commission’s own data point in the opposite direction.²

The hearing thus exposed the basic problem: There is no support for adding enhancements to a guideline covering more than 4,000 cases per year whose ranges have already proved too high.³ As Defenders have urged, the Commission should follow the data, not headlines from outlier cases.⁴

This supplemental comment highlights exchanges at the hearing that reinforce this conclusion. At multiple points, Commissioners probed the evidentiary basis to justify the proposed amendments. And in each instance, the DOJ did not offer data to support the government’s claims:

- As a threshold matter, the DOJ’s written witness statement appears to conflate human smuggling with human *trafficking*, claiming that human smuggling “inherently exploits” the smuggled.⁵ At the hearing, DOJ’s witness acknowledged that trafficking and smuggling are different

¹ Defenders respect the DOJ witness’s experience as Deputy Chief of the DOJ Human Rights and Special Prosecutions Section, which describes itself as focusing on “complex international immigration, violent crime, and other victim-centered cases.” DOJ, [Human Rights and Special Prosecutions Section](#). But that targeted focus on the most serious outlier cases and conduct necessarily excludes the more typical human smuggling cases. See [Defenders’ Comment on the USSC’s 2026 Proposed Human Smuggling Amendment](#) at 3-5 (Mar. 2, 2026) (“Defenders’ Initial 2026 Comment on Human Smuggling”) (describing mine-run smuggling cases). As the former co-director of Joint Task Force Alpha (which the Human Rights and Special Prosecutions Section helps lead) has explained: “There is a distinction between routine alien smuggling and aggravated cases focused on by this task force.” Ian Hanna & James Hepburn, U.S. Dep’t of State, [Foreign Press Center Briefing: Targeting Human Smuggling and Trafficking in the Northern Triangle and Mexico](#) (June 5, 2024).

² See [Defenders’ Initial 2026 Comment on Human Smuggling](#) at 6-8 (discussing how Commission’s data shows that even the more aggravated cases targeted by these amendments regularly see below-guidelines sentences).

³ *Id.*

⁴ *Id.* at 3-5

⁵ [DOJ Witness Statement of Christina Giffin](#) at 1 (Mar. 2, 2026).

offenses, yet claimed that voluntary smuggling offenses often evolve into trafficking offenses, with people being held against their will and subjected to coercion.⁶ The data simply do not bear this out. Section 2L1.1 has an enhancement for cases where a person is “involuntarily detained through coercion or threat” or for certain aggravated cases involving harboring for purposes of prostitution.⁷ From fiscal years 2020 to 2024, that enhancement has applied in approximately only one percent of cases sentenced under §2L1.1, with no trend of increasing or decreasing.⁸

- Commissioner Wong asked whether there are other sources of data that the Commission should consult to determine the extent of smuggling cases involving mass casualties or sexual abuse, outside of the Commission’s data (which indicates such cases are rare).⁹ Ms. Griffin conceded that the DOJ had not collected information “systematically,”¹⁰ acknowledging that her evidence was “anecdotal” and based on media reports.¹¹ Notably, smuggling researchers Dr. Gabriella Sanchez and Dr. Luigi Achilli highlighted for the Commission the overall lack of empirical research on

⁶ See USSC, [Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines](#) at 5:23:23-5:24:22 (Mar. 9, 2026). The witness claimed that “we are seeing” this in large-scale smuggling operations, without citing more than anecdotal experience.

⁷ USSG §2L1.1(b)(8).

⁸ The data for these analyses were extracted from the USSC “Individual Datafiles” spanning fiscal years 2020 to 2024. The dataset is publicly available for download on the Commission’s [website](#).

⁹ USSC, [Public Hearing](#) at 5:03:09-5:03:50. The data briefing showed that both are extremely rare. USSC, [Public Data Briefing on Proposed Amendment on Human Smuggling](#) at 16 (96% of cases did not involve injury/death enhancement, while only 1% involved death); 20 (showing that the median number of victims in cases involving death in FY 2024 was 1 person, and the average was 4); 28 (“In fiscal year 2024, 35 cases [out of 4,179] involved some form of sexual conduct against one or multiple victims.”).

¹⁰ USSC, [Public Hearing](#) at 5:06:03-5:06:54.

¹¹ See *id.* at 5:06:13-5:06:52 (stating that Department’s basis for asserting an increase in large-scale smuggling came from “look[ing] at the mass casualty events we could find on Lexis”).

smuggling, and the media's "focus on the most lethal or high-profile cases, which leads to reproducing stereotypical notions of smuggling."¹²

- Commissioner Wong returned to this theme later in the hearing, asking whether panelists were seeing cases where there is more sexual abuse than reflected in presentence reports.¹³ The DOJ witness claimed that sexual assault is underreported in PSRs, alluding to forthcoming sources and data to support that statement.¹⁴ Defenders are not sure what the presaged data will be,¹⁵ but are confident in encouraging the Commission to use its empirical study tools, including special coding projects, receiving information from experts, and the kind of comprehensive review Defenders have urged.¹⁶ Particularly given the extraordinarily broad reach of the current (b)(7) enhancement, the routine deportation of migrant material witnesses prior to sentencing in these cases, and the

¹² Gabriella E. Sanchez & Luigi Achilli, [Comment on the USSC's Proposed Human Smuggling Amendment](#) at 2 (Mar. 8, 2026). In fact, Drs. Sanchez and Achilli describe this Commission as "the only agency in the Western Hemisphere that systematically publishes official data concerning smuggling." *Id.*

¹³ USSC, [Public Hearing](#) at 5:18:08-5:18:20. See [Data Briefing](#) at 28 ("In fiscal year 2024, 35 cases [out of 4,179] involved some form of sexual conduct against one or multiple victims.").

¹⁴ USSC, [Public Hearing](#) at 5:16:53-5:17:52; 5:18:20-5:18:30. To the extent that the witness was referring to incidents of sexual abuse that are never reported to law enforcement, it is not possible to quantify these; no SOC can capture misconduct that is never reported. As for the suggestion that the Commission's data is incomplete because *reported* sexual assaults are not always reflected in PSRs, POAG's witness explained that PSRs usually do not include allegations of sexual assaults when those allegations do not involve the sentenced individual (i.e. because the alleged sexual assault happened before, after, or unrelated to the sentenced individual's participation in the smuggling conduct). *Id.* at 5:49:00-5:50:23. This is as it should be: individuals should not be penalized for the unknown or unforeseeable misconduct of someone else. In our experience, if there is an allegation that the person being sentenced was involved in a sexual assault, that allegation is always included in the PSR.

¹⁵ As smuggling researchers point out, when it comes to quantification of sexual misconduct it is "fundamental to examine the source and the politics behind quantification" and to proceed carefully to avoid compounding racial disparities. [Sanchez & Achilli Comment](#) at 5.

¹⁶ See generally [Defenders' Initial 2026 Comment on Human Smuggling](#).

lower standard of proof at sentencing, the Commission should use those tools before promulgating any further enhancements.

- When asked if states prosecute cases of sexual assault against migrants that occur in relation to smuggling offenses, the DOJ witness said this sort of prosecution is difficult because victims often cannot identify the state where the alleged assault occurred.¹⁷ But in Defenders' experience, migrants in mine-run, border-district smuggling cases are not typically transported from one U.S. state to another U.S. state; they pay to cross into (and most often are arrested in) a particular U.S. border state of their choosing. And if an alleged sexual assault is not subject to prosecution in the U.S. because it happened in Mexico, then it can be prosecuted by Mexican authorities. More importantly, any jurisdictional barriers to prosecution do not justify the use of an offense-based enhancement or cross reference that would penalize a person for unforeseen/unknown sexual abuse committed by someone else (whether by another migrant, a smuggler, or an immigration enforcement agent) during a smuggling offense. Otherwise, our clients and other sentenced individuals who help migrants cross the border could have their sentences enhanced for alleged assaults by others that occurred hundreds or thousands of miles away, long before (or after) the sentenced person even became involved in the migrant's journey—without any opportunity to investigate or question the accuser, and with a low burden of proof. Strict liability guideline enhancements or cross-references that lack those procedural protections do not track culpability; nor will they prevent future sexual assaults.
- Vice Chair Murray noted that there is a high proportion of below-range §2L1.1 cases and asked the DOJ's witness whether there is a counter to this institutional feedback signal indicating that sentencing ranges are too high already.¹⁸ The witness responded that fast-track and substantial-assistance departures account for the gap.¹⁹ But DOJ cannot make claims as to what the below-range rate would look like without fast-track and substantial-assistance cases because the data do not permit that

¹⁷ See USSC, [Public Hearing](#) at 5:22:43-5:23:22. We assume the DOJ witness was discussing states within the U.S., not states in Mexico.

¹⁸ *Id.* at 5:07:00-5:07:30.

¹⁹ *Id.* at 5:07:30-5:08:40.

conclusion. As Defenders have explained, the way Commission data records sentence placement makes it difficult to determine how many cases receiving a substantial-assistance or fast-track reduction *also* received a downward variance.²⁰ Regardless of the unknowns surrounding potential additional variances, the fact that there are considerable percentages of (non-substantial assistance, non-fast track) below-range sentences, even in aggravated cases, shows that the guideline ranges are greater than necessary.²¹

- Finally, the hearing revealed that the DOJ lacks data justifying an enhancement for offenses involving transnational criminal organizations (TCOs). Vice Chair Restrepo asked the DOJ witness whether there was anecdotal evidence as to how often TCO leaders are actually prosecuted; the witness did not offer anything precise, but replied that “we are looking at the leaders of these organizations as consistently as possible.”²² Vice Chair Restrepo then asked whether there was information on how often individuals in these cases receive leader-organizer role adjustments; again, the witness did not have numbers.²³ Not only is DOJ’s claim that smuggling cases increasingly involve TCOs empirically unsupported, it also repeats the same unsupported claims that U.S. immigration enforcement agencies have been making for decades.²⁴ Such claims have

²⁰ The Commission’s current variable for sentence placement with respect to guideline range reflects only one outcome. For example, a case recorded as receiving a fast-track reduction could have also received an *additional* variance or departure, but that information will not be reflected in the sentence placement data. [Defenders’ Initial 2026 Comment on Human Smuggling](#) at 6 n.17.

²¹ See *id.* at 6-8; see also [Data Briefing](#) at 7, 18 (indicating 30% below range sentences in cases involving 100 or more individuals under §2L1.1(b)(2) and 42% below range sentences in cases involving death under §2L1.1(b)(7)). Also, in our experience, severe cases often do not receive fast-track reductions.

²² USSC, [Public Hearing](#) at 5:12:12-5:13:03. Of §2L1.1 cases sentenced from fiscal year 2020 to fiscal year 2024, only 4% involved some sort of aggravated role adjustment. USSC, [Individual Datafiles](#). Of course, that does not mean individuals who received such an enhancement are affiliated with a TCO.

²³ USSC, [Public Hearing](#) at 5:13:03-5:13:10.

²⁴ See David Spener, *Clandestine Crossings: Migrants and Coyotes on the Texas-Mexico Border* 151-152, 203 (2009) (noting that since the 1970s, U.S. law enforcement agencies have made claims portraying human smuggling networks as

been squarely refuted by scholars who have studied smuggling pathways.²⁵ Moreover, the DOJ's request for a broader definition of TCOs confirms Defenders' concerns that an enhancement based on the TCO label could exacerbate ethnic profiling and sweep in minor conspiracies.²⁶

* * *

Last week's hearing highlighted the many unknowns lurking around the proposed increases to a guideline already haunted by a history of unstudied increases. The Commission should not raise penalties until and unless it has undertaken a comprehensive study of these offenses. If anything, the Commission should instead take the opportunity to fix this broken guideline by narrowing and limiting existing enhancements (as discussed in our initial comment), to better effectuate the statutory purposes of sentencing.

increasingly dangerous and sophisticated organizations that pose a growing threat to national security).

²⁵ See [Defenders' Initial 2026 Comment on Human Smuggling](#) at 29 n. 94, 95 (discussing scholarship); see also [2026 Sanchez and Achilli Comment on Human Smuggling](#) at 2 (noting that "there is sufficient evidence to conclude the vast majority of smuggling cases prosecuted in the US do not pertain to the domain of transnational criminal organizations[,] and "the vast majority of smuggling cases involve tasks performed by loosely organized local groups, often comprised by friends and family members," rather than by TCOs (emphasis omitted)); Samuel Loroña Celaya and Gabriella Sanchez, [A Borderlands Perspective on the Interaction Between Migrant Smuggling and Drug Trafficking: The Case of the Altar Valley](#) in Hope Border Inst. and Temple Univ., *Reimagining the Migration Protection System: Critical Reflections from the Border* at 24 (2024) ("Contrary to the argument that migrant smuggling and drug trafficking have become one and the same, it's important to point out that the people involved in migrant smuggling limit themselves to having a relationship with the faction that charges them for passage of each person through their territory. In other words, there is no structural convergence between those who smuggle migrants and those who traffic drugs. The connection between groups is limited to so-called 'right of passage' payment or fee.") (internal citation omitted) (The original piece is in Spanish; translation is available upon request).

²⁶ [DOJ Witness Statement](#) at 5-6 ("The guidelines should incorporate the objective elements of this definition, *i.e.*, that the organization is transnational and engages in criminal activity."). Given the inherently transnational nature of these offenses, such a broad definition risks covering every small cross-border conspiracy. See also [Defenders' Initial 2026 Comment on Human Smuggling](#) at 29-32 (discussing risks of ethnic profiling and disparity).

**Federal Public and Community Defenders
Comment on Human Smuggling
(January Proposal 4)**

March 2, 2026

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Federal Public and Community Defenders urge the Commission to reject the proposed increases to §2L1.1. Defenders represent both those accused of smuggling and those being smuggled, who are detained as material witnesses or prosecuted for entering illegally. This gives us deep insight into the nature of these offenses. The Department of Justice (the Department) has asked the Commission, with no empirical basis, to expand or add several specific offense characteristics (SOCs) to this broken guideline. But as explained below, this guideline already lacks an empirical basis for its high guideline ranges, which overstate culpability and are often ignored by courts. There is no need for additional unstudied increases that will fall largely on the backs of people of color in low-income border communities, especially given the lack of evidence that doing so will make migrants any safer.

The Commission should conduct a comprehensive study of §2L1.1 offenses before taking action. Defenders are more concerned than anyone about the safety of migrants; they are our largest group of clients.¹ But these unempirical and unnecessary penalty increases will not make border-crossing safer, and history shows increased criminal penalties will not impact the demand for clandestine border-crossing services. As discussed below, the data show that sentences often fall below the guideline range in cases sentenced under §2L1.1, even those with aggravated facts, which means the ranges are already too high in many cases.

In general, offenses sentenced under §2L1.1 are not hostage situations, and they almost never involve people trapped in shipping containers. These are market-driven cooperative offenses (comparable in some ways to drug offenses), in which those being smuggled pay for assistance in committing criminal offenses themselves (illegal re/entry). Most commonly, Defenders see scenarios in which a group of individuals is arrested hiding in a passenger vehicle at a checkpoint or walking through the desert (trying to bypass checkpoints)—all desperately seeking a better life. Upon capture, the government often prosecutes migrants for their immigration offenses. Those migrants who are not immediately prosecuted are held as material witnesses

¹ Defenders and panel attorneys represent a wide variety of those being smuggled; some are held as material witnesses, but many are prosecuted separately for illegal entry and/or reentry.

and detained in jail, prior to their transfer to detention by the Department of Homeland Security (DHS) and removal from the country.

Much like in drug-trafficking cases, the majority of our clients sentenced for smuggling are low-level players in a larger conspiracy. They receive small sums of money for very limited participation (usually driving a group concealed in a vehicle for a very short period of time or guiding a group through the brush to make it around a checkpoint; sometimes part of their own smuggling fee might be paid in exchange for performing other tasks). In general, they have little control over the offense logistics, and they are fungible. Also, like in drug-trafficking cases, the applicable guideline involves empirically deficient, quantity-driven sentencing that produces guideline ranges out of touch with culpability, with an outsized impact on people of color.

This comment proceeds in three parts. Section I lays out the ways in which this guideline is already broken, and it explains why the proposed amendments lack an empirical basis. Section II explains how the proposed amendments will not further the statutory purposes of sentencing and will compound unwarranted disparities. Section III explores an alternative suggestion: if the Commission feels that it must act now, it should focus on improving the guideline's ability to distinguish between more and less culpable individuals. Several existing enhancements—including the current (b)(7)—lack mens rea or causation requirements and routinely hold individuals accountable for harms caused by others, including by immigration enforcement agents—that they had absolutely no control over and could not have foreseen. Further, if the Commission feels that it must take action related to sexual offenses, it can simply move the commentary's instruction that “serious bodily injury” includes criminal sexual abuse to the text of the guideline itself.

I. Section 2L1.1 is broken, and the Commission should not increase the sentencing ranges it produces without significant further study.

Section 2L1.1, the fifth-most commonly applied guideline,² is broken due to decades of unstudied increases that weren't empirically grounded. Sentences routinely fall below the guideline range in §2L1.1 cases (even in cases involving bodily injury or death).³ The Commission should pause and study this fundamentally flawed guideline before taking any action that would increase sentencing ranges that judges are finding already too high.

This section first discusses what the heartland smuggling case looks like, which is nothing like the sensationalized media accounts; then it addresses the lack of empirical support for this proposal; and finally, it addresses the decades of unempirical increases and factor creep, which led to a guideline largely out of touch with offense seriousness.

A. Beyond the headlines: the mine-run §2L1.1 case

What do these cases really look like? In the last five fiscal years, 96% of cases sentenced under §2L1.1 came from the five Southwest border districts.⁴ And if the Commission were to study smuggling offenses, it would find that these cases look different in different border communities. With vehicular smuggling cases, Defenders often see cases involving an individual, desperately in need of money, who gets paid a few hundred dollars to drive a small group of people a short distance through a checkpoint.⁵ If people are

² See USSC, [2024 Sourcebook of Federal Sentencing Statistics](#), at 44-45 tbl. 20 (showing that §2L1.1 applies in the fifth-highest percentage of cases (at 7.3%)).

³ Sentences were below the guideline range in 55% of cases from FY 2020-2024 in §2L1.1 cases. In §2L1.1 cases with levels applied for the specific offense characteristic for bodily injury or death (§2L1.1(b)(7)), the below-range rate was 54%. The data for these analyses were extracted from the USSC "[Individual Datafiles](#)" spanning fiscal years 2020 to 2024. The dataset is publicly available for download on its [website](#).

⁴ [Individual Datafiles](#), FY 2020 to 2024.

⁵ Border Patrol operates several immigration checkpoints within the interior of the country, north of the border. See U.S. Gov't Accounting Off., [Border Patrol Lacks Important Information about Immigration Checkpoints Within the United States](#) (June 29, 2022). They are part of a longstanding policy of "prevention through deterrence," which involves aggressive enforcement to make illegally entering the

concealed in the trunk or cargo area of a car, they are generally there only for a very short period of time to get through the checkpoint, and they often have access to egress methods, airflow, and the ability to communicate with the driver.⁶ We also have clients who get paid a small sum to guide a group of people on foot through rough terrain to circumvent a checkpoint. Sometimes our smuggling clients are related to the individuals being transported, or they are even part of the migrant group themselves. The vast majority of people sentenced under this guideline are people of color (81% Hispanic, 9% Black).⁷ And most are American citizens.⁸

As migration experts have pointed out, there is a key difference between *smugglers* and *traffickers*: “smugglers have clients while traffickers have captives.”⁹ Almost none of our cases involve coercion; the people being smuggled want to avoid detection, as they are committing criminal offenses themselves (illegal entry or illegal reentry), and they pay large sums of money to avoid detection. Many of our smuggling clients are often low-level players in a diffused conspiracy, with little knowledge regarding the other players or those with more responsibility, and they are often just as fungible and unknowledgeable as drug couriers.

Scholars of irregular migration have documented the collaborative nature of illegal border crossings in the U.S. Southwest, dispelling myths surrounding the media portrayal of dangerous “coyotes.”¹⁰ They have shown that those aiding migrants to enter illegally are often themselves part of the

country so deadly and costly that fewer people attempt to do so. See U.S. Gen. Acct. Off., GAO-99-44, [*Illegal Immigration: Status of Southwest Border Strategy Implementation*](#) 3 (1999) (describing policy’s attempt to “shift [migrant] traffic [to] areas that were more remote and difficult to cross).

⁶ See section II.B.2.

⁷ [Individual Datafiles](#), FY 2024.

⁸ *Id.*

⁹ Jasper Gilardi, Migration Pol’y Inst., [*Ally or Exploiter? The Smuggler-Migrant Relationship is a Complex One*](#) (Feb. 5, 2020).

¹⁰ See David Spener, *Clandestine Crossings: Migrants and Coyotes on the Texas-Mexico Border* 163-71 (2011) (documenting how migrants and coyotes collaboratively draw on their social connections and cultural knowledge to stage successful border crossings); Gabriella Sanchez, *Human Smuggling and Border Crossings* at Chapter 2 (2015) (describing the legal history of immigration enforcement and the collaborative nature of irregular crossing in the Sonoran desert).

border communities, which were historically fluid until immigration enforcement ramped up near the turn of this century.¹¹ The involvement of large transnational criminal organizations in these offenses is rare, although smugglers and migrants often have to pay a “piso,” or a sort of tax, to such organizations in order to pass through certain territories.¹²

B. Data do not support the Department’s requests to increase sentencing ranges in §2L1.1 cases, and increased sentences would fall largely on Hispanic individuals in low-income border communities.

Data show that we cannot criminalize our way out of immigration offenses, specifically human smuggling, via guideline increases.¹³ While overall unauthorized border crossings have dropped sharply over the past year,¹⁴ no data suggest that is because of increased Guidelines penalties in immigration offenses.¹⁵ And turning to data regarding §2L1.1, sentences under this guideline routinely fall below the guideline range.¹⁶ This indicates

¹¹ Spener, *Clandestine Crossings* at 160-73 (describing decentralized structure of smuggling networks).

¹² See Gilardi, [Ally or Exploiter?](#) (Feb. 5, 2020); see also Victoria A. Greenfield, et al., [Human Smuggling and Associated Revenues: What Do or Can We Know About Routes from Central America to the United States?](#), Homeland Sec. Operational Analysis Ctr., RAND Corp. at 9, 22-23 (2019).

¹³ See Section I.C. *infra* (discussing Guidelines increases in the 1990s). Compare USSC, [1996 Sourcebook of Federal Sentencing Statistics](#) at Table 17 (1,005 cases sentenced with §2L1.1 as primary guideline) with USSC, [2024 Sourcebook of Federal Sentencing Statistics](#) at Table 20 (4,345 cases sentenced with §2L1.1 as primary guideline).

¹⁴ See U.S. Dept. of Homeland Sec., [Historic 9th Straight Month of Zero Releases at the Border](#) (Feb. 4, 2026); see also Madeline Halpert, [Illegal US-Mexico border crossings hit lowest level in over 50 years](#), BBC (Oct. 7, 2025).

¹⁵ Defenders have previously highlighted how ineffective criminal penalties are in deterring undocumented immigration offenses. [Statement of Marjorie Meyers on behalf of Defenders to USSC](#) at 9-11 (Mar. 16, 2016). Increased penalties have little impact on the demand for illegal crossing services for migrants driven by economic, humanitarian, and familial reasons. And decades of criminalized immigration enforcement have done little to impact the frequency of these cases. See *infra* notes 41-42 and accompanying text (discussing increased frequency of sentenced smuggling cases and previous guideline increases).

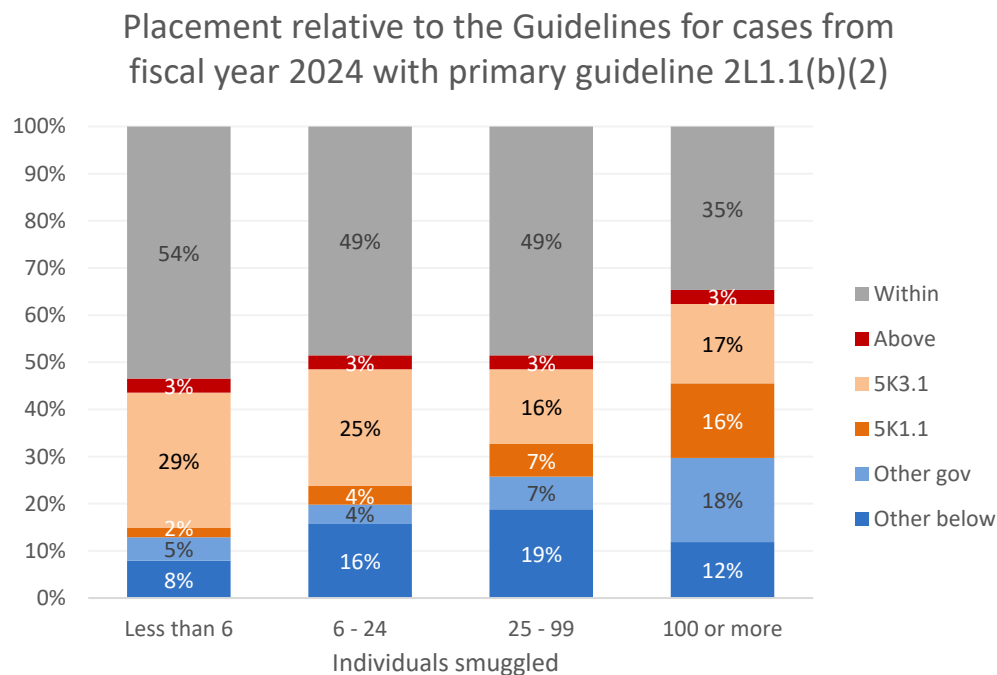
¹⁶ [Individual Datafiles](#), FY 2020 to 2024.

there is a problem in these cases, but the problem is not that the guideline is generating ranges that are too low.

1. Even in aggravated cases, data show that §2L1.1's sentencing ranges are not well calibrated.

In the past five fiscal years, only 43% of cases sentenced under primary guideline §2L1.1 received a within-guidelines sentence; 55% of such cases were sentenced below the advisory guideline range.¹⁷

And this holds true even in cases involving aggravating circumstances. The data briefing shows that cases involving increases under SOC (b)(2) for increased number of smuggled persons actually had *higher* incidences of below-range sentences than cases involving no increase under SOC (b)(2).¹⁸



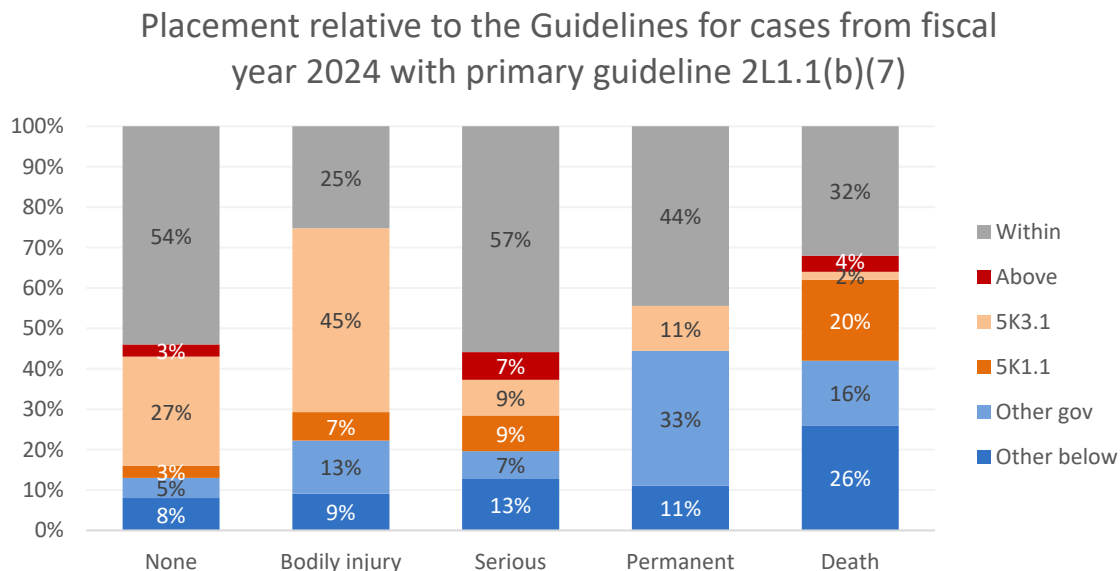
¹⁷ [Individual Datafiles](#), FY 2020 to 2024. Because of the way that placement relative to guideline range is recorded, it is difficult to determine how many cases receiving a fast-track reduction (35% of these cases) also might have received a variance or departure. But the percentage of within-range sentences rose in fiscal year 2024 to 52%, while the percentage of cases receiving fast-track reductions dropped to 27%. See USSC, [Quick Facts: Alien Smuggling Offenses](#) (FY 2024).

¹⁸ Figure created from USSC, [Public Data Briefing on Proposed Amendment on Human Smuggling](#) at 7 (Feb. 13, 2026).

Less than half of cases that received an enhancement under (b)(2) fell within the guideline range.¹⁹

Data also show that over the last five fiscal years, only 34% of cases receiving the harsh (b)(6) SOC enhancement, which automatically moves cases up to at least offense level 18, received within-guidelines sentences, while 65% of such cases received sentences below the guideline range.²⁰

And on average, sentences fell below-range even in the rare cases where the (b)(7) enhancements (related to injury or death) applied,²¹ indicating that this enhancement, too, fails to properly calibrate sentences that are sufficient but not greater than necessary.²²



¹⁹ *Id.*

²⁰ [Individual Datafiles](#), FY 2020 to 2024.

²¹ [Public Data Briefing](#) at 17.

²² Figure created from [Public Data Briefing](#) at 18.

Thus, the data do not support the Department's request for increased penalties.²³ Although one thing that the data is clear on is that additional (unnecessary) enhancements would largely impact Hispanic individuals.²⁴

2. The ranges §2L1.1 currently generates, coupled with § 3553(a), are more than sufficient for outlier cases.

In outlier cases involving increased culpability, the government has a variety of tools at its disposal to seek higher penalties. The Department can charge multiple counts, and it can bring § 1324 charges carrying the possibility of the death penalty in death-resulting cases. Also, in cases resulting in death, the guideline has a cross-reference instructing courts to apply the appropriate homicide guideline “if the resulting offense level is greater than that determined under this guideline.”²⁵

And §2L1.1 already has a plethora of other enhancements available to account for aggravated conduct in outlier cases. As the co-director of Joint Task Force Alpha for the Western District of Texas, targeting human smuggling, has explained: “There is a distinction between routine alien smuggling” and aggravated cases focused on by this task force.²⁶ Task force leaders explained that, even for the outlier cases, the Department can use existing guideline enhancements coupled with charging decisions to “get to a deterrent message.”²⁷

²³ And the data are limited with respect to harms to multiple people: the data briefing slide on harms to more than one person provides averages, which can be impacted by outlier cases, especially in such a small pool of cases (160 cases). [Public Data Briefing](#) at 16-17.

²⁴ *Id.* at 9, 25.

²⁵ USSG §2L1.1(c)(1).

²⁶ Ian Hanna & James Hepburn, U.S. Dep't of State, [Foreign Press Center Briefing: Targeting Human Smuggling and Trafficking in the Northern Triangle and Mexico](#) (June 5, 2024).

²⁷ *See id.* (emphasizing the importance of “focus[ing] our resources to go after the most egregious targets” to be able to use the guideline's enhancements for over 100 persons smuggled or death resulting). Mr. Hanna discussed ways to increase sentences under §2L1.1's structure, favorably invoking the more harsh drug trafficking guideline. However, it does not appear that increased guideline penalties provide a “deterrent message” in smuggling cases, given that §2L1.1 frequencies have increased over time, despite past increases in offense levels. *See infra* n. 41 and

C. Section 2L1.1's history is one of unstudied increases, resulting in overinflated guideline ranges that overstate offense seriousness and individual culpability.

A look at the history of §2L1.1 provides insight into why sentences routinely fall below guideline ranges here. After years of unstudied increases and factor creep, §2L1.1 has drifted away from measuring culpability, and toward producing overinflated ranges.

The original 1987 Guideline carried a base offense level of 6: half of today's lowest base level.²⁸ It had only two SOC enhancements; both were specific to the individual being sentenced.²⁹ In 1987, the Commission estimated that 50% of "first time offenders" sentenced for smuggling undocumented people after being convicted at trial would be sentenced to prison under the new Guidelines scheme.³⁰ By contrast, in fiscal year 2024, 80% of individuals in Criminal History Category I sentenced under primary - guideline §2L1.1 received prison terms, even *after* pleading guilty.³¹

What happened? While there have been several amendments to §2L1.1 over the years, two are particularly relevant to the proposed amendment. First, the Commission created the ancestor of current SOC (b)(2) in 1992, with tiered increases based on the number of people smuggled (replacing language in the commentary suggesting upward departures for cases

accompanying text (discussing history of guideline increases and increased frequency of sentenced smuggling cases).

²⁸ Compare USSG §2L1.1(a) (1987) (providing base offense level 6) *with* USSG §2L1.1(a) (2025) (providing base offense levels between 12 and 25). There is scant information in the original Manual or the Supplemental Report to Congress as to whether this guideline was created by looking at pre-SRA sentences, but the original §2L1.1 guideline levels appear to have been similar to that of the Parole Commission guideline that preceded it. USSC, [*Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*](#) 25, Appx. C 45 (1987).

²⁹ One SOC enhancement applied "if the defendant committed the offense for profit or with knowledge that the alien was excludable as a subversive," and another applied if the defendant was previously convicted of a similar offense. USSG §2L1.1(b)(1), (2) (1987).

³⁰ [*1987 Supplementary Report*](#) at 33 tbl. 1(a). No estimate was provided for sentences for individuals who plead guilty.

³¹ This statistic does not include cases that had any law enforcement contact or any specific offense characteristics applied. [Individual Datafiles](#), FY 2024.

involving “large numbers of aliens”).³² There was little explanation for this, although the amendment noted that the Commission designed the new SOC to “work in conjunction with the operation of the [aggravating] role enhancements from §3B1.1.”³³ Like other quantity-based enhancements in the Manual, the (b)(2) enhancement proved to be a flawed proxy for individual offense culpability,³⁴ and it currently does not track the application of role increases.³⁵

But a later, unstudied package of increases shaped §2L1.1 into the overinflated guideline we know today. A congressional directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), mandated a variety of increases to the guideline, including increased penalties for number of persons smuggled, among other enhancements.³⁶ Congress directed the Commission to increase the (b)(2) enhancement for number of persons by “at least 50 percent,”³⁷ but the Commission went beyond even that baseline in creating the new table at (b)(2).³⁸ Congress also

³² USSG App. C, [Amend. 450](#) (Nov. 1, 1992).

³³ *Id.* at Reason for Amendment.

³⁴ See [Defenders’ Comment on the USSC’s 2025-2026 Economic Offenses Proposed Amendments](#) at 4-6 (Feb. 10, 2026) (discussing flaws of loss as quantity-based increases); [Defenders’ Comment on the USSC’s 2024-2025 Drug Offenses Proposed Amendments](#) at 3, 7-8 (Mar. 3, 2025) (discussing flaws of drug quantity-based increases).

³⁵ In the past five fiscal years, only 4% of individuals who received the (b)(2)(A) enhancement (6-24 persons smuggled) also received an aggravated role increase, whereas 24% received a minor role reduction. For those who received an increase under (b)(2)(B) (25-99 persons smuggled), 13% received an aggravated role increase, whereas 23% received a minor role reduction. For those who received an increase under (b)(2)(C) (100 or more persons smuggled), 39% received an aggravated role increase, whereas 10% received a minor role reduction. [Individual Datafiles](#), FY 2020 to 2024.

³⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 203(e); 110 Stat. 3009.

³⁷ *Id.* at § 203(e)(2).

³⁸ With respect to the number of persons enhancement, Congress directed the Commission to “review the sentencing enhancement for the number of aliens involved (U.S.S.G. 2L1.1(b)(2)), and increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act.” *Id.*; see also [Defenders’ Comment on the USSC’s 1997 Alien Smuggling](#)

directed the Commission to “impose an appropriate sentencing enhancement” on an individual who, in the course of committing a smuggling offense “(i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual; . . . or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury.”³⁹ This directive, and the Commission’s rushed response,⁴⁰ rather than any exercise of the Commission’s empirical function, led to the §2L1.1 guideline we know today, with its higher base offense levels and present-day SOC (b)(6) (reckless endangerment) and (b)(7) (injury or death), which—unlike the directive’s mandate—are not limited to the sentenced individual’s own acts.

As it turns out, this sharp increase in punishment did not deter smuggling offenses: by 2006, cases with §2L1.1 as primary guideline rose to more than triple the amount in 1996.⁴¹ This should surprise no one: as Defenders and others have explained before, criminal penalties are ineffective at deterring human smuggling, which is driven by market forces related to geopolitical, socioeconomic, and humanitarian factors.⁴² And the Guidelines cannot change the nature of smuggling offenses. To the extent that smuggling offenses may be riskier than in the past, scholars have noted that as increasingly militarized immigration enforcement grew over the past three decades, migrants have had to take more dangerous routes through

[Proposed Amendments](#) at 2-4 (noting amendment far exceeded mandated increase in congressional directive and was unsupported by Commission data).

³⁹ *Id.* at Div. C § 203(e)(2)(E).

⁴⁰ The Commission first implemented a package of temporary emergency post-IIRIRA amendments, without notice and comment. USSC, [Proposed Emergency and Non-Emergency Amendments to the Sentencing Guidelines for 1997](#) (Jan. 2, 1997).

⁴¹ Compare USSC, [1996 Sourcebook of Federal Sentencing Statistics](#) at Table 17 (1,005 cases sentenced with §2L1.1 as primary guideline) with USSC, [2006 Sourcebook of Federal Sentencing Statistics](#) at Table 17 (3,462 cases sentenced with §2L1.1 as primary guideline).

⁴² See [Meyers Statement](#) at 9-11 (discussing lack of deterrent effect of increased sentences in immigration context); [ACLU Comment on the USSC’s 2016 Proposed Amendments](#) at 3 (Mar. 21, 2016) (discussing lack of deterrent effect of prosecutions on illegal reentry offenses); [Human Rights Watch Comment on the USSC’s 2016 Proposed Amendments](#) at 8 (Mar. 21, 2016) (discussing lack of deterrent effect of criminal prosecutions on irregular migration).

harsh terrain, increasing both risks to migrants and their perceived need for clandestine crossing methods.⁴³

D. The current §2L1.1(b)(6) and (b)(7) are already overbroad and result in unwarranted similarities and unwarranted disparities.

The SOC at §2L1.1(b)(6) and (b)(7)—which the Commission has proposed broadening—are part of this broken guideline, and they are too broad as things stand.

SOC (b)(6) is far broader than the Congressional directive that spawned it. This provision imposes a two-level increase whenever an offense “involved intentionally or recklessly creating a substantial risk of death or serious bodily injury.”⁴⁴ Congress’s directive in IIRIRA required an enhancement only for an individual who “engages in conduct that consciously or recklessly places another in serious danger.”⁴⁵ The directive focused narrowly on an individual’s conduct and culpable mental state. Yet the SOC as written can, and frequently does, apply based on the actions of others, not the sentenced individual.⁴⁶

⁴³ See Irene I. Vega, [“Reasonable Force” at the U.S.-Mexico Border](#), 69 Social Problems 1154, 1155 (2022) (explaining that “prevention through deterrence” is a “deadly policy” that redirected migration flows into remote terrain); Wayne A. Cornelius, [Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy](#), 27 Population & Development Rev. 661, 674-77 (2001), (finding that intensified border enforcement displaced crossings toward hazardous desert regions, increasing migrant mortality risks); U.S. Gov’t Accountability Off., GAO-06-770, [Illegal Immigration: Border-Crossing Deaths Have Doubled Since 1995: Border Patrol’s Efforts to Prevent Deaths Have Not Been Fully Evaluated](#) 14-18 (Aug. 15, 2006) (reporting increased migrant deaths associated with enforcement strategies that shifted crossings into more remote terrain).

⁴⁴ USSG § 2L1.1(b)(6).

⁴⁵ [IIRIRA](#), Pub. L. 104-208, Div. C at § 203(e)(2)(E)(iii).

⁴⁶ See, e.g., *United States v. De Jesus-Ojeda*, 515 F.3d 434, 443 (5th Cir. 2008) (upholding application of reckless endangerment enhancement for “cohorts” reckless or intentional creation of a substantial risk of death or serious bodily injury); *United States v. Wilkerson*, No. 24-50404, 2025 WL 1605123, at *1 (5th Cir. June 6, 2025) (upholding application of (b)(6) enhancement for co-conspirator’s conduct of “transporting aliens in a vehicle’s trunk” as it was “was reasonably foreseeable to

Commission data suggest that the overbroad (b)(6) does a poor job of quantifying risk. In fiscal year 2024, §2L1.1(b)(6) applied in 1,550 cases, yet 90% of those cases involved no injury or death, suggesting that the enhancement routinely punishes *theoretical* risk.⁴⁷ At the same time, sentences frequently fell below the guideline range in §2L1.1 cases involving the (b)(6) enhancement, suggesting that this enhancement produces guideline ranges that overstate both risk and an individual's culpability.⁴⁸

The (b)(7) SOC adds between two and ten offense levels when bodily injury or death occurs, yet it does not contain a requirement of causation or a nexus to the sentenced individual's conduct, and it has no mental state requirement. Because the current (b)(7) enhancement is so broad, it fails to advance just punishment, cannot promote deterrence, and risks producing unwarranted similarity, running afoul of § 3553(a)(6). The current (b)(7) SOC is far broader than the directive, which instructed the Commission to enhance punishment for a "defendant" who "murders or otherwise causes death, bodily injury serious bodily injury to an individual."⁴⁹ The directive's focus on causation contrasts sharply with the guideline's broad language, which does not require that a sentenced individual act intentionally or even recklessly, which combined with expansive relevant-conduct principles,⁵⁰ means sentenced individuals can receive massive increases based on events only tenuously connected to their conduct,⁵¹ or for the conduct of others even

her given her knowing participation in the conspiracy to transport illegal aliens in their vehicles").

⁴⁷ [Public Data Briefing](#) at 13.

⁴⁸ Nearly 65% of these cases received below guidelines sentence. [Individual Datafiles](#), FY 2020 to 2024.

⁴⁹ [IIRIRA](#), Pub. L. 104-208, Div. C at § 203(e)(2)(E)(i).

⁵⁰ See U.S.S.G. § 1B1.3(a)(1)(B).

⁵¹ See *United States v. Mondragon-Gonzalez*, No. 24-50758, 2025 WL 2465752, at *1 (5th Cir. Aug. 27, 2025) (affirming 480-month sentence in smuggling offense where Mr. Mondragon "hired a co-conspirator to transport illegal aliens," resulting in a fatal crash that he was not present for); *United States v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003) (applying injury/death SOC when smuggler arranged for transport in an overloaded van and the migrants were injured or killed in accident resulting from a tire blow-out, even though that individual was not driving); *United States v. Flores-Flores*, 356 F.3d 861, 863 (8th Cir. 2004) (applying enhancement where sentenced individual was smuggling van full of undocumented people and let a migrant drive the van, resulting in an accident).

if the individual himself was also in danger.⁵²

The result: (b)(7) can increase a sentencing range by *years* based on the (accidental or intentional) conduct of others, including codefendants or DHS agents, regardless of whether it was entirely unforeseeable to the sentenced individual. The Supreme Court has repeatedly recognized that a culpable mental state is a “bedrock” principle separating wrongful conduct from mere accident.⁵³ Yet §2L1.1(b)(7) permits dramatic sentencing increases—even 10 offense levels for death—without proof that the sentenced individual intended, or even recklessly disregarded, the risk of harm. As Defenders and others have written before, strict liability sentencing enhancements carry no deterrent value, as one cannot deter unintentional conduct.⁵⁴ It also results in unwarranted similarity, by treating an individual who cannot foresee and does not inflict harm the same as one who intentionally inflicts harm on a migrant.⁵⁵ The resulting increase often results in strict liability sentencing, inconsistent with proportionality and just punishment.⁵⁶ And this is no doubt part of the reason why cases involving application of this enhancement often produce sentences that fall below the guideline range.⁵⁷

⁵² See Ignacio Castañeda Perez, et. al, [Homeland Secrets, Chapter 2, The Chase](#), Cronkite News (Feb. 24, 2020) (describing HSI unmarked interdiction units performing “pinch” maneuver and opening fire on vehicle transporting migrants in a residential area, killing the driver and injuring defendant and a migrant); see also Defendant’s Sent. Memo., *United States v. Warren Evan Jose*, No. 4:19-1050 ECF No. 304 (D. Ariz., Oct. 20, 2022), Dkt. No. 304.

⁵³ See *Ruan v. United States*, 597 U.S. 450, 457, (2022) (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952)); see also [Statement of Deirdre D. von Dornum on behalf of Defenders to USSC on Proposal 4: Circuit Conflicts](#) at 17 (Feb. 27, 2024); [Defenders’ Comment on the USSC’s 2023 Proposed Amendments: Firearms Offenses](#) at 24 (Mar. 14, 2023).

⁵⁴ [Defenders’ 2023 Firearms Comment](#) at 24.

⁵⁵ See [von Dornum Statement](#) at 17; [Defenders’ 2023 Firearms Comment](#) at 24.

⁵⁶ The Ninth Circuit has previously “suggested that a mens rea of recklessness is required to impose an enhancement under section 2L1.1(b)(7)(4)” for the +10 death resulting enhancement. *United States v. Ramirez Lopez*, 315 F.3d 1143, 1159 (9th Cir. (9th Cir. 2003) (citing *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1059 (9th Cir. 2001), *opinion withdrawn due to dismissed indictment, appeal dismissed*, 327 F.3d 829 (9th Cir. 2003).

⁵⁷ See Sec. I.B.1.

What’s more, (b)(7)’s breadth has produced a persistent circuit split regarding causation standards: Some circuits require only but-for causation, others demand a showing closer to proximate causation, and at least one has held that courts cannot impose a causation requirement at all.⁵⁸ This means that similarly situated individuals face dramatically different sentencing exposure depending on their location, creating additional unwarranted disparity.

The breadth of §2L1.1(b)(7) also allows enhancements based on actions of DHS agents, rather than on those of sentenced individuals or their codefendants. In *United States v. Gaspar-Felipe*, Border Patrol agents engaged in a high speed chase of a vehicle transporting migrants and “fired their rifles at” the vehicle, shooting and killing one of the migrants.⁵⁹ The Fifth Circuit upheld application of the 10-level (b)(7)(D) enhancement to Mr. Gaspar-Felipe, who had been identified as the foot guide who had previously guided the group including the deceased migrant on foot. Mr. Gaspar-Felipe was not a part of the high speed chase, and he was acquitted of causing the migrant’s death at trial.⁶⁰ Applying the broad but-for causation standard, the Fifth Circuit reasoned that “[a]bsent Gaspar-Felipe’s guiding [the deceased individual] from Mexico to the rendezvous point in Texas, [the deceased] would have not found himself in the Chrysler where he was killed by police

⁵⁸ Compare *United States v. Ramos-Delgado*, 763 F.3d 398, 401-02 (5th Cir. 2014) (concluding §2L1.1(b)(7)(D) requires at least but-for causation); with *United States v. Flores-Flores*, 356 F.3d 861, 862-63 (8th Cir. 2004) (focusing on whether the death was “causally connected to the dangerous conditions created by [the defendant’s] unlawful conduct”); compare *United States v. Zaldivar*, 615 F.3d 1346, 1350-51 (11th Cir. 2010) (focusing on whether it was “reasonably foreseeable ... that [the defendant’s] actions or the actions of any other member of [his criminal] operation could create the sort of dangerous circumstances” likely to result in death); with *United States v. Cardena-Garcia*, 362 F.3d 663, 666 (10th Cir. 2004) (because § 2L1.1(b)(7)(D) “contains no causation requirement” courts “have no license to impose one”). No circuit requires that the individual himself cause the injury or death, since (b)(7) is clear that’s not required.

⁵⁹ *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

⁶⁰ *Id.* at 343 (“[T]he government need show only that the defendant’s alien-smuggling conduct was a but-for cause of someone’s death”). This case was decided prior to the Commission’s acquitted conduct amendment, but absent an acquittal at trial, the relevant conduct rules would allow for expansive liability under this SOC.

firing at the fleeing car.”⁶¹ The lack of causation in the (b)(7) enhancement therefore transfers liability to individuals based on the downstream actions of immigration agents.

Gaspar-Felipe is not an aberration. Scholars have documented what Defenders at the border have known for decades: U.S. Border Patrol has a longstanding practice of routinely utilizing force, which can result in injury or death to migrants (and others).⁶² Border Patrol does not publicly track use-of-force incidents that lead to death, but the Southern Borders Community Coalition reports that since 2010, 367 people have been killed in encounters with Border Patrol; 58 were killed in 2021 alone.⁶³ Agency practices are particularly troubling in vehicular smuggling cases; Border Patrol has a well-documented practice of engaging in high-speed chases that lead to deaths or serious injuries when they are attempting to apprehend suspected migrants.⁶⁴ Given the but-for causation standard the Fifth Circuit has read

⁶¹ *Id.*

⁶² See Robin C. Reineke and Daniel E. Martinez, [Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona](#), 12 J. on Migration and Hum. Sec. 243, 247-250 (2024) (cataloguing reports and studies documenting Border Patrol’s long history of physically abusing migrants and describing routine tactics including high-speed vehicle chases; aggressive chase and use of helicopter tactics against migrants on foot; and the use of lethal force, including fatal shootings, asphyxiation, tasers, and beatings); Vega, [“Reasonable Force”](#) at 1154-55 (“[V]iolence against Mexicans and other migrants has been a feature of the Border Patrol since its founding in 1924”); Inter-Am. Comm’n on Hum. Rts, [Report No. 60/25, Case 14.042, Merits Report \(Publication\), Anastasio Hernández Rojas and Family, United States](#) at 23-25 (April 28, 2025) (finding U.S. Customs and Border Protection (“CBP”) agents tortured a migrant, violating his rights to life, personal integrity, and access to justice, and that the violations occurred in a broader context of “discrimination against migrants of Latin American origin”).

⁶³ See Southern Borders Community Coalition, [Abuse of Power and its Consequences](#) (Feb. 3, 2026) (reporting data collected by monitoring media reports and CBP press releases); see also Robin C. Reineke and Daniel E. Martinez, [Excessive Use of Force and Migrant Death and Disappearance in Southern Arizona](#), 12 J. on Migration and Hum. Sec. 243, 246 (2024) (describing a “culture of force” within the agency that, along with other factors, “creates a milieu where there is routine abuse of migrants with low levels of accountability”).

⁶⁴ See, e.g., Eileen Sullivan, [A Rise in Deadly Border Patrol Chases Renews Accountability Concerns](#), N.Y. Times (Jan. 9, 2022) (reporting 21 deaths from Border Patrol vehicle chases in 2021). In 2023, after public outcry, CBP updated their policy regarding vehicle pursuits. U.S. Customs and Border Protection, [CBP Updates](#)

into (b)(7), our clients can, and in fact do, receive the (b)(7) enhancement for this official conduct.⁶⁵

Finally, the unique nature of smuggling cases compounds all these concerns. The facts alleged to support the (b)(6) and (b)(7) enhancements frequently rely on statements from migrants who are either detained as material witnesses and at risk of potential prosecution themselves, or who are removed from the United States at the beginning of the case, giving defense counsel little to no ability to investigate facts. Material witnesses are routinely removed from the country after being deposed by the government early in the case, which makes later additional investigation of alleged facts underlying sentencing enhancements nearly impossible.⁶⁶

II. The proposed enhancements would not effectuate the statutory purposes of sentencing and would make this broken guideline even worse.

This year's proposed amendments would compound the disparities created by this broken guideline. Unlike the unstudied increases of the past, there is no emergency directive and no need to act at this time. In fact,

[*Emergency Driving and Vehicular Pursuits Directive*](#) (Jan. 11, 2023). However, the updated policy was rescinded on January 20, 2025. U.S. Customs and Border Protection, [*Emergency Driving Including Vehicular Emergency Driving Including Vehicular Pursuits by U.S. Customs and Border Protection Personnel: Directive 4510-026*](#) (indicating rescission of the 2023 policy as of Jan. 20, 2025). Currently, the full scope of the CPB's vehicle pursuits policy is not known, as large sections of the updated policy, including the entire section labeled "Tactics," have been redacted from the policy posted on CBP's website. See U.S. Dept. of Homeland Sec., U.S. Customs and Border Protection, [CBP Directive No. 4510-026B](#) (effective Oct. 2025).

⁶⁵ *Gaspar-Felipe*, 4 F.4th at 343. The two Texas border districts (in the Fifth Circuit) produced over half of sentenced §2L1.1 cases last year. USSC, [Quick Facts: Alien Smuggling](#) (FY 2024).

⁶⁶ See, e.g., *Gaspar-Felipe*, 4 F.4th at 336 (migrant witnesses deported after government deposed them, but before the defense could cross-examine them); *United States v. Hernandez*, 347 F. Supp. 2d 375, 383-384 (S.D. Tex. 2004) (granting motion to dismiss a case involving an assault on a USBP agent because a migrant witness who had given a statement favorable to the defense was deported without notice to defense counsel); *United States v. Jose Manuel Gutierrez, et al.*, No. 2:22-CR-251, Dkt. 105 (Order on Defendant's Motion to Dismiss) (S.D. Tex. 2022) (granting motion to dismiss a § 1324 case because migrant witness with exculpatory information was deported).

unauthorized border crossings are currently *down*. And the rates of below-guidelines sentences in §2L1.1 function as institutional feedback showing that additional unstudied guideline increases would be inappropriate. The Commission should not repeat its past mistakes here.

Just as we have in the past,⁶⁷ we urge the Commission to pause and study these offenses instead of proceeding with unstudied and unnecessary increases that will fall on the backs of low-income people of color.

A. The proposed changes to §2L1.1(b)(2) make this enhancement more complicated and less useful to judges seeking to base sentences on culpability.

The existing enhancement at (b)(2) for the number of persons smuggled already generates penalty ranges that are beyond sufficient to account for offense seriousness. As things stand, Commission data indicate that the (b)(2) enhancements currently produce overinflated guideline ranges, with average sentences consistently falling below the average guideline minimums for each ordinal increase in number of undocumented persons smuggled.⁶⁸ There is no need to make this enhancement more complex, or to call for even higher enhancements in most cases.

The Commission originally believed that in cases involving large numbers of people, this enhancement would work in tandem with the aggravated role enhancement.⁶⁹ But that has not happened, as discussed above.⁷⁰ What Defenders see is that, much like in drug-trafficking cases, the relevant conduct rules, coupled with quantity-based increases, result in low-level players being held liable for the actions of others.

⁶⁷ See [Defenders' Comment on the USSC's 1997 Proposed Amendments](#) at 1-4 (noting the amendment far exceeded the mandated increase in the Congressional directive and was unsupported by Commission data).

⁶⁸ See [Public Data Briefing](#) at 6.

⁶⁹ See USSC App. C, [Amend. 450](#), Reason for Amend. (1992) (describing increase as designed to work with aggravated role adjustment).

⁷⁰ Section I.B.1.

B. The proposed new §2L1.1(b)(6) (trunk enhancement) would create new problems while solving nothing.

There is no need to add another unempirical and expansive strict-liability enhancement untethered from an individual's conduct or intent into this already flawed guideline. The proposed SOC related to a migrant in a trunk or overcrowded vehicle would fail to effectuate the statutory purposes of sentencing.

1. Without any mens rea requirement, and without defendant-specific language, the trunk/overcrowding enhancement will compound the guideline's existing flaws.

As with the current (b)(7), the new unstudied vehicular enhancement in the proposed (b)(6) has no mens rea requirement and is not defendant-specific, in contrast to the original Congressional directive. This means that a court might find that a foot-guide who never gets into a vehicle could receive this enhancement, based on actions that occurred after his conduct ended. Among other problems, the lack of mens rea makes the enhancement worthless as a potential deterrent.⁷¹

The proposed enhancement is also dramatic, acting not only as a two-level increase but also as a portal to offense level 18 if the offense level isn't at 18 already. This would lead to increased unwarranted *similarity* in sentences for differently situated individuals.

2. The existing enhancements already address risky transportation involving trunks.

The Commission has provided no public data on how often smuggling offenses involve migrants riding in trunks or overcrowded vehicles. But Defenders are concerned that the proposed (b)(6) could result in a de facto base offense level in many vehicular smuggling cases simply because of how these cases work. Migrants do not want to be caught; they often voluntarily

⁷¹ See *United States v. Handy*, 570 F. Supp. 2d 437, 478, 479 (E.D.N.Y. 2008) (noting strict liability enhancement for possession of a stolen firearm is an ineffective deterrent "since a person cannot be deterred from doing what he or she does not know is being done").

conceal themselves for brief periods of time, in vehicles passing through the interior checkpoints. The current (b)(6) enhancement already applies when this is done in a risky manner, often including when people are transported in the trunk of a car.

As the Ninth Circuit has explained, “there is a baseline risk inherent in all vehicular travel, and we focus on the ways in which the method of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger” when considering application of the current risk-focused (b)(6) enhancement.⁷² Every case is different, and the application of the current (b)(6) enhancement hinges on an assessment of the facts.⁷³ This makes sense, as an offense involving two people willingly transported in a large trunk for less than 10 minutes to clear a checkpoint, who had cell phones, airflow, the ability to talk to the driver, and access to and understanding of how to use the glow-in-the-dark trunk release handle is very different than a situation involving multiple people trapped in a trunk of an older vehicle for an extended period. The Commission has provided no data on why all offenses involving trunks (regardless of if it was only for a short duration, at very slow speeds, and where the migrants had multiple methods of egress) should be considered more inherently risky than those involved in normal highway automobile transportation, such as riding unrestrained in a vehicle’s front seat.⁷⁴

⁷² *United States v. Bernardo*, 818 F.3d 983, 986 (9th Cir. 2016) (quoting *United States v. Torres–Flores*, 502 F.3d 885, 889 (9th Cir. 2007)).

⁷³ The Fifth Circuit “has identified five factors to consider when applying the current § 2L1.1(b)(6) to situations involving migrants concealed in vehicles: ‘the availability of oxygen, exposure to temperature extremes, the aliens’ ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs.’” *See United States v. Rodriguez*, 630 F.3d 377, 381 (5th Cir. 2011) (citing *United States v. Zuniga–Amezquita*, 468 F.3d 886, 889 (5th Cir.2006)).

⁷⁴ To the extent this proposal acts as a proxy for perceived risk of injury from vehicular crashes, this enhancement is also particularly troubling, because as laid out above, high-speed immigration enforcement chases and shootings pose a serious risk to migrants. *See* section I.D. To the extent the Commission wants to keep migrants safe and reduce the risk of vehicular crashes, it could also consider a *reduction* in these cases (to deter government use of force against migrants) where immigration enforcement conduct created a risk of injury.

Further, many of our clients sentenced under §2L1.1 lack authority over transportation or logistics decisions. Vehicle type, routes, and timing are typically determined by others or factors outside of their control. So, increasing penalties for low-level participants has no ability to impact the conduct the enhancement seeks to address. The existing enhancement (along with courts' miserly approach to applying minor role adjustments) provides more than adequate increases to punish risky situations, while giving judges flexibility to make individualized assessments.

3. The proposed increase for overcapacity vehicles overestimates risk and removes discretion from sentencers closest to the facts of the case.

With respect to a new (b)(6) enhancement for “carrying substantially more passengers than the rated capacity of a motor vehicle,” the proposed amendment is unnecessary, overly vague, and would result in double counting with the (b)(2) amendment. The Commission has provided no data on how often offenses involve vehicles with “substantially more” passengers than the rated capacity. This language is also vague: What does “substantially more passengers” mean? This enhancement would likely lead to disparate interpretations and litigation.

It will also punish conduct that is not necessarily inherently risky. Law-abiding families occasionally pack more people into their vehicle than ideal for short periods of time, out of necessity. And in four out of the five border districts, there is no applicable state law restricting adults from riding in the back of pickup trucks—a routine practice in rural and agricultural communities that could well receive an increase under the new proposed SOC.⁷⁵ To the extent the Commission is considering this proposed enhancement to account for the risk of vehicle crashes, it should stop and study the matter, particularly given the immigration enforcement practices described above.⁷⁶

⁷⁵ Compare [2026 Proposed Amendments: Human Smuggling](#) at 6 with Insurance Inst. for Highway Safety and Highway Loss Data Inst., [Restrictions on riding in pickup beds](#) (February 2026).

⁷⁶ See Section I.D.

C. The proposed new (b)(8)(B) (currently (b)(7), re bodily injury/death) would make an already problematic enhancement far worse.

The Commission has proposed expanding what is currently (b)(7) (but would become (b)(8) under the full proposal) to include certain sexual crimes; and it has separately proposed to create a new sub. (B) to this enhancement dealing with multiple victims who sustain varying degrees of bodily injury. As a general matter, this comment has already explained that the current (b)(7) is deeply flawed and overstates culpability, largely because it lacks any mens rea or causation requirements, and also because it does not look to the conduct of the sentenced individual. The Commission should not expand this broken SOC further unless it first also acts to cabin the already overexpansive existing injury/death enhancement.

As for the specific proposed changes, the next section of this comment addresses changes to the existing enhancement related to sexual crimes. Here, we will address the proposed new sub(B) in general. Of the two options presented, the scope of covered conduct in Option 2 is more attuned with the statutory purposes of sentencing. Option 2 limits the enhancement for additional instances of “death or permanent or life-threatening bodily injury,” with the second set of bracketed language that would apply to offenses where “the defendant intentionally or knowingly caused” death or permanent or life-threatening bodily injury. Defenders appreciate that, for both options, at least the second set of bracketed language is both defendant-specific and contains a mens rea requirement, which is consistent with the directive language that the original enhancement was based on (but was broader than). But the scope of Option 1, which includes less serious injuries as well as relatively minor sexual-contact offenses like touching an adult’s buttocks over the clothes—more on that in the next section—is far too broad. That said, the offense-level increases in Option 2 are too large and could potentially render the cross-reference irrelevant.

That is why Defenders strongly urge the Commission not to promulgate either option. Commission data on number of victims in cases involving what is currently a (b)(7) enhancement show that for more serious or permanent injuries, there is a median of one victim, so it is unclear why

this proposed increase is necessary.⁷⁷ For cases involving multiple deaths, the Department can charge multiple counts, and has its choice of charges under § 1324, including charges that carry the *death penalty*.⁷⁸ And the homicide cross-reference in §2L1.1 is more than sufficient to handle serious cases involving one or more death; in fact, the proposed (b)(8) could increase sentences to the point that it renders the cross-reference moot. The Department has stated this increase is needed due to language in 28 U.S.C. § 994(c)(3), which directs the Commission to consider the “nature and degree of the harm caused by the offense, including whether it involved . . . a person, a number of persons” But the factors in § 994(c) matter “only to the extent that they do have relevance” to an appropriate sentence.⁷⁹ And the (b)(7) injury/death enhancement already lacks an empirical foundation and sweeps too broadly. It would not help judges impose sentences consistent with § 3553(a) to increase it further.

D. The remaining portions of the proposed amendment, addressing sexual conduct, are overbroad and unwarranted.

The Commission has proposed to make several changes to §2L1.1 related to smuggling offenses involving sexual misconduct:

- a new provision in what is now (b)(6) (but under the proposal would be (b)(7)) increasing the sentence where the offense “created a substantial risk of . . . serious bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law”);
- a new provision in what is now (b)(7) (but under the proposal would be (b)(8)) treating “criminal sexual contact under 18 U.S.C. § 2244” the same as “bodily injury” for purpose of that enhancement; and
- a new cross-reference for sexual offense conduct.⁸⁰

⁷⁷ [Public Data Briefing](#) at 20.

⁷⁸ See 8 U.S.C. § 1324(a)(1)(B)(iv).

⁷⁹ 28 U.S.C. §994(c).

⁸⁰ The Commission also has proposed adding language to the current (b)(7) that effectively would move from commentary to text an instruction providing that a

As noted in the preceding section, there's also Option 1 of the proposal for a new subsection of the current (b)(7) enhancement, which would enhance a sentence based on additional injuries—including “criminal sexual contact” under § 2244. But as we explained earlier, Option 1 is problematic for additional reasons; and in any event, our discussion of the breadth of § 2244 should make clear why enhancing a sentence based on “criminal sexual contact” would be a nonstarter.

1. Enhancing a sentence based on a “risk of . . . criminal sexual abuse” does not make sense.

The most obvious problem with the proposal to enhance a sentence based on a risk of criminal sexual abuse is that it is nonsensical: How does conduct create a substantial risk that a migrant will be subject to criminal sexual abuse? Perhaps a smuggler who works with a co-conspirator who is a known registered sex offender? What about just housing people of different genders in the same room? Or for that matter, the same gender? And should the judge not care that no sexual crime was actually committed?

The one thing we do know is that the enhancement will apply in every case in which sexual abuse *actually occurs*, regardless of whether the sentenced individual was involved or could possibly foresee that event, because the proposed amendment would mandate the application of the risk enhancement in every case in which a person receives an enhancement for bodily injury on the basis of criminal sexual abuse. This is straight double-counting, and it would grossly overstate the sentenced person's culpability, particularly since the application of the risk enhancement automatically increases a person's base offense level to 18.

Moreover, this expansion of what is currently (b)(6) comes with the problem that already plagues (b)(6): no requirement that the defendant

violation of § 2241 or § 2242 “or any similar offense under state law” is treated the same as “serious bodily injury” for purposes of that enhancement. But this is not a change per se, since the rule is already in the commentary, and the Guidelines also specifically define “serious bodily injury” to encompass “conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.” USSG §1B1.1, cmt. n.1(L).

himself engaged in this conduct—here, no requirement that the sentenced individual created the risk.⁸¹

Given that Defenders do not understand this enhancement, it might never apply in the absence of sexual abuse that does not occur; or it might apply sometimes in ways we cannot foresee. The only thing that is clear is that whenever a PSR might suggest this provision applies, significant litigation would ensue.

2. The Commission should not expand the already overbroad (b)(7) enhancement to include “sexual contact.”

The Commission should not expand the already overbroad injury/death SOC further by adding “sexual contact” under § 2244 to the types of “bodily injury” that result in an enhancement.⁸² While the enhancement currently applies (through commentary) if the offense involved conduct under § 2241 or § 2242 (or similar conduct under state law), it does not currently apply to mere “sexual contact” under § 2244—with good reason. The conduct covered by § 2244 is extremely broad. “Sexual contact” includes touching, over

⁸¹ The SOC is worded so broadly that it could conceivably apply even to sexual abuse by immigration officials, which is a well-documented problem that the Department and DHS could focus on preventing. See Michael Sainato, [*‘Horrific’: report reveals abuse of pregnant women and children at US Ice facilities*](#), The Guardian (Aug. 6, 2025) (describing report compiled by Sen. Ossoff’s office finding “deaths in custody, physical and sexual abuse of detainees” among other things); Emily Bregel, [*Border agent charged with child sex trafficking, fraud in Cochise County*](#), Arizona Daily Star (July 24, 2025) (discussing Border Patrol agent who was arrested on allegations of criminal wrongdoing, including child sex trafficking); DOJ, [*Former Customs and Border Patrol Agent Found Guilty of Federal Civil Rights and Kidnapping Charges for Sexually Assaulting and Abducting Minor Victim*](#) (Aug. 30, 2024) (reporting that a former Border Patrol agent was found guilty of kidnapping and repeated sexual assault of a minor); Lomi Kriel, [*ICE Guards “Systematically” Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*](#), ProPublica (Aug. 14, 2020) (describing alleged sexual abuse of migrants in immigration detention).

⁸² [*Proposed 2026 Amendments: Human Smuggling*](#) at 4-5. In addition to adding conduct constituting criminal sexual contact under § 2244, the amendment would move the instructions to equate criminal sexual abuse with serious bodily injury from the commentary to the text of § 2L1.1. *Id.*

clothing, a person's breast or buttocks, with a sexual purpose.⁸³ And the specific offenses at § 2244 include nonconsensual sexual contact (*e.g.* buttocks-touching) with an adult⁸⁴ and consensual sexual contact (*e.g.* buttocks-touching) with a teenager.⁸⁵

It is likely no accident that of the many SOC's in the Guidelines that address bodily injury, *not one of them* incorporates § 2244's broad definition of "sexual contact."⁸⁶ Under this definition, and under the proposed amendment, touching the rear pockets of a person's jeans (with sexual intent) could result in an enhanced sentence. This could apply, for example, if a migrant claims that a smuggler touched her buttocks when lifting her into a truck, or if he grazed her breast while helping her cross a fence. And because the enhancement is offense-based, it would apply regardless of whether the person sentenced is the person who (allegedly) touched the migrant.

These sorts of allegations would be much more difficult for the defense to rebut than allegations of the types of sexual abuse that are criminalized by §2241 and § 2242, which require more significant and invasive sexual acts, which would not happen accidentally.⁸⁷ And people subject to the enhancement will likely be deprived of the opportunity to question other migrants who might have witnessed the purportedly intentional touching and could shed light on its context, because, as noted earlier, migrant witnesses are generally removed from the country well before trial, much less

⁸³ 18 U.S.C. §2246(3) (defining "sexual contact" under Chapter 109A, which includes § 2244).

⁸⁴ 18 U.S.C. § 2244(a)(2).

⁸⁵ 18 U.S.C. § 2244(a)(3).

⁸⁶ Guidelines that include SOC's for bodily injury—including, for example, §2A6.2(b)(1)(B) (stalking or domestic violence) and 2H4.2(b)(1) (willful violations of the Migrant and Seasonal Agricultural Workers Act) incorporate § 1B1.1's definition of "bodily injury," which means "any significant injury; *e.g.* an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." USSG § 1B1.1, cmt. n.1(B). The conduct covered by § 2244 will rarely meet that definition; nor can it be equated to that level of injury.

⁸⁷ 18 U.S.C. § 2246(2) (defining the "sexual act[s]" that are criminalized by §§ 2241 and 2242 to require either penetration or contact between a person's genitals or mouth and the anus or genitals of another).

sentencing. The only certainty this proposal brings is that of increased litigation and hearings at sentencing.

3. The proposed cross-reference to Chapter 2 guidelines for offenses involving sexual conduct can overstate individual culpability in smuggling cases involving sexual abuse, and it would rarely be applicable in cases involving sexual contact.

The Commission should not adopt the expanded cross-reference for offenses involving sexual conduct.⁸⁸ The proposed cross-reference to Chapter Two, Subpart A for §2L1.1 offenses involving conduct described in 18 U.S.C. §§ 2241-2242 will result in guideline ranges that are too severe for, and have no nexus to the offense of conviction, due to the expansive application of the relevant-conduct rules.

Section 2A3.1 is the guideline that applies to offenses under §§ 2241 and 2242, with a base offense level of 30 for most offenses, and many enhancing SOCs.⁸⁹ People who are subject to the proposed cross reference will therefore face substantially higher guideline ranges than they would face under §2L1.1, without the government having to prove the alleged sexual abuse beyond a reasonable doubt.⁹⁰ This end-run around the burden of proof will be even more troubling if the cross-reference is offense-based, and a person can face the guideline range produced by §2A3.1 even without any allegation that they personally committed any sexual misconduct. And as we noted earlier, it can be extremely difficult (or impossible) for our clients to successfully dispute allegations of sexual misconduct, whether the misconduct is alleged against a co-conspirator, another migrant, or

⁸⁸ If the Commission does choose to adopt this cross reference, we urge it to select the “defendant engaged in” bracketed language, given the expansive liability present in this guideline, so that it appropriately tracks individual culpability.

⁸⁹ See USSG §2A3.1. The guideline has a base offense level of 38 if the person was convicted under 18 U.S.C. § 2241(c), which involves aggravated sexual abuse of a child under the age of 12, or between the ages of 12-15 who is 4 years younger than the person committing the abuse. See *id.* at §2A3.1(a)(1). Presumably, that BOL would not apply in human smuggling cases not involving a conviction under § 2241(c); but if it did, that is even more reason not to include the cross-reference.

⁹⁰ The base offense level for a § 1324 offense is 12. See USSG §2L1.1(a)(3).

immigration officials,⁹¹ because witnesses are often detained and rapidly removed from the country.

Defenders, of course, want our migrant clients to be safe from sexual misconduct. But without the proposed cross-reference, the harms it would target will hardly go unaddressed. If the government can prove criminal sexual abuse, the person will receive an enhancement for serious bodily injury under the current §2L1.1(b)(7)—even without the proposed amendments. And there can also be a federal or state prosecution for a sex crime.⁹² Such prosecutions not only provide justice for victims, they also provide procedural fairness to both the accused and victims in a way that simply is not possible when such allegations are subject to a lesser standard of proof at sentencing, often based on reported statements of deported witnesses.

As for offenses involving conduct described in 18 U.S.C. § 2244, a cross-reference to §2A3.4 would result in a base offense level of 12. While §2A3.4 has enhancements for offenses involving sexual conduct with children under the age of 16, §2L1.1 will almost always provide the higher sentence, rendering the cross-reference irrelevant.

Finally, the cross-reference is unwarranted because criminal sexual abuse occurs rarely in smuggling offenses, and when it does, judges are perfectly capable of addressing it under § 3553(a).

⁹¹ See, e.g., U.S. Dept. of Justice, U.S. Att’y’s Off., S. Dist. of Ohio, [*Grand jury indicts former deportation officer with federal crimes related to sexually assaulting immigrant victims*](#) (Dec. 8, 2022) (discussing indictment of ICE deportation officer alleging the sexual assault of “at least two females under his supervision in the ICE Alternatives to Detention program”); U.S. Imm. and Customs Enf’t, [*Former ICE special agent arrested on federal civil rights charges that allege he sexually assaulted 2 women*](#) (Aug. 15, 2018) (alleging ICE special agent attempt to rape one woman and did rape another).

⁹² See, e.g., U.S. Imm. and Customs Enf’t, [*Convicted felon ordered to serve nearly 10 years for sexual assault near the Arizona/Mexico border*](#) (Oct. 17, 2019).

E. An enhancement for offenses conducted in connection with a transnational criminal organization is empirically unsupported and risks compounding unwarranted ethnic disparity.

In response to the Commission’s request for comment,⁹³ Defenders oppose any additional increases for the involvement of transnational criminal organizations (TCOs). Human smuggling is, by definition, a transnational offense, but the involvement of large cartels is rare. Requiring sentencing courts to determine whether a person committed a transnational smuggling offense “in connection with [their] participation” in a TCO will lead to overbroad, inconsistent application of an enhancement that is empirically unsupported. Beyond that, such an enhancement risks double counting and would overlap with existing guideline provisions, and it would create substantial risks of unwarranted ethnic profiling and disparity.

1. The involvement of TCOs in §2L1.1 offenses is empirically unsupported.

Scholarship has shown that involvement of large cartels in smuggling offenses is rare,⁹⁴ and Defenders’ experience confirms that. In our experience, smuggling operations at the Southwest border frequently consist of small-scale facilitators performing discrete tasks—drivers, guides, document providers, or local coordinators—linked through flexible and opportunistic networks.⁹⁵ Even on the other side of the border, in Mexican territories controlled by TCOs, past research indicates that they often do not conduct migrant smuggling operations directly. Instead, they extract tolls from migrants and smugglers for protection, leaving smuggling logistics largely in

⁹³ [Proposed 2026 Amendments: Human Smuggling](#) at 8-9 (Issue for Comment #4).

⁹⁴ See Sanchez, *Human Smuggling and Border Crossings* at Chapter 1 (discussing lack of empirical research on smuggling and racial undertones of discourse surrounding the transnational nature of the offense, noting that most smuggling involves local facilitators).

⁹⁵ See also *id.*; Spener, *Clandestine Crossings* at 160 (describing decentralized structure of smuggling networks). Defenders would hope that the sorts of loose associations that arrange smuggling would not incorrectly be labeled as a TCO (or a subsidiary of a TCO), but we have some concerns with that possibility.

the hands of smaller-scale actors.⁹⁶ As one analysis explains, there has been “little evidence” that cartels themselves smuggle migrants, despite public narratives suggesting otherwise.⁹⁷

The Commission’s data briefing supports that TCO involvement in these cases is rare.⁹⁸ Moreover, the data show that these rare cases were more likely to receive six- and nine-level enhancements for conduct involving at least 25 or 100 migrants, respectively; and they were more likely to receive enhancements for inflicting any bodily injury or death.⁹⁹ Thus, cases involving TCOs are already receiving substantial enhancements that produce higher guideline ranges than those for more typical smuggling offenses. A separate TCO enhancement is not needed.

2. The proposed enhancement would broadly punish alleged association, posing a serious risk of unwarranted ethnic disparity.

A TCO enhancement risks sweeping in broad swaths of Hispanic individuals for alleged associations, without looking to actual conduct. As we previously explained in relation to the gang enhancement in §2K2.1, “[t]he problems with law enforcement methods for documenting criminal affiliation have been widely recognized, and counsel in favor of great caution....”¹⁰⁰ Scholars and stakeholders have shown that law enforcement use broad,

⁹⁶ Greenfield, [Human Smuggling and Associated Revenues](#) at 9 (“Migrants’ payments to drug-trafficking TCOs are not payments for smuggling, per se, but they are the only revenue associated with human smuggling that we could attribute directly to TCOs of some kind.”); *see also* Amelia Frank-Vitale, *Coyotes, caravans, and the Central American migrant smuggling continuum*, 26 Trends in Organized Crime 64, 68 (Feb. 17, 2023) (discussing cartels in Mexico requiring fees to move migrants within their territory).

⁹⁷ Gilardi, [Ally or Exploiter?](#) (Feb. 5, 2020).

⁹⁸ According to the recent Commission data briefing, in fiscal year 2024, an estimated 201 (or 5%) of §2L1.1 cases involved a “cartel or [TCO].” [Public Data Briefing](#) at 30; *see also* USSC, [Transcript of Public Data Briefing on Proposed Amendment on Human Smuggling](#) at 7 (Feb. 13, 2026). This indicates TCO involvement is rare, although the data briefing does not explain the exact parameters of the special coding project used to identify which cases involved a cartel or TCO or how these findings of fact were made.

⁹⁹ [Public Data Briefing](#) at 30-31.

¹⁰⁰ [Defenders’ 2023 Firearms Comment](#) at 15 (Mar. 14, 2023).

unbridled discretion in determining whether someone is involved in a criminal organization, designating people as gang members (or “affiliated” with a gang) based on mere suspicion—leading gang databases to be significantly overinclusive, and riddled with racial bias.¹⁰¹

These problems will be compounded in determining if someone is affiliated with a TCO, since TCOs are typically based in other countries. In some border districts, Defenders find that prosecutors already sometimes insinuate that our Mexican or Mexican-American clients have cartel ties and should not receive role reductions, where evidence on the ground is scant. For instance, if a client in a drug case admits even just to being from the Sinaloa region, Defenders often worry that he will unjustifiably be thought to be associated with the Sinaloa cartel.

This raises another problem that we flagged in connection with gang enhancements: participation in the activities of a criminal organization is “not a reliable identifier of culpability,” as teens “who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis.”¹⁰² Instead, “[i]t is not mere participation that predicts criminality—it is the degree of the person’s participation that matters.”¹⁰³ The same is true of TCOs, which dominate some regions in northern Mexico. Given the disparity risks inherent in the determination of whether a person participated in a TCO, the Commission should not take action without comprehensive study of smuggling offenses.

3. A TCO enhancement would overlap with existing enhancements that already address the targeted harms.

Finally, such an enhancement would not properly track offense seriousness because organizational affiliation does not reliably correlate with culpability or role. A common low-level driver recruited for a single trip in a large conspiracy could receive the same enhancement as the rarely-prosecuted genuine cartel member.

¹⁰¹ *Id.* at 15-18.

¹⁰² *Id.* at 18 (quoting Brady United Against Gun Violence’s [Comments on the USSC’s 2023 Proposed Priorities](#) at 5 (Oct. 17, 2022)).

¹⁰³ [Defenders’ 2023 Firearms Comment](#) at 18.

Relatedly, the proposed enhancement would also fail to properly gauge offense seriousness because the Guidelines already contain enhancements that account for the harms caused by hypothetical TCO involvement. Section §2L1.1(b)(9) provides for a 2-level enhancement if the sentenced individual was convicted under § 1324(a)(4), which includes cases where “the offense was part of an ongoing commercial organization or enterprise.”¹⁰⁴ Also, aggravating role adjustments can address the conduct of the rarely prosecuted individuals with actual decisional responsibility in a TCO.

Finally, we note that in 2016, the Commission considered adding an enhancement to §2L1.1 (in the form of a higher base offense level) if a person “smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization.”¹⁰⁵ After a hearing and public comment, the Commission opted not to adopt the amendment. There is no reason to change course now.

III. Rather than adding empirically unsupported enhancements that would make a broken guideline worse, the Commission should contemplate changes that could actually make it better.

The Commission should not take any action with §2L1.1 that would drive sentencing ranges higher, when data show that the existing ranges are already too high. At least, it should not do so without first pausing and studying these offenses. There is no need to act now, particularly given the documented decrease in irregular border crossings in the past year. But if the Commission wants to take action to amend §2L1.1 now, it should use the opportunity to actually improve its functionality.

The two SOC's addressing risk, injury, and death—the current §2L1.1(b)(6) and (b)(7)—are broken, and they produce sentencing ranges that data indicate are frequently disregarded. The Commission should not be expanding those SOC's; it should fix them instead. The injury/death SOC, in particular, operates without meaningful mens rea, individualization, or causation guardrails, unduly transferring liability for the unforeseen actions

¹⁰⁴ 8 U.S.C. § 1324(a)(4)(A).

¹⁰⁵ USSC, [2016 Proposed Guidelines Amendment: Immigration](#) at 56-58 (Jan. 15, 2016).

of co-conspirators or immigration enforcement agents onto the individual being sentenced. The result is unwarranted disparity and sentencing ranges that are often greater than necessary.

In particular, the Commission could:

- amend the current reckless endangerment enhancement to focus on the “defendant’s” conduct, in accordance with the original Congressional directive in IIRIRA, rather than focusing on risks created by other actors;
- cabin the overbroad injury/death SOC to include both mens rea and individual causation, which would add guardrails and track the original Congressional directive;
- move the note defining “serious bodily injury” as criminal sexual abuse to the text of the (b)(7) SOC itself; and
- consider an additional SOC *reduction* for mitigating circumstances such as when immigration enforcement action causes injury, sexual abuse, or death of a migrant.¹⁰⁶

IV. Conclusion

We urge the Commission not to adopt the proposed amendments. Migrants make up one of the largest demographic of clients that we serve, and we care deeply about their safety. But the proposed amendments will not make them safer. The history of §2L1.1 tells a familiar tale of factor creep and severity expanded by unstudied increases justified by perceived enforcement needs and knee-jerk reactions to troubling headlines, while empirical analysis lags behind.¹⁰⁷ These penalty increases have had, and will continue to have, an outsized impact on Hispanic individuals. The Commission should engage in comprehensive study of these offenses instead of adopting the proposed amendments. In the alternative, if the Commission feels it must act, it could take the opportunity to fix this broken guideline to better effectuate the statutory purposes of sentencing, as described above.

¹⁰⁶ See [2026 Proposed Amendments: Human Smuggling](#) at 9 (Issue for Comment #5).

¹⁰⁷ See [Statement of Michael Carter on behalf of Defenders to USSC re: Proposed 2023 Firearms Amendment](#) at 27 (March 7, 2023).