



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: The Sentencing Project Comment on Proposed Amendments to the Sentencing Guidelines (Sentencing Options, Career Offender, and Human Smuggling)

Dear Chairman Reeves:

The Sentencing Project appreciates this opportunity to comment on the Commission's proposed amendments for the amendment cycle ending May 1, 2026. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just, equitable sentencing policies.

The Commission's proposed amendments for comment period span some of the most consequential and frequently applied provisions of the Guidelines. Across all three, we urge the Commission to be guided by the evidence: that incarceration is overused, that the Guidelines have long reflected a structural bias toward prison sentences that Congress did not intend, and that the individuals most burdened by unnecessarily punitive guidelines are disproportionately Black and Latino. We support the proposed Sentencing Options amendments and urge the Commission to extend them further. We urge the Commission to narrow the career offender guideline's predicate offenses and resist expanding its reach. And we encourage the Commission to decline to expand the human smuggling guideline. This amendment cycle offers the Commission a meaningful opportunity to bring the Guidelines closer to what Congress intended, and justice demands — a sentencing system that is proportionate, equitable, and not reflexively punitive.

I. Sentencing Options: The Commission Should Adopt Part A and Part B and Go Further

The Sentencing Project supports the proposed amendment on Sentencing Options and we urge the Commission to go further to guide judges toward more proportionate and evidence-based sentences. Part A would add new introductory commentary to Chapter Five, emphasizing the court's ability to choose between sentence types and the role of non-imprisonment sentences. It would also create a new guideline at §5A1.1, providing courts with guidance on how to select the sentence type before selecting length and conditions. Part B would significantly expand Zones B and C of the Sentencing Table, which cover non-imprisonment and split sentences. The proposed expansion of these zones is a welcome development, though one that should extend further than the proposal currently reaches.

Part A

Part A's new introductory commentary and the creation of §5A1.1 are necessary to guide courts toward more parsimonious sentencing, to align the Guidelines with the Sentencing Reform Act (SRA)'s intent, and reduce the burden on the federal Bureau of Prisons.

Before the Guidelines took effect in 1987, roughly half of all sentenced federal defendants received non-prison sentences; by 2015, that figure had fallen to about one in ten, where it remains today.¹ One factor that shaped the Guidelines' emphasis on prison sentences was the Commission's decision when developing the guidelines to only study cases that resulted in imprisonment and went to trial, according to Melissa Hamilton, professor of law and criminal justice at the University of Surrey. In turn, the Guidelines did not reflect sentencing norms, only prison sentencing norms — creating a structural bias in the Guidelines towards incarceration.² The result was far more prison sentences than necessary for public safety at significant cost to individuals, families, communities, and taxpayers. Part A's amendments are a necessary corrective.

Part A's new introductory commentary and §5A1.1 better align the Guidelines with the SRA by reminding courts that Congress explicitly declined to establish a presumption in favor of imprisonment. Rather, the Sentencing Reform Act makes clear that probation is a significant sanction capable of serving the purposes of sentencing in many cases.³ Congress instructed the Commission to “insure [sic] that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”⁴

Part A's amendments are also a small step toward addressing the dangerous and deteriorating conditions within federal prisons. For several years the Bureau of Prisons has faced a seemingly intractable and worsening crisis of staffing and infrastructure that has compromised its ability to safely house the individuals already in its custody.⁵ Conditions are so poor in some facilities that some federal judges have already taken the step of reducing sentences and, in some cases, refusing to designate defendants to federal facilities at all. As Judge Jesse Furman of the Southern District of New York observed in January 2024, it had become “routine” for judges to “give reduced sentences to defendants based on the conditions of confinement” at the Metropolitan Detention Center in Brooklyn — with prosecutors no longer even contesting that “the state of affairs is

¹ Newton, B. E., & Sidhu, D. S. (2017). The history of the original United States Sentencing Commission, 1985–1987. *Hofstra Law Review*, 45, 1167; U.S. Sentencing Commission. (2024). *2024 sourcebook of federal sentencing statistics* (Figure 6). <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Figure06.pdf> (89.1% received an imprisonment-only sentence; 2.4% received a sentence of imprisonment and alternatives).

² Hamilton, M. (2014). Prison-by-default: Challenging the federal sentencing policy's presumption of incarceration. *Houston Law Review*, 51, 1271, 1290.

³ 28 U.S.C. § 994 (stating that the duties of the Commission include creating guidelines for “a determination whether to impose a sentence to probation, a fine, or a term of imprisonment”).

⁴ 28 U.S.C. § 994 (1984).

⁵ U.S. Department of Justice, Office of the Inspector General. (2025). *Top management and performance challenges facing the Department of Justice — 2025*. <https://oig.justice.gov/sites/default/files/2026-01/TMPC-2025.pdf>

unacceptable.”⁶ The Commission cannot fix the Bureau of Prisons, but it can help reduce the number of people unnecessarily sent there.

Finally, we suggest a minor language change to better align both Part A and Part B with post-*Booker* sentencing.⁷ *Booker* makes clear that only federal statutes can “authorize” sentence ranges. As such, we suggest that throughout the Guidelines the text make explicit that it “recommends,” rather than does or does not “authorize” sentence ranges. After decades of reflexively treating incarceration as the default, courts need as much explicit prompting as possible to recall that they have a wealth of discretion to sentence more holistically, proportionately, and justly.

Part B

We applaud Part B's proposed expansion of Zones B and C, but urge the Commission to extend that expansion further into higher Criminal History Categories. Under the current guidelines, Zone B recommends a minimum sentence of probation, provided that the minimum term of imprisonment specified in the guideline range is “satisfied by a period of intermittent confinement, community confinement, or home detention.” Zone C recommends a minimum sentence of a “split sentence” of imprisonment, in which at least one-half of the minimum term specified in the guideline range is satisfied by a term of supervised release, community confinement, or home detention. The proposed expansion of the zones would significantly expand Zones B and C for individuals who have no or minimal criminal history — extending the upper limit of Zone B from offense level 11 to offense level 23 and extending the upper limit of Zone C from offense level 13 to offense level 29. For individuals with more criminal history, it would more modestly expand the zones upwards by one or two offense levels in each criminal history category.⁸

Criminal history is a limited predictor of risk, and reflects racial disparities in which communities are most policed, how cases are charged, and which pleas are offered. As such, criminal history enhancements reinforce and deepen racial disparities.⁹

Scholars have critiqued the significant role that criminal history plays in sentencing in the United States compared to other western democracies.¹⁰ Among other recommendations, Richard Frase, emeritus professor of law at the University of Minnesota, and Julian Roberts, emeritus professor of criminology at the University of Oxford, suggest dramatically reducing the magnitude of enhancements — compressing sentence ranges for offenses between the lowest and highest

⁶ Weiser, B. (2024, January 4). Judge refuses to send defendant in drug case to troubled Brooklyn jail. *The New York Times*. <https://www.nytimes.com/2024/01/04/nyregion/brooklyn-judge-mdc-jail.html>.

⁷ *United States v. Booker*, 543 U.S. 220 (2005).

⁸ U.S. Sentencing Commission. (2026, January 30). *Proposed amendments to the sentencing guidelines* [Reader-friendly version]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

⁹ Hester, R., Frase, R. S., Roberts, J. V., & Mitchell, K. L. (2018). Prior record enhancements at sentencing: Unsettled justifications and unsettling consequences. *Crime and Justice*, 47(1), 209–254. <https://doi.org/10.1086/695400>.

¹⁰ Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46(1), 441–504. <https://doi.org/10.1086/688456>; Roberts, J. V. (2013). Punishing persistence: Explaining the enduring appeal of the recidivist sentencing premium. *Punishment & Society*, 15(4), 384–401. <https://www.jstor.org/stable/23639532>; Vega, C., Solter, A., Kwon, S., & Isaac, D. M. (2012). *Cruel and unusual: U.S. sentencing practices in a global context*. University of San Francisco School of Law, Center for Law and Global Justice.

criminal history categories.¹¹ Michael Tonry, emeritus professor of law at the University of Minnesota and past advisor to several sentencing commissions, recommends that criminal histories not account for more than one-third of sentence lengths overall.¹² And for sentences 10 years or longer, The Sentencing Project recommends that criminal records should account for no more than 10% of sentence lengths.¹³

Without a more robust expansion into higher Criminal History Categories, the Commission's proposed zone changes risk amplifying rather than moderating the role that criminal history plays in federal sentencing. The disparity is stark: at offense level 23, a defendant with minimal criminal history could receive a non-prison sentence, while a defendant with 13 or more criminal history points could face a recommended sentence of over nine years — a gap driven substantially by prior record rather than the nature of the offense itself.¹⁴ The Commission should seize this opportunity to ensure that the expansion of Zones B and C promotes more parsimonious sentencing across the full range of criminal history categories, rather than reserving its benefits primarily for those with the most limited records.

II. Career Offender Guideline: The Commission Should Eliminate State Drug Offenses and Limit the “Crimes of Violence”

We appreciate the Commission's repeated efforts to revisit the career offender guideline and find an approach which addresses stakeholder concerns regarding overincarceration and racial disparities, as well as the challenges of the categorical approach. The career offender guideline's harm can only be reduced, not remedied, because it is the product of a directive from Congress to impose a term of imprisonment at or near the maximum term for individuals who are convicted of a crime of violence or a controlled substance offense after two prior felony convictions for those crimes. The career offender guideline has been widely criticized by practitioners, judges, and by those who must serve the lengthy, disproportionate, and racially disparate sentences that it can yield — particularly given that it applies more broadly than the directive requires.¹⁵ As discussed above, criminal history is a limited and racially skewed predictor of risk. The career offender guideline effectively compounds the inequities embedded in prior convictions; convictions that disproportionately reflect overpolicing of Black and Latino communities, coercive plea practices, and overburdened public defender systems rather than the relative culpability or dangerousness of

¹¹ Frase, R. S., & Roberts, J. V. (2019). *Paying for the past: The case against prior record sentence enhancements*. Oxford University Press.

¹² Tonry, M. (2017). Making American sentencing just, humane, and effective. *Crime and Justice*, 46(1), 441–504. <https://doi.org/10.1086/688456>; Reitz, K. R. (2025). Tonry's blueprint for the comparative study of sentencing law and policy. *Criminal Law Forum*, 36, 233–250. <https://doi.org/10.1007/s10609-025-09502-9>.

¹³ Ghandnoosh, N., Boxerman, B., & Barry, C. (2026). *Re-punished for the past: How criminal records increase prison terms and racial injustice*. The Sentencing Project. <https://www.sentencingproject.org/reports/re-punished-for-the-past-how-criminal-records-increase-prison-terms-and-racial-injustice/>.

¹⁴ U.S. Sentencing Commission. (2026, January 30). *Proposed amendments to the sentencing guidelines* [Reader-friendly version]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

¹⁵ See U.S. Sentencing Commission. (2016). [Report to Congress: Career Offender Sentencing Enhancements](#); U.S. Sentencing Commission. (2023). *Sample of public comment on proposed amendments* [Public comment compilation on proposed amendments, 88 Fed. Reg. 7180 (Feb. 2, 2023)]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

the individual before the court. While roughly one quarter of all federally sentenced individuals in FY24 were Black,¹⁶ nearly 60% of those subject to the career offender guideline were Black.¹⁷

In our February 3, 2025 letter we urged the Commission to prioritize two principles: that given the career offender guideline’s draconian penalties and racially disparate impact, the Commission should not expand the impact of the guideline and the guideline should be revised in a manner to reduce racial disparities as much as possible.¹⁸ Accordingly, we recommended that the definition of “controlled substance offense” in the federal career offender guideline be revised to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The Commission now again proposes eliminating the categorical approach and various means of defining “crime of violence” and “controlled substance offense.”

4B1.2(a) - “Crimes of violence” should be defined as narrowly as possible

The Commission’s first option for a definition of a crime of violence would eliminate the categorical approach for state offenses by listing presumptive violent offenses. This approach avoids the complexity of matching statutory elements but is likely to be both over- and under-inclusive of offenses given the enormous variation in how states define crimes.

The Commission’s second option for a definition of a crime of violence involves matching the elements of state offenses with federal offenses, but without some of the limits of the categorical approach and the Commission offers multiple language options. Given the severity of the career offender guideline, however, the narrowness and at times under-inclusiveness of the categorical approach serves a protective function — its limiting effect is a strength, not a shortcoming.

Additionally, for either definition, the Commission proposes failsafes to rebut the presumption that an offense qualifies as a crime of violence, with options in bracket: “(i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison; (ii) the acts for which the defendant is criminally liable [did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant’s conduct during the commission of the offense was limited to reckless or negligent conduct.”

The complexity of these approaches makes it difficult to assess the likely impact of each option on incarceration. And critically, the Commission’s data briefing offers no racial impact estimate.¹⁹

¹⁶ U.S. Sentencing Commission. (2024). *2024 annual report*. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024-Annual-Report.pdf>.

¹⁷ U.S. Sentencing Commission. (2025). *Quick facts: Career offenders*. <https://www.ussc.gov/research/quick-facts/career-offenders>.

¹⁸ The Sentencing Project. (2025, February 3). *Comment on the “career offender” guideline* [Public comment submitted to the U.S. Sentencing Commission]. <https://www.sentencingproject.org/app/uploads/2025/03/TSP-Career-Offender-Comment-Final.pdf>.

¹⁹ U.S. Sentencing Commission. (2026). *Proposed amendment on individuals sentenced under §4B1.1 career offender: Public data briefing*. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026_Career-Offender.pdf.

The career offender guideline is already one of the most draconian components of the Guidelines; we urge the Commission to not widen its reach. As such, The Sentencing Project opposes ending the categorical approach to “crimes of violence,” absent more evidence that alternatives will not increase the application of the guideline.

Should the Commission nonetheless move forward with one of these approaches, we urge it to include a robust failsafe that imposes meaningful limitations on which state offenses qualify as “crimes of violence.” Those limitations should include a minimum *mens rea* of at least recklessness and prior sentence consistent with a felony-level offense: at minimum, more than a year served in prison. Incorporating actual, intended, or risk of serious bodily injury into the failsafe is likewise essential to ensure that the guideline captures only conduct serious enough to warrant punishment at the upper end of the sentencing range.

Furthermore, the Commission should provide specific guidance regarding state offenses that may encompass low-level conduct with minimal risk to public safety. Robbery may include conduct as minor as shoving someone and taking their backpack.²⁰ Arson can include minor fires causing property damage without injury — fires that research indicates are often set by individuals experiencing psychosis or acute homelessness, acting out of psychiatric compulsion rather than predatory intent.²¹ Requiring use of a dangerous weapon or serious bodily injury as a prerequisite would screen out many state robbery offenses that do not reflect the kind of serious, dangerous conduct the career offender guideline was designed to reach. Similarly, for arson offenses, requiring culpable *mens rea* would reduce the risk of overbroad application. The severity of the career offender guideline demands that its predicate offenses be defined with precision and that precision requires considering more than a statutory label to determine whether it is a “crime of violence.”

4B1.2(b) - “Controlled substance offenses” should exclude state drug offenses

As discussed in our prior comment, we urge the Commission to narrow “controlled substance offenses” to exclude state drug offenses.²² When state drug offenses serve as predicate offenses under the career offender guideline, substantial arbitrariness follows. The reasons are numerous: state-controlled substance laws diverge from federal law, sometimes sweeping in substances that federal law does not reach and, in the case of marijuana, producing stark inconsistencies from state to state.²³ Statutory felony quantity thresholds are not uniform across states.²⁴ Even within a single state, charging decisions and plea bargaining practices can vary dramatically. The result is a

²⁰ See, e.g., N.Y. Penal Law § 160.05 (McKinney 2024).

²¹ Anwar, S., Långström, N., Grann, M., & Fazel, S. (2011). Is arson the crime most strongly associated with psychosis? A national case-control study of arson risk in schizophrenia and other psychoses. *Schizophrenia Bulletin*, 37(3), 580–586. <https://doi.org/10.1093/schbul/sbp098>; Geller, J. L., McDermeit, M., & Brown, J. M. (1997). Psychiatric aspects of arsonists. *Journal of Forensic Sciences*, 42(3), 477–480. <https://pubmed.ncbi.nlm.nih.gov/10432607/>.

²² The Sentencing Project. (2025, February 3). *Comment on the “career offender” guideline* [Public comment submitted to the U.S. Sentencing Commission]. <https://www.sentencingproject.org/app/uploads/2025/03/TSP-Career-Offender-Comment-Final.pdf>.

²³ Knight, Carly. (2023). [High time to revisit federal drug sentencing: The confusing interplay between controlled substances and career offender sentence enhancements](#). 39 *Georgia St. Univ. L. Rev.* 895.

²⁴ See Ohio Criminal Sentencing Commission. (2018). [50 state low-level drug possession review](#).

guideline whose application turns less on the nature of the conduct than on the fortuity of where a defendant was prosecuted.

Excluding state drug offenses would address both of these problems. Uniformity in the guideline's application would improve significantly, including the resolution of “controlled substance offense” circuit split.²⁵ And the population subject to the career offender designation solely on the basis of drug trafficking offenses would downsize; an appropriate outcome given that this group presents a considerably lower risk of reoffending than the guideline's severity implies. The Commission has recognized as much, previously calling on Congress to amend its directive to exclude those who qualify as career offenders based solely on drug trafficking offenses, noting that the guidelines' existing criminal history rules are sufficient to capture their recidivism risk.²⁶

We also encourage the Commission to narrow the definition of a “controlled substance offense” to only the federal drug offenses listed in the statutory directive, limiting the application of the career offender guideline further. Were the Commission to maintain the current definition of a “controlled substance offense,” we urge the Commission to limit its application to convictions for which the defendant served a minimum of five years in prison,²⁷ not including revocation sentences.

The career offender guideline has exacted an enormous cost — on individuals, on families, and on the credibility of a sentencing system that aspires to proportionality. The Commission should meet that record with narrower predicates, meaningful failsafes, and a commitment to ensuring that the guideline's reach is commensurate with its severity.

IV. Human Smuggling: The Commission Should Not Increase the Severity of §2L1.1

The proposed amendment to §2L1.1, the human smuggling guideline, would create additional enhancement tiers based on the number of individuals smuggled, add a new enhancement for especially dangerous transportation methods such as concealment in trunks or engine compartments, and introduce or expand enhancements for cases involving bodily injury, sexual assault, and transnational criminal organizations. Human smuggling guideline pertains to offenses under 8 U.S.C. §1324(a) and §1327 related to “bringing in and harboring certain aliens” and “aiding or assisting certain aliens to enter” the United States.²⁸ The human smuggling guideline is

²⁵ The Commission requests comment on how to resolve the circuit splits over two questions related to “controlled substance offenses” under §4B1.2(b): (1) whether a “controlled substance offense” under §4B1.2(b) is limited to substances controlled under the federal Controlled Substances Act or extends to substances controlled only under state law; and (2) which temporal version of the applicable drug schedule — federal or state, and as of what date — governs whether a prior conviction qualifies as a predicate offense. The result is that defendants with identical criminal histories may or may not qualify as career offenders depending solely on the circuit in which they were sentenced. Eliminating state drug offenses will fully resolve both circuit splits. U.S. Sentencing Commission. (2026, January 30). *Proposed amendments to the sentencing guidelines* [Reader-friendly version].

https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202602_rf-proposed.pdf.

²⁶ U.S. Sentencing Commission. (2016). *Report to Congress: Career offender sentencing enhancements*.

²⁷ The Sentencing Project. (2025, February 3). *Comment on the “career offender” guideline* [Public comment submitted to the U.S. Sentencing Commission]. <https://www.sentencingproject.org/app/uploads/2025/03/TSP-Career-Offender-Comment-Final.pdf>.

²⁸ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1. <https://www.ussc.gov/guidelines/2025-guidelines-manual>.

among the most frequently applied in the federal system: in fiscal year 2024, approximately 4,350 individuals were sentenced under §2L1.1, accounting for roughly one in four federal immigration-related criminal cases.²⁹ The Department of Justice requested that the Commission revisit this guideline based in part on smuggling data from 2021 through 2023, a period of historically elevated border crossings that does not reflect current conditions.³⁰ Unauthorized border crossings have since dropped sharply, reaching their lowest levels in decades.³¹ The data also suggest that courts already regard the guideline as sufficiently severe. In FY2024, the average sentence imposed, 15 months, fell below the average guideline minimum of 17 months, and downward variances outnumbered upward variances by more than four to one (13.2% versus 3.0%).³² There is no need to make §2L1.1 more severe.

The Department of Justice cited the deadliest migrant smuggling case in U.S. history – the tragic 2022 tractor trailer smuggling conspiracy in San Antonio which claimed the lives of 53 migrants — as an illustration of the need for more severe penalties under §2L1.1.³³ Lengthy sentences, however, are already recommended by the guidelines for the most egregious human smuggling cases and applied by the courts. The maximum penalty in a human smuggling case that results in death is the death penalty.³⁴ For example, of the defendants sentenced for the 2022 San Antonio case to date, both were convicted of three counts related to the transportation of aliens within the United States resulting in death, causing serious bodily injury, and placing lives in jeopardy and one received a life sentence and the other a term of 83 years.³⁵ The guidelines can adequately address the most extreme cases already.

The guidelines fail, however, to mete out proportional punishment in more routine cases. The Commission should reform rather than expand §2L1.1(b)(7), the specific offense category (SOC) that imposes tiered level increases when bodily injury or death occurs. The (b)(7) SOC grew out of a far narrower Congressional directive, which instructed the Commission to enhance punishment for a defendant who “murders or otherwise causes death, bodily injury, or serious bodily injury to an individual.” Instead, today, like felony murder liability — itself a widely

²⁹ U.S. Sentencing Commission. (2024). *Quick facts: Alien smuggling*. <https://www.ussc.gov/research/quick-facts/alien-smuggling>.

³⁰ U.S. Department of Justice. (2025). *[Comment on proposed priorities for the amendment cycle ending May 1, 2026]* [Public comment submitted to the U.S. Sentencing Commission]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=93.

³¹ U.S. Customs and Border Protection. (n.d.). *Southwest land border encounters* [Data set]. Retrieved March 13, 2026, from <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; U.S. Customs and Border Protection. (2025, November 5). *DHS delivers historic start to border crossings for FY 2026*. <https://www.cbp.gov/newsroom/national-media-release/dhs-delivers-historic-start-border-crossings-fy-2026>.

³² U.S. Sentencing Commission. (2024). *Quick facts: Alien smuggling*. <https://www.ussc.gov/research/quick-facts/alien-smuggling>

³³ U.S. Department of Justice. (2025). *[Comment on proposed priorities for the amendment cycle ending May 1, 2026]* [Public comment submitted to the U.S. Sentencing Commission]. https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=93.

³⁴ U.S. Department of Justice. (n.d.). *1907. Title 8, U.S.C. 1324(a) offenses* [Justice Manual, Criminal Resource Manual]. <https://www.justice.gov/archives/jm/criminal-resource-manual-1907-title-8-usc-1324a-offenses>.

³⁵ U.S. Department of Justice, Office of Public Affairs. (2025, June 27). *Smuggling leader and top coordinator will spend remainder of their lives in prison following their sentencing on third anniversary of deadly tractor-trailer smuggling conspiracy* [Press release]. <https://www.justice.gov/opa/pr/smuggling-leader-and-top-coordinator-will-spend-remainder-their-lives-prison-following-their>.

criticized doctrine³⁶ — (b)(7) contains no *mens rea* requirement and no requirement that the defendant's own conduct caused the harm.

A defendant may even face a ten-level increase for a death to another migrant caused by a responding officer or for injuries that result from a law enforcement vehicular pursuit.³⁷ For example, Esteban Gaspar-Felipe led a group of 13 fellow migrants on foot for nine nights through the Rio Grande into Texas. After crossing the border, the migrants split into two vehicles, neither of which Mr. Gaspar-Felipe was driving. A high-speed vehicular pursuit by Border Patrol ensued and Border Patrol fired on one of the vehicles, resulting in the death of one of the migrants. Mr. Gaspar-Felipe was convicted by a jury of illegally reentering the United States and for “transportation of illegal aliens,” but acquitted of an enhancement for criminal conduct resulting in death. Mr. Gaspar-Felipe was 50 miles away at the time of the fatal shooting. The judge, however, found him responsible for the death, and increased Mr. Gaspar-Felipe’s sentence under the guidelines accordingly, more than doubling Mr. Gaspar-Felipe’s time in prison.³⁸ Expanding an enhancement that already operates without regard to intent or proximate causation would compound an existing injustice rather than address it. The Commission should instead use this opportunity to add a meaningful culpability requirement to (b)(7), one that ties the enhancement to what the defendant actually did and could have reasonably foreseen.

Likewise, the proposed two-level enhancement for concealing a person in a trunk, engine compartment, or similar space is overbroad and should not be adopted. The enhancement is drafted broadly enough to capture a wide range of conduct that differs substantially in its actual dangerousness — from individuals briefly concealed to avoid detection at a checkpoint to those confined in genuinely life-threatening conditions for extended periods. Treating these situations identically with a flat two-level increase does not advance proportionality. More importantly, the genuine harms the Commission is attempting to address through this enhancement — risk of serious injury, exposure to extreme heat or cold, deprivation of air — are already captured by the existing injury-related specific offense characteristics. We urge the Commission to decline to adopt this enhancement, and instead rely on the injury and endangerment SOCs to address dangerous transportation conditions.

The Commission should also decline to adopt the proposed enhancement for offenses where the defendant committed the offense knowing or with reckless disregard of the fact that the organization was a transnational criminal organization (TCO) as defined in 21 U.S.C. § 2341(5). The proposed enhancement is redundant. Defendants with meaningful organizational involvement are already subject to substantially higher sentences under the existing guideline. The number of individuals smuggled, a proxy for organizational capacity, drives the (b)(2) enhancement, which can add up to nine levels.³⁹ Cases involving serious harm trigger (b)(7).⁴⁰ And §2L1.1(b)(9) already provides a two-level enhancement where the offense was committed as part of an ongoing

³⁶ Ghandnoosh, N., Stammen, E., & Budaci, C. (2022, updated May 2024). *Felony murder: An on-ramp for extreme sentencing*. The Sentencing Project. <https://www.sentencingproject.org/reports/felony-murder-an-on-ramp-for-extreme-sentencing/>.

³⁷ See *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

³⁸ *United States v. Gaspar-Felipe*, 4 F.4th 330, 335 (5th Cir. 2021).

³⁹ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1(b)(2). <https://www.ussc.gov/guidelines/2025-guidelines-manual>.

⁴⁰ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1(b)(7). <https://www.ussc.gov/guidelines/2025-guidelines-manual>.

commercial organization or enterprise — language that encompasses the kinds of structured operations the TCO enhancement purports to target.⁴¹ Indeed, the Commission has been here before: in 2016, it proposed and then declined to adopt an alternative base offense level structure that would have turned on commercial organization membership, concluding that the existing guideline adequately captured organizational culpability through specific offense characteristics and role adjustments.⁴² Nothing in the Commission's data or the record of this proceeding provides a basis to revisit that judgment.

The proposed expansions to §2L1.1 are unsupported by current conditions and unnecessary given existing sentencing patterns. The Commission's energy is better spent reforming the guideline's existing deficiencies, particularly the lack of any culpability or causation requirement in (b)(7), than adding enhancements unlikely to improve public safety.

Conclusion

The Sentencing Project thanks the Commission for this opportunity to provide comment. The amendments under consideration this cycle present the Commission with a genuine opportunity to make the Guidelines more proportionate, more racially equitable, and more consistent with the purposes Congress articulated in the Sentencing Reform Act. The Sentencing Project urges the Commission to seize that opportunity — by expanding sentencing options, narrowing the career offender guideline's reach, and resisting pressure to increase penalties under §2L1.1 that courts are already declining to apply in full. We are grateful for the Commission's continued openness to evidence-based reform and look forward to remaining a resource as this work continues.

Please reach out with any questions to Liz Komar, Senior Policy Counsel, at lkomar@sentencingproject.org.

Many thanks,



Kara Gotsch
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⁴¹ U.S. Sentencing Commission. (2025). *2025 Guidelines manual*. §2L1.1(b)(9).
<https://www.usc.gov/guidelines/2025-guidelines-manual>.

⁴² Sentencing Guidelines for United States Courts, 81 Fed. Reg. 2295 (Jan. 15, 2016) (proposed amend.)
https://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108_RFP.pdf;
U.S. Sentencing Commission. (2016). *Amendment 802* (eff. Nov. 1, 2016).
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