Before the United States Sentencing Commission Public Hearing on Proposed Amendments to the Career Offender Guideline

Statement of Juval O. Scott, Federal Public Defender
for the Western District of Virginia, on Behalf
of the Federal Public and Community Defenders

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Hon. Chair Reeves, Vice-Chairs, and Commissioners: Thank you for holding a hearing on this important topic and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders.

I. Introduction

My name is Juval O. Scott, and I am the Federal Public Defender for the Western District of Virginia. I have been a Federal Defender for more than seventeen years, in three different jurisdictions (Virginia-Western, Indiana-Southern, and Wisconsin-Eastern), as well as an attorney advisor in the Training Division of the Office of Defender Services. I have represented hundreds of clients and have seen the devastating impact of career offender and other recidivist guideline enhancements on their sentences, their lives, their families, and their communities.

The Commission has proposed a four-part amendment to the career offender guideline, every part of which would expand its reach.[1] This is the same guideline that has long been recognized—including by the Commission—to be overly punitive, to have no empirical basis, and to exacerbate racial disparities in guideline sentencing. Even though individuals sentenced as career offenders represent only about 3% of those sentenced in federal court, they comprise over 11% of the federal prison population.[2] Even the Department of Justice, in its comments on the Commission's proposed priorities for 2023, recognized that guideline recidivist penalties are "not optimally set."[3] As the Commission recently reported, the career offender guideline is already the least influential guideline, with judges imposing below-guideline

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[1] *See* 88 Fed. Reg. 7180, 7209- 7218 (2023) ("2023 Proposed Amendments").

[2] *See* USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements ("*2016 Career Offender Report*").

[3] *See* DOJ Comments on the Sentencing Commission's Proposed Priorities 15 (Sept. 12, 2022).

sentences in nearly 80% of cases.[4] Extending its reach would give judges still more reasons to disregard it.

The Commission should take no action that will expand this problematic guideline. It definitely should not take the actions proposed here.

The Supreme Court's categorical approach is the best way to maintain consistency with the language of §4B1.1 and § 994(h), to ensure a reliable basis for severe sentencing enhancements, and to cabin the reach of the career offender guideline. The Commission's proposal to abandon the categorical approach would vastly and unreliably expand the reach of the guideline, without alleviating complexity. And it would give rise to new forms of unwarranted disparity and absurdity. If the Commission wishes to simplify the application of the categorical approach, it could greatly advance that goal by limiting the definition of "controlled substance offense" to those offenses enumerated in § 994(h),[5] and excluding inchoate offenses entirely.[6] But even if the Commission were to reject these particular suggestions, the problems that eliminating the categorical approach would create are too great to bear.

The Commission also should not retreat in other ways from its stated goal[7] of narrowing career offender and related enhancements by:

- expanding the definition of "robbery" to include offenses that require neither immediate threats, nor threats to the person (Part B);
- expanding the definitions of both "crime of violence" and "controlled substance offense" to include unidentified, undefined, and unknown breeds of inchoate offenses and accomplice liabilities (Part C); or

[4] *See* USSC, *The Influence of the Guidelines on Federal Sentencing* 55-56 (2020), https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing ("*Influence Report*"); USSC, *Quick Facts: Career Offenders* (2022), https://www.ussc.gov/research/quick-facts/career-offenders ("*2022 Career Offenders Quick Facts*").

[5] *See* Statement of Michael Caruso on Acceptance of Responsibility and Controlled Substance Offense § II.B (March 7, 2023).

[6] *See, infra,* § III.C.

[7] *See 2016 Career Offender Report* at 55.

- expanding the definition of "controlled substance offense" to include "offers to sell," which need not involve any controlled substance at all (Part D).

Consistent with § 994(h), however, the Commission must include offenses described in Chapter 705 of title 46.

II. Given problems with the career offender guideline, the Commission should not further expand its reach.

In its *2016 Career Offender* Report, the Commission acknowledged "longstanding policy concerns" with the career offender guideline, explained steps it had taken toward its goal of targeting only the most dangerous individuals, and recommended that Congress enact legislation that would permit the Commission to further narrow the guideline's reach.[8] Judges recognize the broad overreach of this guideline and have responded by imposing below-range sentences in an ever-increasing percentage of cases, reaching nearly 80% in FY2021.[9] The Commission should heed this judicial feedback and cabin, not expand, the reach of the guideline.[10]

This is especially true given the lack of any rationale, tied to statutory sentencing purposes, for the guideline's severity. Commission data has consistently reflected that the career offender guideline does a poor job of

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[8] *See 2016 Career Offender Report* at 43-45, 52-56. In the Report, the Commission recommended to Congress only that it remove from the career offender directive those assigned career offender status based solely on drug-trafficking convictions. *Id.* at 44-45. But the Report acknowledges that the Commission's data reflect that individuals in what the Commission calls the "mixed pathway" (those who may have a prior conviction or arrest for a violent crime) resemble in many respects, including in the rate and extent of below-guideline sentences, what the Commission calls the "drug trafficking only pathway" (those with no prior conviction or arrest for a violent crime). *Id.* at 43. And, although those in the "mixed pathway" and "violent only pathway" have a higher recidivism rate than those in the "drug trafficking only pathway," as noted in detail, *infra*, at 5-7 & nn. 22-33, the recidivism rate for these groups also correlates most closely with total criminal history points, not career offender status.

[9] *See Influence Report* at 55-56; *2022 Career Offenders Quick Facts*.

[10] *See Rita v. United States*, 551 U.S. 338, 350 (2007).

identifying defendants at the greatest risk of recidivism.[11] And the Commission has never provided any other sound reason for relying solely on criminal history to set a sentence at or near the statutory maximum. At the same time, the Commission has long recognized the guideline as a source of significant and unwarranted racial disparities.[12]

Because the guideline is overly punitive, has no empirical basis, and exacerbates racial disparity, the Commission should not further expand its reach.

Overly Punitive. The Sentencing Reform Act (SRA) directed the Commission to assure that the Guidelines specify a sentence at or near the maximum term for categories of defendants convicted of a felony crime of violence (undefined in the statute) or one of a list of certain enumerated federal drug-trafficking offenses, and who had previously been convicted of two or more felony crimes of violence or those same enumerated trafficking offenses.[13] With the SRA's abolition of parole,[14] and the increase in maximum terms for drug-trafficking offenses under the Anti-Drug Abuse Acts of 1986,[15] a sentence at or near the statutory maximum is an exceptionally long sentence.

The Commission implemented this directive by creating the career offender guideline, §4B1.1. And then it went about defining who would be subject to this guideline, §4B1.2. That is to say, while Congress directed that a discrete category of individuals must be subject to a near-maximum career

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[11] *See, e.g.,* USSC*, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004), https://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/index.cfm ("*Fifteen-Year Assessment*"); *2016 Career Offender Report* at 2-3, 38-41, 44.

[12] *See Fifteen-Year Assessment* at 132, 134.

[13] 28 U.S.C. § 994(h).

[14] Just before the SRA's passage, the average federal prisoner was released after serving less than half the sentence imposed. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850-1984*, Table 6-17.

[15]*Compare* 21 U.S.C. § 841(b)(1)(B) (1982) (setting five year maximum for schedule II non-narcotic controlled substance) *with* 21 U.S.C. § 841(b)(1)(C) (1986) (setting 20-year maximum for schedule II controlled substance)

offender sentence, the Commission has exercised significant control over which individuals would come within that category.[16]

Judges recognize that the guideline calls for sentences that are too high in most of the cases it captures. The Commission reported in its *2016 Career Offender Report* that, since *Booker*, the proportion of those identified as career offenders who are sentenced within the applicable guideline range decreased from 43.35% in FY2005 to 27.5% in FY 2014.[17] In FY2021, judges imposed within-range sentences in just 19.7% of those deemed career offenders.[18]

It is no wonder that, in its 2020 report on *The Influence of the Guidelines on Federal Sentencing*, the Commission identified the career offender guideline as one of the least influential guidelines.[19] Not only do judges impose a within-guideline sentence in a small and shrinking percentage of cases, but the difference between the average guideline minimum in these cases and the average sentence imposed has steadily widened.[20] Thus, unlike other guidelines, whose influence has stabilized over time, judges have diverged from the career offender guideline in more cases and to a greater extent over time.[21]

No empirical basis. The judges' instincts are not wrong. The Commission has repeatedly observed that the career offender guideline does a poor job of identifying defendants at the greatest risk of recidivism—starting from its very first recidivism report.[22] In its *Fifteen-Year Assessment,* the Commission explained that the "recidivism rates for career offenders more

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[16] *See 2016 Career Offender Report* at 12-15.

[17] *See id.* at 22.

[18] *See 2022 Career Offenders Quick Facts.*

[19] *See Influence Report* at 55-56.

[20] The difference between the average guideline minimum and the average sentence imposed in career offender cases widened from a difference of 45.6 months in 2005, just after *Booker*, to a difference of 66.9 months in 2017, the last year of the study period. *See id.* By FY2021, the difference had grown to 73 months. *See 2022 Career Offenders Quick Facts.*

[21] *See Influence Report* at 56.

[22] *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9, 37 (2004).

closely resembles the rates for individuals in the lower criminal history categories in which they would be placed under the normal criminal history scoring rules."[23] And the Commission repeated this observation in its *2016 Career Offender Report*: "recidivism rates are most closely correlated with total criminal history points."[24]

Commission data has consistently reflected that, as a group, those placed in Criminal History Category (CHC) VI by operation of the career offender and armed career criminal guidelines have a recidivism rate closer to those placed in CHC III based on points.[25] Even limiting the analysis to "violent offenders" placed in CHC VI by the career offender guideline, Commission data still reflects that, as a group, they have a recidivism rate[26] closer to those in CHC III[27] and lower than other "violent offenders" placed in CHC III based on points.[28] Likewise, the *2016 Career Offender Report* also reports a recidivism rate for those placed in CHC VI through its "violent only career offender" pathway as having a recidivism rate[29] closer to CHC III.[30]

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[23] *Fifteen-Year Assessment* at 134.

[24] *2016 Career Offender Report* at 43.

[25] *See, e.g.*, USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29, fig.14 (2022), https://www.ussc.gov/research/research-reports/recidivism-federal-violent-offenders-released-2010 ("*2022 Recidivism Report-Violent*"); USSC, *Recidivism of Federal Drug Offenders Released in 2010* 31 fig.14 (2022), https://www.ussc.gov/research/research-reports/recidivism-federal-drug-trafficking-offenders-released-2010 ("*2022 Recidivism Report-Drugs"*); USSC, *Recidivism of Federal Offenders Released in 2010* 26, fig.13 & 29, fig.16 (2021), https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010 ("*2021 Recidivism Report*"); *2016 Career Offender Report* at 38-41, 44; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs.7A & 7B (2016), https://www.ussc.gov/research-and-publications/research-publications/2016/recidivism-among-federal-offenders-comprehensive-overview ("*2016 Recidivism Report*); *Fifteen Year Assessment* at 134.

[26] *See 2022 Recidivism Report-Violent* at 29 fig.14 (65% for ACCA/CO "violent offenders").

[27] *See 2021 Recidivism Report* at 26 fig.13 (61.9% for CHC III).

[28] *See 2022 Recidivism Report-Violent* at 29 fig.14 (65% for ACCA/CO "violent offenders," 66.3% for CHC III "violent offenders").

[29] *See 2016 Career Offender Report* at 42 fig.21 (69% for "violent only career offenders").

[30] *See 2016 Recidivism Report* at 19 fig.7A (63.3% for CHC III).

The mismatch between the career offender guideline and recidivism is even worse for the approximately 75% of people classified as career offenders based on instant drug-trafficking offenses.[31] The Commission's most recent data for those placed in CHC VI by operation of the career offender and armed career criminal guidelines based on instant controlled substance offenses show that, as a group, they have a recidivism rate[32] below those in CHC III.[33]

Further, beyond the CHC, those deemed career offenders based on an instant drug-trafficking offense also suffer some of the steepest offense level increases. The career offender offense level is tied to the statutory maximum for the offense, and the statutory maximum terms for federal drug offenses rise quickly from 20 years for some of the least serious offenses to life.[34] As a result, individuals deemed career offenders on the basis of a conviction under 21 U.S.C. § 841 receive a starting offense level no lower than 32, and are frequently placed in offense level 37, to staggering effect.[35] An individual convicted of distributing 28 grams of crack cocaine with one § 851 enhancement faces a statutory mandatory minimum of 10 years and could have a §2D1.1 guideline range significantly lower than that. If he is deemed a career offender, his starting guideline range soars to 360 months to life.

There is no empirical basis for this severe increase. Again, risk of recidivism provides no basis for any increase in either CHC or offense level. Nor has the Commission articulated any *other* principled rationale for sentencing any particular set of individuals at or near the statutory maximum term. And it would be hard to find one. Indeed, even retributivist theories—those that justify criminal history enhancements on the theory of greater offender

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[31] The percentage of those deemed career offenders based on a current drug-trafficking offense hovers above 75%. *See, e.g.*, USSC, *Quick Facts: Career Offenders* (2022) (969 out of 1246); USSC, *Quick Facts: Career Offenders* (2021) (948/1216); USSC, *Quick Facts: Career Offenders* (2020) (1305 out of 1737).

[32] *See 2022 Recidivism Report-Drugs* at 31 fig.14 (58.9% for ACCA/CO).

[33] *See 2021 Recidivism Report* at 26 fig.13 (61.9% for CHC III).

[34] *See* 21 U.S.C. § 841(b)(1)(C), (b)(1)(A).

[35] *See* USSG §4B1.1.

culpability—agree that the added penalty for the criminal history should not exceed the penalty for the offense itself.[36]

The Commission itself appears to have abandoned any effort to identify a rationale for the career offender guideline tied to sentencing purposes. In its *2016 Career Offender Report*, the Commission stated: "Despite the continued reliability of the guideline's criminal history score in predicting recidivism, and the impact an offenders' criminal history score has on increasing the offenders' range of punishment under the guidelines, the Commission continues to believe that certain recidivist offenders should be punished more severely based on the nature of their priors."[37] But the Commission's "belief" is not a rationale. The Commission notably did not purport to justify a sentence near the statutory maximum for *any* set of individuals without any case-specific aggravating offense facts. Instead, what followed in the *Report* was the Commission's plea to Congress, based on empirical evidence and national experience, to remove individuals whose career offender status was based solely on drug trafficking convictions from the reach of the directive. This recognition of one of the most obvious of the guideline's problems, while welcome, does not justify the other ways in which the guideline overreaches.

It's no surprise that neither the Commission nor anyone else has offered a principled rationale for the career offender guideline. The career offender guideline is not a product of the Commission acting within its "characteristic institutional role"[38]; it is simply the product of a congressional directive. The Commission cannot change or eliminate the directive (although it should continue to implore Congress to do so). But given the lack of any principled rationale for the career offender guideline, other than the directive, the Commission should ensure that the guideline reaches no further than the directive, § 994(h), requires.

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[36] *See* Richard S. Frase & Julian V. Roberts, *Retributivist Perspectives*, *in Paying for the Past: The Case Against Prior Record Sentence Enhancements*, 23, 35-36, 38 (2019). In practical terms, this means "offenders with the longest records should not receive penalties more than twice as severe as first offenders who commit the same offense." *Id.* at 36. And this is roughly what the normal operation of the CHC achieves, with the ranges provided in CHC VI roughly double the ranges provided in CHC I for the same offense level. *See* USSG Chapter 5, Part A (Sentencing Table).

[37] *2016 Career Offender Report* at 43.

[38] *Kimbrough v. United States*, 552 U.S. 85, 89 (2007).

Racially disparate. Finally, this singularly problematic guideline—problematic in both its severity and its lack of empirical basis—is disproportionately visited on Black individuals. As early as 2004, the Commission identified the career offender guideline—along with the since-reduced 100-to-1 quantity ratio between powder and crack cocaine—as a source of significant and unwarranted adverse impact on Black defendants.[39] In the last five years, Black individuals comprised 20.8% of those sentenced under the Guidelines, but 60.7% of those identified as career offenders.[40] Viewed from the other side, the rate at which Black individuals are assigned career offender status is almost six times the rate for non-Black individuals.[41]

Thus, the severe and empirically unjustified career offender enhancement feeds not only over-incarceration but also racial inequality in the criminal legal system. The racially disproportionate impacts of sentencing enhancements based on prior convictions, like this one, have led the Robina Institute's Sentencing Guidelines Resource Center to call on sentencing commissions to examine the racial impact of their use of prior convictions: "[I]f a particular component is found to have a strong disparate impact on nonwhite offenders, the commission should carefully evaluate the rationales for including the component to ensure that the degree of added enhancements is narrowly tailored to meet the chosen goals without unnecessary severity and disparate impact."[42]

In the case of the career offender guideline, the total absence of a real rationale ensures that its enhancement is *not* narrowly tailored to meet any chosen goal. As the Commission recognized in 2004, a "rule that serves no clear purpose would be questionable in any event, but rules that adversely affect a particular group deserve extra scrutiny."[43] For these reasons alone, the

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[39] *See Fifteen-Year Assessment* at 131-34.

[40] *See* USSC, Individual Datafiles FY 2017-2021.

[41] *Id.* (6.9% of Black individuals sentenced under the Guidelines were identified as career offenders, whereas 1.2% of non-Black individuals were identified as career offenders).

[42] Richard Frase & Rhys Hester, *Criminal History Enhancements as a Cause of Minority Over-Representation*, *in Criminal History Enhancements Sourcebook* 105, 116 (Robina Institute of Criminal Law and Criminal Justice, 2022).

[43] *Fifteen-Year Assessment* at 131

Commission should take care to cabin the reach of the career offender guideline.

But there is more. A disturbing source of this disparity—especially with respect to drug prosecutions, the primary source of career offender placement—is racially disparate law enforcement practices.[44] It has long been acknowledged that law enforcement practices spawned by the War on Drugs increased arrests for low-level drug trafficking offenses, and that Black Americans were and are disparately affected.[45] Recent individualized data analyses suggest that the greater likelihood of arrest for Black individuals, in comparison with white individuals, cannot be explained by differences in either drug or non-drug offending or by differences in community context, such as greater likelihood of selling drugs to strangers, in public places, or in areas with heavy police presence.[46] After controlling for these differences, Professors Mitchell and Caudy report that the disparity in arrests for drug distribution between Black and white individuals remained "statistically significant and substantively large."[47] They conclude that these results are most consistent with racial bias.[48]

Research from across the country confirms that Black drivers and pedestrians are stopped, frisked, searched, and arrested far in excess of their portion of the population or their share of criminality. Drugs, weapons, and other contraband are found at significantly lower rates in frisks and searches of Black than of white individuals, and the bar for searching Black drivers is lower than that for searching white drivers.

For example, the Stanford Open Policing Project analyzed data from 21 state patrol agencies and 29 municipal police departments, comprising nearly

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[44] *See* Nat'l Research Council, *The Growth in Incarceration in the United States: Exploring Causes and Consequences* 97 (Jeremy Travis *et al.*, eds. 2014).

[45] *See, e.g.,* Michael Tonry, *Malign Neglect, Race, Crime, and Punishment in America* (1995).

[46] *See* Mitchell, O. and Caudy, M., *Race Differences in Drug Offending and Drug Distribution Arrests*, 63(2) Crime & Delinquency 91, 108 (2017).

[47] *Id.*

[48] *See id.*

100 million traffic stops.[49] It found significant racial disparities in policing and, in some cases, evidence that bias plays a role. Specifically, the Project found that Black drivers were less likely to be stopped after sunset, when their race would not be apparent.[50] It also found that the bar for searching Black and Hispanic drivers once stopped was lower than that for searching white drivers.[51] Similar results have been found in studies of specific cities[52] as well as whole states.[53] Because police can find contraband only where they look for it, Black individuals are arrested and convicted in disproportionate numbers relative to similarly situated white individuals.[54]

We could go on. But the point is this: sentencing enhancements based on prior convictions replicate this racial inequality in the criminal legal system over time and space. Put differently, even if all of today's investigation, prosecution, and sentencing within the federal system were somehow to shed all racial inequality (an obvious impossibility), increasing federal sentencing ranges based on prior convictions would continue to "bake in" the inequalities of the past.[55]

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[49] *See* Findings, Stanford Open Policing Project, https://openpolicing.stanford.edu/findings/ (last visited Feb. 8, 2023).

[50] *See* Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States,* 4 Nature Human Behavior 736, 742-43 (2020).

[51] *See id.*at 743.

[52] *See, e.g.*, Office of the San Francisco Dist. Att'y, *Report of the Blue Ribbon Panel on Transparency, Accountability, & Fairness in Law Enforcement* (2016), http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf; *Floyd v. City of New York,* 959 F. Supp.2d 540, 559-60 (S.D.N.Y. 2013) (summarizing reports of Jeffrey Fagan, Ph.D.); Ian Ayres & Jonathan Borowsky*, A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 5-6 (2008), *https://www.aclusocal.org/sites/default/files/wp -content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf.*

[53] *See, e.g.*, Frank R. Baumgartner *et al., Targeting Young Men of Color for Search and Arrest during Traffic Stops: Evidence from North Carolina, 2002-2013*, Politics, Groups, & Identities (2016); Matthew B. Ross et al., Inst. for Mun. & Reg'l Policy, Cent. Conn. State Univ., *State of Connecticut: Traffic Stop Data Analysis and Findings* (2016).

[54] *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 297, 301-02 (1999).

[55] Rhys Hester, *Prior Record and Recidivism Risk,* 44 American Journal of Criminal Justice 353, 354 (2019); *see also, generally,* Richard Frase & Rhys Hester,

We were pleased that the Commission took steps in 2016 to address these concerns. Recognizing that § 994(h)'s mandate is out of sync with the statutory purposes of sentencing and the Commission's data, the Commission recommended to Congress that it remove from § 994(h) those who qualify as career offenders based solely on controlled substance offenses.[56] That same year, the Commission amended the "crime of violence" definition consistent with its goal of focusing on the most dangerous individuals,[57] and recommended that Congress adopt the resulting definition as a uniform definition for "crime of violence."[58]

Yet, every part of the Commission's proposed career offender amendment moves in the opposite direction. Each would have the effect of expanding—in the case of Parts A and C, drastically—the reach of this draconian guideline, identifying many more individuals as subject to near-maximum sentences, and visiting these overly severe sentences disparately on Black individuals. We oppose each part.

Criminal History Enhancements as a Cause of Minority Over-Representation, *in Criminal History Enhancements Sourcebook* (Robina Institute of Criminal Law and Criminal Justice, 2022); Rhys Hester et al., *Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences*, 47 Crime & Justice 209, 238 (2018).

Similar concerns are at play in USSG §2K2.1, which contains enhanced base offense levels that were promulgated not based on data or national experience, but a desire to achieve "proportionality" with statutory mandatory minimum sentences. *See* Statement of Michael Carter on Firearms Offenses at 21 (March 7, 2023). Like the career offender guideline, these severe enhancements disparately impact Black individuals. For example, according to data obtained from the USSC FY2017-2021, Individual Datafiles, Black individuals comprised 20.8% of all individuals sentenced under the Guidelines, 53.3% of those for whom §2K2.1 was the primary guideline, and 72.5% of those who were assigned base offense level §2K2.1(a)(2), based on two qualifying prior convictions.

[56] *See 2016 Career Offender Report* at 43-45.

[57] *See* USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

[58] *See 2016 Career Offender Report* at 48-55.

III. Every part of the four-part proposal would expand the reach of the career offender guideline.

A. The Commission should not replace the Supreme Court's narrow elements-based categorical approach with a broad, unworkable accusation-based approach.

Although imperfect, the Supreme Court's categorical approach is "under-inclusive by design."[59] By contrast, the proposal in Part A to substitute the elements-based categorical approach with an accusation-based examination of court documents, coupled with new definitions of "crime of violence" and "controlled substance offense" requiring identification of the most appropriate federal guideline even for state offenses, appears to be *over*-inclusive by design. It would not solve the problems it targets—complexity, unwarranted disparity, perceived arbitrariness. It would only swap them out for new problems of the same ilk. This is not a trade the Commission should make.

The Commission's proposal to abandon the Supreme Court's categorical approach consists of two components. First, the Commission proposes to replace the uniform definitions for "controlled substance offense" and "crime of violence" with a long list of federal guidelines: federal offenses for which these guidelines are the applicable guideline, and state offenses for which these guidelines would be the "most appropriate" guideline if the state offense had been sentenced under the Guidelines in federal court, would constitute career offender predicates. Second, the Commission proposes to replace the Supreme Court's elements-based categorical approach with what functions as an accusation-based approach: federal judges examine court documents to determine what conduct the conviction was based on.[60]

While the Commission has not released data on the impact of this proposal, there can be no doubt it would vastly increase the number of people subject to the career offender guideline and other recidivist enhancements, further increase the federal prison population, and exacerbate racial disparity. The proposal would also worsen, not alleviate, complexity, and thus

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[59] *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021).

[60] *See* 2023 Proposed Amendments at 7209-14.

significantly increase litigation and decrease judicial efficiency. And it would give rise to new disparities and arbitrary results.

1. The listed-guideline approach is overly expansive and complicated.

In its *2016 Career Offender Report*, the Commission described its "overall goal of focusing the career offender and related enhancements on the most dangerous offenders."[61] Contrary to this goal, the Commission's current proposal replaces the tailored definitions of "crime of violence" and "controlled substance offense" with a list of more than half of the Chapter 2 guidelines in the book.[62] And it provides that prior state convictions will constitute career offender predicates if one of the listed guidelines would be "the most appropriate guideline . . . had the defendant been sentenced" for the state offense "under the guidelines in federal court."[63]

No doubt, most of the listed guidelines cover *some* offenses that involve the purposeful use of violent force.[64] But most—perhaps all—also include some offenses that do not. Adopting this approach would sweep in many offenses that fit no one's understanding of a "crime of violence" or "controlled substance offense."

For example, the proposal lists §§2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise), as crimes of violence. But these are the applicable guidelines for the offenses of participating in hundreds of types of racketeering and specified unlawful activities, including gambling, sports bribery, counterfeiting, theft from interstate shipments, trafficking in counterfeit labels for computer programs, and contraband cigarettes.[65] Under the Commission's proposal, participating in the affairs of an enterprise that engages in, or conspiring to travel in

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[61] *2016 Career Offender Report* at 55.

[62] *See* 2023 Proposed Amendments at 7210-11.

[63] *Id.* at 7211.

[64] *See Borden*, 141 S. Ct. at 1828 (holding use means purposeful or knowing use); *Johnson v. United States*, 559 U.S. 133, 140 (2010) (holding physical force means violent force).

[65] *See* USSG §§2E1.1, 2E1.2; 18 U.S.C. §§ 1952(b); 1961.

furtherance of, any of these activities would be crimes of violence. And, if a court thought that §§2E1.1 or 2E1.2 would be "the most appropriate guideline" for state racketeering offenses, then racketeering in forgery, counterfeiting, gambling, and lottery enterprises;[66] or participating in grand larceny, failure to pay withheld child support, or unlawful sublease of motor vehicles corrupt organizations[67] would be crimes of violence also.

So, too, would offenses like obstructing an officer. This is because the Commission included §2A2.4 (Obstructing or Impeding Officers) in its list of crimes of violence. Many of the federal offenses indexed to §2A2.4 could never be career offender predicates because they are misdemeanors.[68] But some are felonies: for example, a person in charge of a vessel of the United States commits the federal felony of failing to heave to, if he fails to obey an order by an authorized Federal law enforcement officer to adjust the vessel's course to facilitate law enforcement boarding.[69] And in many states, simple obstruction offenses are punishable by imprisonment for a term exceeding one year.[70] If a court were to determine §2A2.4 was the "most appropriate guideline" for these state obstruction felonies, they could all be career offender predicates.

Indeed, even determining which guideline to consult would be no easy task. Consider for just three paragraphs how maddeningly complicated it would be to determine the applicable guideline for one common category of offenses: assault. Sections 2A2.2 (Aggravated Assault) and 2A2.4 (Obstructing and Impeding an Officer) are listed guidelines for "crime of violence," but §2A2.3 (Assault) is not. Even federal offenses do not fit neatly into these guidelines, much less do state offenses. Take 18 U.S.C. § 111, which prohibits assaulting, resisting, or impeding certain federal officers or employees. It

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[66] *See* Miss. Code Ann. § 97-43-1, *et seq.*

[67] *See* Va. Code Ann. § 18.2-512, *et seq.*

[68] *See, e.g.*, 18 U.S.C. §§ 111(a), 1501, 1502, 3056(d).

[69] *See* 18 U.S.C. § 2337(a)(1).

[70] *See* Md. Code Ann., Crim. Law § 9-408 (interfering with an individual who the person has reason to know is a police officer who is making or attempting to make a lawful arrest or detention of another person); Mass. Gen. Laws Ann. Ch. 268, § 32A (willfully interfering with a firefighter in the lawful performance of his duty); 30 Pa. Stat. and Cons. Stat. Ann. § 904; 18 Pa. Stat. and Cons. Stat. Ann. § 5104.3 (resisting inspection by a waterways conservation officer); Wis. Stat. Ann. §§ 946.41, 939.62 (obstructing an officer as a "repeater").

covers misdemeanor assaults and resisting, which are elevated to felonies if the acts involve physical contact with the victim or the intent to commit any other felony.[71] The Guidelines' Statutory Index (Appendix A) specifies §§2A2.2 and §2A2.3 as the applicable guidelines for § 111. Because both are among the listed guidelines for crimes of violence, one might conclude that all violations of § 111, and all state offenses that are "most similar" to § 111, are "crimes of violence."

But it's not nearly so simple. After all, § 111(a) includes assaults that are *misdemeanors* under federal law and thus can never be career offender predicates. And, although Appendix A does not index § 111 to §2A2.3 (Assault), a federal sentencing judge could well conclude that the "most appropriate" guideline for a state offense that resembled the misdemeanor violation or other non-aggravated versions of § 111, is §2A2.3. And, as noted above, §2A2.3 is not listed as a "crime of violence."

If the court were persuaded to ignore Appendix A, it might be tempted to draw a distinction between aggravated assault and simple assault and conclude that the former are career offender predicates, whereas the latter are not. After all, the *background* to §2A2.3 (Assault) explains that "[t]his section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault)." And the *commentary* to §2A2.2 purports to define "aggravated assault" as "a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.,* not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony."[72] But it is unclear why the commentary defines "aggravated assault," since the guideline text does not use the phrase "aggravated assault." Moreover, that definition could not define the contours of which assaults constitute "crimes of violence" because the definition specifies no *mens rea* requirement. The Commission's proposal excludes from the "crime of violence" definition convictions under federal or state law based upon a finding of recklessness or negligence, and some "aggravated assaults" can be committed with a reckless

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[71] *See* 18 U.S.C. § 111.

[72] USSG §2A2.2, comment. (n. 1).

state of mind.[73] In short, under the Commission's listed guideline approach, determining whether assault—under federal or state law—is a crime of violence would be complicated.

Indeed, every guideline the Commission has identified as a "crime of violence" raises complexities. Even §2A1.1 (First Degree Murder) would not be entirely straightforward. Section 2A1.1 is the applicable guideline for federal felony murder.[74] The guideline itself notes that there may be cases where the defendant did not cause the death intentionally or even knowingly and that a downward departure might in those cases be warranted.[75] Does this acknowledge that not every federal felony murder should be a career offender predicate? And, what about state felony murder convictions? Would §2A1.1 always be the "most appropriate guideline . . . had the defendant been sentenced [for the state felony murder] under the guidelines in federal court"?

Consider Missouri, where James Colenburg was convicted of felony murder after he killed a child who suddenly ran into the middle of the street in front of the car Mr. Colenburg was driving, which he knew had been stolen seven months earlier.[76] Or Illinois, where Allison Jenkins was convicted of felony murder after an officer chased him, erroneously suspecting he had drugs. When Mr. Jenkins elbowed the officer to shake free, the officer's gun went off, killing his partner.[77] Federal felony murder encompasses neither a death caused in the course of driving a car without permission, nor a killing committed by a police officer in attempting to effect an arrest. Is the guideline that covers the type of conduct "most similar" to these offenses the listed guideline §2A1.1 (First Degree Murder) or the unlisted guideline § 2A1.4 (Involuntary Manslaughter)?

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[73] *See, e.g.,* 18 U.S.C. § 113(a)(6); Ariz. Rev. Stat Ann. §§ 13–1203, 1204; Me. Rev. Stat. tit. 17-A, § 208; Tenn. Code Ann. § 39-13-102(a)(1)(B); Tex. Penal Code Ann. § 22.02.

[74] *See* USSG §2A1.1; 18 U.S.C. § 1111(a).

[75] *See* USSG §2A1.1, comment. (n. 2(B))

[76] *See State v. Colenburg*, 773 S.W.2d 184, 185, 187-89 (Mo. Ct. App. 1989).

[77] *See People v. Jenkins*, 545 N.E.2d 986, 990-91 (Ill. App. Ct. 1989).

2. The non-elemental approach is unreliable, overly inclusive, and impossibly complicated.

The second component of the Commission's proposal to eliminate the categorical approach—to require courts, for each prior conviction, to determine from court records what *conduct* the conviction was based on—may be even more problematic. The categorical approach, for better or worse, at least has a clear basis: A prior conviction is not for a specified offense unless the conviction establishes the elements of the specified offense because otherwise the individual has not been convicted of the specified offense.[78]

The Commission's proposal eschews this elements-based approach and proposes to substitute in its place an approach with nothing clear about it:

- It would direct federal courts to determine what the "most appropriate guideline" for the state offense would have been if the defendant had been sentenced for the state offense in federal court, by determining which guideline "covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted."[79]

- It would direct that "[t]he court shall make this determination based on: (1) the elements, and means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any element or means."[80]

- It would identify, in commentary, a variety of documents, including "the charging document" and "any comparable judicial record," that the court may consult in making this determination.[81]

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[78] *See Taylor v. United States*, 495 U.S. 575, 602 (1990). Defenders set forth a detailed rationale for the categorical approach at pages 6-18 of our Comments on the Sentencing Commission's 2019 Proposals (Feb. 19, 2019).

[79] 2023 Proposed Amendments at 7211-12.

[80] *Id.* at 7212.

[81] *Id.*

- Finally, it would instruct, also in commentary, that the "[f]act that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the [listed guidelines] is not determinative."[82]

Every step of these directions decreases the reliability of the court's assessment, expands the pool of eligible convictions, and exacerbates the complexity of the proposed approach.

Start with reliability. The reason the Supreme Court forbids application of a recidivist sentencing enhancement without first determining the *elements* of the prior offense of conviction is that the only "conduct" a prior conviction proves is the conduct that was necessary to sustain the conviction—that is, the elements of the offense.[83] As the Supreme Court explained in *Descamps*, any other fact a court purports to divine from records "may be downright wrong."[84] A defendant "has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to."[85] At trial, the court may well prohibit extraneous facts and arguments that may confuse the question of guilt for the jury.[86]

The Court reiterated this in *Mathis*: "Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary."[87] When a defendant does not contest (or even is precluded from contesting) what does not matter under the law, "a prosecutor's or judge's mistake as to means, reflected in the records, is likely to go uncorrected."[88] By directing courts to discern non-elemental facts from court documents, the Commission's proposal requires courts to engage in unreliable factfinding.

And to be clear, the non-elemental facts upon which the proposal directs federal sentencing courts to rely are *the prosecution's accusations*. The

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[82] *Id.*

[83] *See Descamps v. United States*, 570 U.S. 254, 269-70 (2013).

[84] *Id.* at 270.

[85] *Id.*

[86] *See id.*

[87] *Mathis v. United States*, 579 U.S. 500, 512 (2016)

[88] *Id.*

first two items on the Commission's list of permissible sources of information are the judgment of conviction and the charging document. It is the charging document that will usually contain the most information about conduct, but that's nothing more than allegations—sometimes prepared by the prosecution, sometimes by a police officer, sometimes even by a civilian complainant.[89] Even a grand jury indictment is not proof; it's a finding of sufficient evidence to charge.[90] And just as a jury is required to be unanimous only about the elements of an offense, so when a defendant pleads guilty, he is required to admit only the elements.[91] Indeed, most states permit a plea without admitting *any* of the facts in the charging document.[92] Directing courts to find facts from charging documents would replace the Supreme Court's narrow elements-based approach with a broad accusation-based approach.[93]

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[89] *See, e.g., State ex rel. Kalal v. Circuit County for Dane* County, 681 N.W.2d 110, 117 (Wis. 2004) (discussing private criminal complaints under Wisc. Stat. Ann. § 968.02(3)); *State v. Smith*, 505 A.2d 511 (Md. 1986) (describing statement of charges of civilian complaint sworn before judicial officer under Md. R. 4-211(b)(1)).

[90] *See, e.g., Wright v. Commonwealth*, 667 S.E.2d 787, 701 (Va. Ct. App. 2008).

[91] *See, e.g., Schad v. Arizona*, 501 U.S. 624, 637 (1991), *abrogation on other grounds recognized by Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (trial); *State v. Derango*, 613 N.W. 2d 833, 838-841 (Wis. 2000) (trial); *Davison v. Commonwealth*, 819 S.E.2d 440, 445-446 (Va. 2018) (trial); *Descamps*, 570 U.S. at 269-70 (plea); *State v. Thomas*, 605 N.W.2d 836, 843-45 (Wis. 2000) (plea); *Stott v. State*, 486 N.E.2d 995, 997 (Ind. 1985) (plea).

[92] *See, e.g., North Carolina v. Alford*, 400 U.S. 25 (1970); *In re Barr*, 684 P.2d 712, 715 (Wash. 1984); *People v. Martin*, 374 N.E.2d 1012, 1015 (Ill. App. Ct. 1978); *People v. Clairborne*, 39 A.D.2d 587, 588, (N.Y. App. Div. 1972); *People v. Johnson*, 181 N.W.2d 425, 429 (Mich. Ct. App. 1970), *abrogated on other grounds by People v. Smith-Anthony*, 837 N.W.2d 415 (Mich. 2013).

[93]Moving to a pure conduct-based approach, as the Department of Justice has suggested in the past, would not resolve these concerns. In addition to inviting a mini-trial at every single sentencing involving recidivism enhancements under the Guidelines, the defendant would be placed at an insurmountable disadvantage. For the same reasons that "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary," *Mathis*, 579 U.S. at 512, court and especially law-enforcement records will rarely record exculpatory facts that would not constitute a defense to the crime. That evidence is not likely to be preserved anywhere. As a result, a so-called conduct-based approach could easily devolve into a routine reading of police reports as if they were an objective representation of the facts in the case. Recent events have laid bare that there can be no presumption of reliability for such reports simply because they were

By permitting courts to identify convictions as eligible based on prosecutorial accusations, the Commission's proposal would vastly increase the pool of newly-eligible convictions—and of newly-minted career offenders.

What's more, the proposal would not simplify federal sentencing. To be clear, Defenders do not think that it is justifiable to wrongly identify whole new groups of individuals as subject to harsher penalties for the purpose of simplifying Article III judges' jobs. But, even if it were, the Commission's proposal will create more, not less, work.

First, a federal judge cannot escape the categorical approach. Regardless of the Guidelines, the categorical approach will continue to apply to standards under the Bail Reform Act,[94] firearm prosecutions under §§ 922(g)(9) and 924(c),[95] and challenges to prior deportations under 8 U.S.C. § 1326(d),[96] as well as all statutory sentencing enhancements.[97] In firearm and drug-trafficking prosecutions with statutory enhancements, the court would have to first perform an elements-based categorical analysis to determine whether prior convictions triggered an enhanced statutory range, and then perform a second accusation-based analysis—sometimes for the same conviction—to determine whether the recidivist guideline enhancement applied.

Second, at least in the early years, a threshold question in every case would be whether the proposed amendments to the guideline setting forth *definitions* for terms used in the career offender guideline, §4B1.2, conflicts with the *substantive* guideline, §4B1.1, and the career offender directive, § 994(h), itself. The directive and the substantive guideline both require "convictions" as the basis for the enhancement. And the Supreme Court has

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prepared by law enforcement officers. Jaglois, et al., *Initial Police Report on Tyre Nichols Arrest is Contradicted by Videos*, N.Y. Times, January 30, 2023, https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html.

[94] *See United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999).

[95] *See United States v. Castleman*, 572 U.S. 157, 169 (2014) (§ 922(g)); *United States v. Taylor*, 142 S. Ct. 2014, 2020 (2022) (§ 924(c)).

[96] *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017).

[97] *See Borden*, 141 S. Ct. at 1822 (2021) (ACCA); *United States v. Thompson*, 961 F.3d 545, 549 (2d Cir, 2020) (§ 851 enhancement); *United States v. Schopp*, 938 F.3d 1053, 1059 (9th Cir. 2019) (§ 2251(e)); *United States v. Leaverton,* 895 F.3d 1251, 1253 (10th Cir. 2018) (§ 3559(c)).

consistently held that the term "conviction" requires an elements-based analysis because being "convicted" of a certain type of offenses is not the same thing as "committing" a certain type of conduct.[98] In each case implicating the Commission's new approach, courts would first need to address whether the Commission can, through §4B1.2, convert the elements-based approach required by §4B1.1 and § 994(h) into an accusation, or even conduct-based one. Is this even within the Commission's statutory authority?[99] How will courts reconcile §4B1.1 with §4B1.2?

The executive branch's attempt to change what it means to be "convicted of . . . a crime involving moral turpitude," as summarized in *Matter of Silva-Trevino III*, offers a cautionary tale.[100] Immigrants convicted of a "crime involving moral turpitude" are ineligible for discretionary relief from deportation.[101] In 2008, the Attorney General attempted to eliminate the use of the categorical approach for this determination in the exercise of his authority to issue controlling determinations with respect to questions of law in immigration courts.[102] He issued an opinion establishing a three-step framework: the first step resembled a categorical inquiry; the second permitted resort to the modified categorical approach in every case in which there was not a categorical match; and the third permitted the adjudicator to look beyond the record of conviction.[103]

What followed was six years of litigation, leading to a circuit conflict over the propriety of the Attorney General's opinion, with five circuits rejecting the Attorney General's interpretation as contrary to the statute's use of

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[98] *See, e.g., Taylor* 495 U.S. at 600 (interpreting "conviction" and applying the categorical approach to enumerated offense clause of 18 U.S.C. § 924(e)); *Moncrieffe v. Holder,* 569 U.S. 184, 200 (2013) (holding that "convicted of" requires categorical approach to 8 U.S.C. § 1227(a)(2)(A)(iii)); *Castleman*, 572 U.S. at 168 (applying categorical approach to determine whether defendant had been "convicted" of a misdemeanor crime of domestic violence as required under 18 U.S.C.§ 922(g)(9)); *Johnson v. United States*, 576 U.S. 591, 604-05 (2015) (residual clause of 18 U.S.C. § 924(e)).

[99] *See United States v. LaBonte*, 520 U.S. 751, 762 (1997).

[100] *See Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 826, Interim Decision 3875 (BIA 2016) ("*Matter of Silva Trevino III*").

[101] *See* 8 U.S.C. § 1182(a)(2).

[102] *See Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 688, Interim Decision 3631 (U.S. Atty Gen. 2008) ("*Matter of Silva-Trevino I*") (invoking 8 U.S.C. § 1103(a)(1)).

[103] *See id.* at 689-90.

the term "convicted," and two according deference to the construction.[104] In 2015, the Attorney General decided this was untenable and vacated the 2008 opinion in its entirety and directed the Board of Immigration Appeals to develop a uniform national framework.[105] In 2016, the Board of Immigration Appeals adopted the categorical and modified categorical approaches as defined by recent Supreme Court precedent, including the threshold divisibility analysis.[106]

Should the Commission pursue its proposed course of attempting to define what it means to be "convicted" of or to have "convictions for" triggering offenses by directing an examination of non-elemental facts in prior court records, it would invite similar litigation with respect to the propriety of that attempt.

Third, even if the amendment survived a frontal challenge, every word and phrase will require interpretation. For example:

- Must the court choose the guideline for conduct *most similar* to the offense, even if there is no guideline that is actually similar?
- Does it suffice for the guideline to cover the type of conduct most similar to the *offense charged* in the count on which the defendant was convicted, irrespective of what the conviction was based on?
- Must the court make its determination based on the elements *and* means *and* conduct, or is one of these bases sufficient?
- May a court use the *charging document* as a source of information in all cases, irrespective of the reliability of the information in the charging document?

Fourth, to the extent the proposal seeks to promote judicial efficiency, it is far more time-consuming than the categorical approach. Under the categorical approach, once it is determined that an offense categorically is, or is not, a triggering offense, the inquiry is over for that offense; the same answer

[104] *See Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 552 & nn.1, 2, Interim Decision 3833 (U.S. Atty Gen. 2015) ("*Matter of Silva-Trevino II*").

[105] *Id.* at 552-54.

[106] *See Matter of Silva-Trevino III* at 831-33 & n. 8.

would adhere in every case involving that offense. Under the Commission's proposal, if a statute is overbroad, the court would need to review documents in every case to determine non-elemental facts. And there will be no answering the question once and for all, because every conviction will have different non-elemental facts.

This more time-consuming analysis would also need to occur in more cases. In FY2017-2021, 44.4% of cases sentenced under the Guidelines involved at least one of the guidelines listed in the Commission's proposal.[107] In every one of these cases—nearly half of all sentenced cases—if the individual also had two prior felony convictions of any sort, the Probation Office would need to obtain court records to determine whether the conduct that establishes any element or means of the offense was most similar to the conduct covered by one of the listed guidelines. The added workload would be enormous.

3. The Commission's proposal would result in unwarranted disparities and arbitrary results.

Finally, the Commission's proposal would result in additional unwarranted disparities and new types of arbitrary results. As set forth above, recidivist penalties already visit overly severe sentences on Black individuals in a disparate manner. Expanding their reach would exacerbate that disparity.

The proposal would also exacerbate unwarranted disparities based on the differing recordkeeping and responsiveness to record requests of different states, counties, and courthouses. Courts would need to look at the

[107] This figure was derived from USSC, Individual Datafiles FY 2017-2021. Of the 334,688 sentenced cases for which the Commission had relevant documentation, in 148,471 of the cases one of the guidelines listed in proposed §§4B1.2(a)(2) or (b)(2) was identified as either (1) one of the statutory guidelines calculated in the case, or (2) the primary guideline where one of the statutory guidelines was §§2X1.1 or 2X2.1. Section 2A6.1 was not limited to offenses involving a threat to injure a person or property because a court would need to make this determination in each instance. Section 2K2.1 was not limited to offenses involving possession of a firearm described in 26 U.S.C. § 5845(a) for the same reason. In addition, the proposed amendments would also impact all cases for which §2K2.1 was one of the statutory guidelines or the primary guideline because the proposed conforming amendment would also impact the definitions of "crime of violence" and "controlled substance offense" in §2K2.1.

documents in many more cases, but as the Probation Officers Advisory Group explains in its comments, "the documentation necessary to apply the modified categorical approach is often lacking the required detail or not available."[108] And as Defenders explained in our 2019 comments, the availability of documents differs even within a single jurisdiction.[109] Convictions for the same offense would be treated differently based on document availability.

Even the same exact conviction would be treated differently by different judges. Surely, some judges would recognize that a three-time participant in contraband cigarette or unlawful vehicle sublease rackets has not been convicted of three crimes of violence; but others, literally following the language of the proposal, might disagree. Likewise, some judges would be reluctant to conclude that an individual is a career offender because of two prior felony disorderly conduct convictions, where the facts in the complaint could also make out obstructing an officer. But others might disagree.

It is true, as the Commission notes, that some judges have "criticized the categorical approach as a 'legal fiction' in which an offense that a defendant commits violently is deemed non-violent because other defendants at other times could have been convicted of violating the same statute without violence, often leading to 'odd' and 'arbitrary' results."[110] But the proposal casts the net so wide that it would deem violent far more offenses that did not involve violence—arbitrarily subjecting more individuals to extremely harsh penalties.

Again, the categorical approach the Commission seeks to eliminate is "under-inclusive by design."[111] By disallowing the use of convictions unless the least serious conduct they cover satisfies the requirements of a uniform definition, the Supreme Court's categorical approach "*expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences."[112] The Commission's proposal, by contrast,

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[108] POAG's Comments on the Sentencing Commission's Proposed Priorities 8 (Oct. 17, 2022).

[109] *See* Defender Comments on the Sentencing Commission's Proposed Amendments 20 (Feb. 19, 2019) ("Defender Comments on 2019 Proposed Amendments").

[110] 2023 Proposed Amendments at 7210.

[111] *Borden*, 144 S. Ct. at 1832.

[112] *See id.*

appears over-inclusive by design. Erring on the side of sweeping in more offenses—and thus more individuals—is no way to go about fixing any problem.

B. The Commission should not expand the definition of robbery.

Part B of the Commission's proposal is to amend USSG §4B1.2 to add a definition of "robbery" that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1):

> "Robbery"' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.[113]

As explained in our 2019 Comments on a similar proposal, the Commission has provided no justification for expanding the already over-inclusive career offender guideline to reach offenses involving *future* threats of force against *property*.[114]

In its *2016 Career Offender Report*, the Commission described the considerable resources it had devoted to formulating a "crime of violence" definition that advanced the goals of judicial efficiency, just punishment, and targeting recidivism risk, and it recommended that Congress adopt the same framework for other recidivist enhancements.[115] It should not now, at the request of the Department of Justice, start expanding that definition again.

The Commission proposes the new robbery amendment to address the "concern" that Hobbs Act robbery is not a crime of violence under its 2016

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[113] 2023 Proposed Amendments at 7214-15.

[114] *See* Defender Comments on 2019 Proposed Amendments at 27-30; Defender Reply Comment on Sentencing Commission's Proposed Amendments 6-7 (Mar. 15, 2019)

[115] *See 2016 Career Offender Report* at 53.

definition.[116] But this is not concerning. Unlike other modern robbery offenses—including other federal robbery offenses—Hobbs Act robbery may be committed without an immediate threat of force, and without a threat of force against the person.[117] For this reason, federal law often distinguishes between generic robbery and Hobbs Act robbery.

Notably, the term "serious violent felony"—for the federal three-strikes law and, as incorporated in the First Step Act of 2018, for an enhancement to federal drug offenses—includes "robbery (as described in sections 2111, 2113, or 2118)," but not Hobbs Act robbery.[118] Indeed, the original Armed Career Criminal Act, which was triggered only by prior convictions for burglaries and robberies, defined robbery as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will *imminently* be subjected to *bodily injury*."[119] Given longstanding federal distinctions between Hobbs Act robbery and generic robbery, the Commission should not mirror Hobbs Act robbery in its "crime of violence" definition.

In addition, defining robbery to mirror Hobbs Act robbery will import additional complexity into the analysis. The Commission has taken care to exclude non-violent threats from its extortion definition,[120] but Hobbs Act robbery, too, can be committed by non-violent threats. Juries are routinely instructed that, for Hobbs Act robbery, the use or threat of force or violence might be aimed at causing *economic* rather than physical injury,"[121] and that fear of injury "exists if a victim experiences anxiety, concern, or worry over expected *personal harm or business loss, or over financial or job security*."[122]

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[116] 2023 Proposed Amendments at 7214.

[117] *Compare* 18 U.S.C. § 1591 *with* 18 U.S.C. §§ 2111, 2113, 2118.

[118] *See* 18 U.S.C. § 3559(c)(1)(F)(i); 21 U.S.C. § 802(58).

[119] *See* 18 U.S.C. App. 1202(c)(8) (Supp. II 1984).

[120] *See* USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

[121] 3 Leonard B. Sand, *Modern Federal Jury Instructions-Crimina*l ¶ 50.01, Instruction 50-5 (emphasis added).

[122] *Id.*, Instruction 50-6 (emphasis added); *see also* Tenth Circuit Pattern Criminal Jury Instructions. 2.70 (" 'Fear' means an apprehension, concern, or anxiety about physical violence or harm *or economic loss* or harm that is reasonable under the circumstances") (updated January 2023) (emphasis added); Eleventh Circuit Pattern Jury Instructions, Criminal Cases (last revised March 2022) ("”Fear' means

The Commission's use of § 1951's definition would communicate that *all* Hobbs Act robberies are crimes of violence, regardless of this broad reach, and it would reopen the possibility that non-violent state extortion convictions could be considered crimes of violence under this new definition.

C. The Commission should exclude inchoate offenses.

Part C of the Commission's proposal involves two options, both of which would expand the definitions of both "crime of violence" and "controlled substance" to include:

> the offense of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or "controlled substance offense."[123]

Option One would further instruct judges not to use the generic definitions of the relevant inchoate offense or offense arising from accomplice liability:

> To determine whether any offense described above qualifies as a "crime of violence" or "controlled substance offense," the court shall only determine whether the underlying substantive offense is a "crime of violence" or a "controlled substance offense," and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.[124]

In its Issues for Comment, the Commission asks whether it should instead exclude these offenses altogether as predicate offenses.

As explained in our Comments on a similar 2019 Proposal, the Commission should exclude these offenses altogether.[125] Inchoate offenses are not

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a state of anxious concern, alarm, or anticipation of harm. It includes the *fear of financial loss* as well as fear of physical violence").

[123] 2023 Proposed Amendments at 7217.

[124] *Id.*

[125] Defender Comments on 2019 Proposed Amendments at 30-34.

equivalent in seriousness to completed offenses.[126] Excluding them would be a significant step toward the Commission's goal of focusing the career offender and related enhancements on the most dangerous individuals.[127] It would also be consistent with § 994(h), which does not broadly include inchoate offenses.[128] And it would be consistent with force-clause jurisprudence: The Supreme Court recently held that the inclusion of "attempted use of force" in the force clause of the crime of violence definition does not include every attempted crime of violence, but only those offenses that actually require the attempted use of force.[129]

As for accomplice liability, "aiding and abetting" is already included so there is no need for the Commission to specify "aiding and abetting" for it to be included. Every jurisdiction has expressly abrogated the distinction between principals and aiders and abettors.[130] The Commission should also not add any other forms of accomplice liability, as they are far less serious than principal liability. Accessory after the fact, for example, is punishable under federal law by half the term of the principal[131]; misprision by no more than three years.[132] (Notably, the Commission has not proposed to add accessory after the fact or misprision of a felony under its listed-guideline proposal.)

Much less should the Commission add "any other inchoate offense or offense arising from accomplice liability." This would expand the career offender predicates beyond even the current commentary at Application Note 1 to any unidentified, undefined, and unknown inchoate offense or offense arising from any sort of accomplice liability. It would do so in at least three ways:

- It would add "any other inchoate offense or offense arising from accomplice liability," which would extend, without limit, the reach of

[126] *Id.* at 31-32.

[127] *2016 Career Offender Report* at 55.

[128] *See* 28 U.S.C. § 994(h) (omitting conspiracy and attempt, except for 46 U.S.C. § 70506(b)).

[129] *Taylor*, 142 S. Ct. at 2021-22.

[130] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007).

[131] *See* 18 U.S.C. § 3.

[132] *See* 18 U.S.C. § 4.

these federal enhancements to any theories that any state has now or may devise in the future.

- It would move from a requirement that the offense be an attempt or conspiracy to commit the substantive offense to one that covers any inchoate offense or offense arising from accomplice liability "involving" the substantive offenses, which could be interpreted to broadly reach offenses that "relate to or connect with" the substantive offenses.[133]

- It would eliminate the requirement of a match between the elements of the inchoate offenses and the offenses arising out of accomplice liability, which would treat even the furthest outlier theories of liability as equivalent to the completed substantive offenses.[134]

As with the Commission's proposal to define "controlled substance" to include any substance "controlled under applicable state law," this open-ended proposal would cede entirely to the states the ability to invent new forms of liability that trigger severe federal sentencing penalties.

If the Commission insists on including inchoate offenses and offenses arising out of accomplice liability, it should do no more than move the definition from the commentary into the text as written: "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[135] And it should define these terms in the generic sense.[136] But, given that the career offender guideline already reaches too far, even this expansion is not warranted.

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[133] *See, e.g., United States v. Fields*, 53 F.4th 1027, 1045 (6th Cir. 2022) (discussing varying interpretations of the term "involving").

[134] *See, e.g.*, *Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (holding that Indiana attempt law does not require state to prove defendant had intent to commit substantive crime).

[135] USSG §4B1.2, comment. (n. 1).

[136] For example, most state conspiracies require an overt act. 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) n.52 (3d ed. Oct. 2022 update).

D. The Commission should not expand the controlled substance offense definition to include offers to sell.

Part D of the Commission's proposal is to add "offers to sell" and title 46 offenses to the definition of "controlled substance offense."[137] The Commission should not expand the definition to include "offers to sell." Section 2L1.2's inclusion of "offers to sell" a controlled substance is an anomaly. It was added by the Commission in 2008 only to §2L1.2, and no reason was given for its addition.[138] Offer to sell is not included in § 994(h), there is no such federal offense, and the states that criminalize it permit convictions without any possession of, or intent or ability to sell, a controlled substance.[139] A conviction can be sustained for selling baking soda, coffee, and sugar.[140] If anything, §2L1.2 should be amended to *delete* offers to sell. Expanding the definition of "controlled substance offense" would unjustifiably extend the reach of a guideline that undisputedly reaches too far already.

The Commission must, however, consistent with § 994(h), include offenses described in chapter 705 of title 46. As Defenders recommend in our Statement regarding the "controlled substance offense" circuit conflict, the Commission should limit the definition of "controlled substance offense" to the offenses enumerated in § 994(h), while continuing to press Congress to eliminate the career offender status of those convicted solely of controlled substance offenses.[141]

IV. Conclusion

Both the courts and the Commission have long recognized that the career offender guideline calls for sentences that are too high in most of the cases it captures. This leads to both over-incarceration and racial inequality in sentencing. Although the Commission cannot ignore or eliminate the career offender directive on its own, it can take steps to ensure that its guideline applies to no one to whom the directive itself does not apply.

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[137] 2023 Proposed Amendments at 7217-18.

[138] USSG App. C, Amend. 723, Reason for Amendment (Nov 1, 2008).

[139] Defender Comments on 2019 Proposed Amendments at 35 & nn.168, 169.

[140] *Id.* at 35 n.169.

[141] *See* Statement of Michael Caruso on Acceptance of Responsibility and Controlled Substance Offense § II.B (March 7, 2023).

The Defenders urge the Commission to reject all parts of the proposed amendment.