

**Federal Public and Community Defenders
Comment on Circuit Conflict re: Controlled
Substance Offense (Proposal 4B) and Proposals to
Amend Career Offender Guideline (Proposal 6)**

March 14, 2023

Table of Contents

I. Introduction	1
II. The Commission’s proposals for the career offender guideline would have a substantial negative impact and should not be adopted without further study and review.....	2
A. By expanding the reach of the career offender guideline, every one of the Commission’s proposals would increase unwarranted disparities without relieving complexity.....	2
B. Before making significant changes to the career offender guideline—changes that in our view would make a problematic guideline much worse—the Commission should undertake a robust review of relevant data and likely impact.....	4
III. The categorical approach is a <i>solution</i> to a host of potential problems, not a problem in need of solving.....	11
A. It is for good reason that Defenders and DOJ agree that the Commission should not compare prior offenses against listed guidelines.....	11
B. The elements-based categorical approach remains the best methodology for assessing prior convictions.....	15
1. A methodology that relies on old court documents—or even worse, non-court documents—to discern “conduct” ignores the realities of state court practice and would be fundamentally unfair	16
2. A methodology that goes beyond documents, providing for true mini-trials, would come with its own problems	19
3. Anomalous cases can be addressed through variances	20
IV. Arguments in favor of expanding the definitions of “controlled substance offense” and “crime of violence” in other ways are not persuasive	21

A.	There is no justification for expanding the reach of the definition of “controlled substance offense” (Proposals 4B, 6C, 6D)	21
1.	The Commission should limit the definition of “controlled substance offense” to the federal felonies enumerated in 28 U.S.C. § 994(h)(2)(B)	22
a.	This proposal is the most parsimonious and is consistent with the language of § 994(h)	22
b.	This proposal would resolve most of the concerns raised this cycle with respect to the definition of “controlled substance offense”	26
2.	At minimum, the Commission should clarify that “controlled substance” has its federal definition, and it should not otherwise expand the reach of “controlled substance offense”	26
a.	The Commission should clarify that “controlled substance” is federally defined (Proposal 4B)	26
b.	The Commission should exclude inchoate offenses, including “offers to sell” (Proposals 6B, 6D)	30
B.	There is also no justification for expanding the reach of the definition of “crime of violence” (Proposals 6B, 6C, 6A-recklessness, force against property)	31
V.	Conclusion	34

I. Introduction

This Comment addresses both Proposal 4B (the circuit conflict regarding “controlled substance offense”) and Proposal 6 (the career offender proposals). This is because both proposals would affect the reach of the career offender guideline and other recidivist enhancements that cross-reference USSG §4B1.2.

In their written statements (attached) Federal Public Defenders Michael Caruso and Juval Scott addressed each of the Commission’s proposals. We encourage the Commission to carefully review their written submissions, and we refer back to them where appropriate.

This Comment responds to arguments raised at the hearings:

- It explains why the primary justifications offered for proposals that would expand the reach of the guideline—disparity and complexity—are not persuasive: expanding the career offender guideline would *increase* both disparity and complexity. (§ II.A.).
- It discusses data the Commission could collect to inform its work on the career offender guideline. (§ II.B.).
- It explains why the categorical approach is superior to any of the proposals discussed at the hearing. (§ III).
- It explains that our proposal to limit the definition of “controlled substance offense” to the federal felonies enumerated in the career offender directive is in full compliance with the directive. (§ IV.A.1).
- It responds to the Department of Justice (“DOJ” or “the Department”) and the Probation Officers Advisory Group’s (“POAG”) arguments in favor of expanding the definitions of “controlled substance offense” and “crime of violence.” (§ IV).

Ultimately, Defenders encourage the Commission to follow the data. The career offender guideline is overly punitive, it has no empirical or other principled basis, and it exacerbates racial disparity in federal sentencing. Thus, the Commission should take no action that would expand its reach.

II. The Commission’s proposals for the career offender guideline would have a substantial negative impact and should not be adopted without further study and review.

A. By expanding the reach of the career offender guideline, every one of the Commission’s proposals would increase unwarranted disparities without relieving complexity.

The Department’s written testimony starts by acknowledging that the career offender guideline is deeply problematic. It recognizes “legitimate concerns about severity levels” associated with Guidelines recidivist provisions; that the career offender guideline in particular has been “the subject of considerable criticism for producing overly long sentences”; and that “[d]ecades of research show that the career offender guideline produces a clear racial disparity in application.”¹ The Department acknowledges that district judges impose below-range sentences in increasing numbers of cases—often at the government’s request—and that the Commission has urged Congress to narrow the career offender directive.²

POAG has also recognized that data suggests the guideline calls for sentences that are too high in most of the cases it reaches.³

But although both DOJ and POAG *know* the career offender guideline is deeply problematic, they nevertheless recommend that the Commission adopt amendments from Proposals 4B and 6 that would vastly *expand* that guideline’s reach. That is, they recommend that the Commission adopt amendments that would ensure even *more* individuals would be subject to this guideline. Their reasoning boils down to two justifications: reducing disparity and increasing simplicity.

These justifications cannot support the recommendations. Individuals subject to the career offender guideline will always be subject to an unwarranted disparity when compared to those not subject to the guideline

¹ Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent’g Comm. at 27 & n.42, 35. (Feb. 27, 2023) (“DOJ Written Testimony for March 2023 Hearings”).

² See *id.* at 27 & nn.43, 44.

³ See POAG Circuit Conflicts Testimony 4 (Feb. 27, 2023) (“POAG Written Testimony on Circuit Conflicts”); POAG Comments on Proposed Priorities 3–4 (July 31, 2017), <https://tinyurl.com/y43vvanh>.

because there is no empirical or other principled justification for imposing a near-maximum sentence on any category of individuals absent case-specific aggravating facts.⁴ And Black individuals will disparately be subjected to this unjustified sentence because of racial inequality in the criminal legal system over space and time.

The fact that some individuals will be captured by an unwarranted recidivist provision cannot justify subjecting other individuals to that provision based on principles of fairness. The career offender guideline is fundamentally unfair; it is an unwarranted-disparity-creating machine. And whether by broadening the definition of “controlled substance offense” or “crime of violence,” or by altering the methodology for identifying whether convictions fall into these categories, any expansion of the reach of the guideline will *increase* unwarranted disparity. Contraction will *reduce* unwarranted disparity.

The DOJ and POAG also emphasize simplicity. But, as Federal Defenders Michael Caruso and Juval Scott have explained, the Commission’s proposals are unlikely to simplify anything; introducing new definitions and methodologies would simply multiply the approaches courts will have to master. For example:

- Controlled substances are limited to federally controlled substances for purposes of the Armed Career Criminal Act, 21 U.S.C. § 802(57), and 8 U.S.C. § 1326(d) motions; under the Guidelines, controlled substances would include any substance “otherwise controlled under applicable law.”
- Hobbs Act robbery and reckless offenses are not predicates under 18 U.S.C. § 924(e) (ACCA) or 21 U.S.C. § 802(58); the opposite would be true under the Guidelines.
- The categorical approach is used for statutory-recidivism-enhancement and immigration cases; under the Guidelines there would be a new accusation-based, “listed guideline” approach. And this new approach would be performed in *many* more cases: as

⁴ The career offender guideline exists solely because a statute mandates that it exist. But the existence of a congressional mandate is not an empirical justification for the guideline, and it’s certainly not a justification for expanding that guideline.

discussed below, nearly half of cases fall within one of the listed guidelines.

But even if the proposed amendments would simplify the application of recidivist enhancements, simpler is not unfailingly better. After all, the simplest method would be to make *all* offenses subject to the career offender guideline. No one thinks that is appropriate. But expanding the reach of the career offender guideline moves in that direction, one step at a time.

B. Before making significant changes to the career offender guideline—changes that in our view would make a problematic guideline much worse—the Commission should undertake a robust review of relevant data and likely impact.

At the hearing, there was significant discussion of the need for additional data. Vice Chair Mate suggested that the Commission might update its *2016 Career Offender Report*, and several Commissioners asked what sort of research and data collection the Commission could engage in to inform decisions about the career offender guideline. Defenders agree that the Commission should not expand the reach of the career offender guideline without undertaking a robust review of relevant data and the likely impact of any changes. That review should incorporate at least the following components:

- the Commission should collect data to determine the characteristics of those who its proposed, amended guideline would reach, and the impact the amendments will have on those individuals;
- the Commission should articulate the justification for the career offender guideline consistent with the statutory purposes of sentencing; and
- the Commission should review relevant Commission and other data and research to determine which categories of individuals require a near-maximum sentence, to achieve the articulated goal of the enhancement.

Characteristics of impacted individuals. In light of what we already know—that judges impose below-range sentences in nearly 80% of career-offender cases; that the guideline is a poor predictor of recidivism; and that the guideline is a driver of racial disparity in federal sentencing—the Commission should not promulgate any amendment that would expand the reach of the career offender guideline without understanding who it would reach.

For example, there is reason to be very, very concerned about the “listed guideline” alternative to the categorical approach. Commission data reflect that, in the last five fiscal years, 44.4% of Guidelines sentences involved at least one of the “listed guidelines”; this is an astoundingly high percentage for a guideline that is meant to capture the worst of the worst. The Department has proposed to add *additional* guidelines to the Commission’s list, which would cause this percentage to rise to a full 50%.⁵

For any proposal the Commission considers, it should collect data on how many individuals the proposal will identify as career offenders, whether they share characteristics with those for whom judges are already imposing below-range sentences, and whether the expansion will further increase racial disparity in sentencing.

Justifications for the guideline. Perhaps most fundamentally, the Commission should interrogate the penological basis for the career offender guideline, which calls for a sentence at or near the maximum for certain categories of defendants. Although Congress mandated the existence of such a guideline, through the use of definitions, the Commission has exercised significant control over who the guideline captures. Before setting out to capture more individuals, and to guide determination of which individuals the guideline *should* capture, the Commission should articulate the

⁵ As with the data cited at Statement of Juval O. Scott Before the U.S. Sentencing Comm’n, at 24 n.107 (Mar. 8, 2023) (“Statement of Juval O. Scott”), 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 167,278 of the cases, one of the guidelines listed in the proposed amendment or proposed by the Department 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. Due to data limitations, these were not filtered for the additional requirements the Department proposes.

justification for basing a near-maximum sentence solely on criminal history and category of offense.

“The most common justifications for enhancements” based on criminal history “are elevated risk (crime prevention goals) and elevated culpability (retributive rationales).”⁶ Although the Commission has never expressly articulated a justification for the career offender guideline, the Commission’s discussion of the guideline, including in the *2016 Career Offender Report*, has focused on the former rationale: crime prevention.⁷ Under a crime-prevention rationale, imposing longer sentences protects the public through specific deterrence, general deterrence, and/or incapacitation.⁸

If any or all of these are, in fact, the best justifications for the career offender guideline, then the Commission should explain that, so that data and research can focus on whether, and how, the guideline can be designed to meet these goals.

Crafting the guideline in light of its justifications. Once the Commission articulates the penological justifications for the career offender guideline, it can measure the guideline’s definitions against the justifications. The Commission’s overarching obligation is to promulgate guidelines that recommend a sentence for each defendant that is sufficient but not greater than necessary to serve the statutory purposes of sentencing.⁹ If the Commission believes the career offender guideline is justified by a crime-prevention rationale, the Commission should conduct research that would inform the question: For which category of individuals, if any, would a near-

⁶ Richard S. Frase & Julian V. Roberts, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* 207 (2019).

⁷ See, e.g., USSC, *Report to the Congress: Career Offender Enhancements* 43 (2016) (“*2016 Career Offender Report*”), <https://tinyurl.com/3ubzdabx>. As mentioned in Attorney Juval Scott’s statement, even retributivist theories would not justify the sentences currently recommended by the career offender guideline. See Statement of Juval O. Scott at 7–8 & n.36.

⁸ See Frase & Roberts, *supra* note 6 at 73.

⁹ See *Rita v. United States*, 551 U.S. 338, 347–49 (2007) (explaining that Commission’s enabling statute tells the Commission to write guidelines that will lead to sentences that comply with § 3553(a)).

maximum sentence be the least punishment necessary to achieve the guideline's crime prevention goals?

Some of this research could be performed by the Commission's Office of Research and Data. The Commission's individual data files, special coding projects, and recidivism data would be invaluable both to Commission staff and others in performing research that would inform this question. In addition to collecting its own data and conducting research, the Commission is also charged with "collect[ing] systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process."¹⁰ So the Commission should also look outside the Commission for work that would inform this question. The Robina Institute of Criminal Law and Criminal Justice, an academic think tank devoted to sentencing guidelines systems, for example, publishes a Criminal History Enhancement Sourcebook, which examines questions regarding the justification for criminal history enhancements at sentencing, the relationship between criminal history and recidivism risk, and criminal history enhancements as a cause of minority over-representation in prisons.¹¹

The data the Commission has reported reflect that more examination is needed. For example, although Defenders do not have access to the Commission's recidivism datafiles, the data the Commission has published reflect that the career offender guideline does not properly identify those at the greatest risk of recidivism even for those the Commission identify as "violent." Before digging into that data, we want to note a critical data point that is missing: The Commission's *2016 Career Offender Report* compared those assigned career offender status based on controlled substance offenses with those assigned based on crimes of violence. But, when determining whether the career offender guideline is appropriate for any category of individuals, it is essential to compare the recidivism rates of those who are assigned career offender status with those who are not.

With the data that do exist, it appears that those the Commission describes as violent offenders, like others assigned career-offender status, *also* have a recidivism rate that does not approach the Criminal History

¹⁰ 28 U.S.C. § 995(a)(13).

¹¹ See Richard S. Frase, et al., Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* (2015).

Category VI they are automatically assigned by the career offender guideline. That is, this is not just a problem for controlled-substance-pathway cases. To be specific, the *2016 Career Offender Report* reported a 69.4% recidivism rate for “mixed career offenders,” and a 69.0% recidivism rate for “violent only career offenders.”¹² The Commission’s *2016 Recidivism Among Federal Offenders: A Comprehensive Overview* reports recidivism rates of 74.7%, 77.8% and 80.1% for those placed in CHC IV, V, and VI, respectively.¹³ So, Commission data reflects that for the group of individuals the Commission identifies as “violent” who were placed in CHC VI on the basis of career offender status, their recidivism rate falls below other defendants in CHC IV.

This was not a singular occurrence. As early as 2004, in its very first recidivism report, the Commission reported that counting career offenders as CHC VI made the CHC a worse predictor of recidivism.¹⁴ And in its most recent reports, the Commission again reported that for “violent offenders” released in 2010, those placed in CHC VI as career offenders or armed career criminals, as a group, had a recidivism rate of 65.0%.¹⁵ By comparison, “violent offenders” with CHC III, IV, V, and VI, had recidivism rates of 66.3%, 73.5%, 79.0% and 83.9%, respectively.¹⁶ That is, for this most recent cohort, “violent offenders” placed in CHC VI based on career offender or armed career criminal status had a recidivism rate lower than other “violent offenders” in CHC III. Simply put, Commission data *already* reflects the career offender guideline cannot be justified on the basis of recidivism risk.

Further, if (as suggested above) the Commission considers crime prevention the primary goal of the career offender guideline, among the

¹² See *2016 Career Offender Report* at 42 fig.21 (2005 Recidivism Release Cohort Datafile). It should be noted that the *2016 Career Offender Report* identified three “pathways” that approximate, but do not match the three categories of those assigned career offender status. See *id.* at 27, 38–39.

¹³ See USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19 fig.7A (2016), <https://tinyurl.com/h5s62tym> (2005 Recidivism Release Cohort Datafile).

¹⁴ See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9, 37 (2004), <https://tinyurl.com/2mpd5nbc>.

¹⁵ See USSC, *Recidivism of Federal Violent Offenders Released in 2010* 29 fig. 14 (2022), <https://tinyurl.com/2mwju7xt> (2010 Recidivism Release Cohort File).

¹⁶ See *id.*

questions the Commission must consider are whether longer sentences prevent crime. There is a broad academic consensus that longer sentences do not serve as either a specific or a general deterrent.¹⁷

Ex-officio Member Wroblewski suggested at the recent hearing that incapacitation of gun offenders with prior crimes of violence should be an area of agreement. But the career offender guideline is rarely applied to firearm offenses.¹⁸ Moreover, the recidivist enhancements in USSG §2K2.1 are *not* data driven, and data does *not* show that they are a good predictor of recidivism.¹⁹ And, most importantly, the Commission should not assume, but rather should study, how incapacitation interacts with crime-prevention goals. Almost all incarcerated individuals will someday reenter our communities and, as Attorney Leslie Scott explained in her testimony on the firearms panel, there is evidence indicating incapacitation is actually criminogenic.²⁰

¹⁷ See, e.g., Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 154 (Jeremy Travis, et al., eds. 2014) (any deterrent effect of lengthy sentences is modest at best and diminishes, rather than increases, as sentence length increases); Daniel S. Nagin, et al., *Imprisonment and Reoffending*, 38 Crime & Just. 115, 178 (2009) ("a key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending"); U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* 1 (May 2016), <https://tinyurl.com/54tshyyj> ("increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent").

¹⁸ See *2016 Career Offender Report* at 19 (in 2014, 5.4% of those sentenced as career offenders would have been sentenced under the firearms guideline).

¹⁹ See Statement of Michael Carter Before the U.S. Sentencing Comm'n on Firearms Offenses 19–21 (Mar. 7, 2023) (tracing history of recidivism enhancements in §2K2.1). The Commission has observed that base-offense levels assigned based on the number and type of prior convictions under §2K2.1 correlate with higher recidivism rates but has explained "[t]hese higher recidivism rates are likely due to the greater criminal history accrued by offenders in the higher BOLs." USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 41 (2021), <https://tinyurl.com/8erahmz7>.

²⁰ See also Daniel Webster, et al., Johns Hopkins Ctr. for Gun Pol'y and Rsch., *Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore* 24 (2020), <https://tinyurl.com/4k8xaxfx> (incarceration "does not prevent reoffending and often has a criminogenic effect on those who are imprisoned"); Don Stemen, Vera Institute for Justice, *The Prison Paradox: More Incarceration Will Not*

Ultimately, § 994(h) will always be a blunt instrument. Given the overarching obligation that the Guidelines recommend a sentence that is sufficient but not greater than necessary to serve the statutory purposes of sentencing, the Commission should not cast the §4B1.1 net wide with the goal of ensuring that it catches the anomalous cases that warrant more punishment than the non-career offender guideline recommends. After all, judges impose sentences above the recommended guideline range in less than 3% of cases, and below the recommended guideline range in nearly 50% of cases, annually.²¹ As for within-guideline sentences, 41.7% of them fall at the guideline minimum.²²

Instead, the Commission should build on the important work it has done in the past to determine the particular subset of individuals that is appropriate for the longest sentences that the Guidelines call for. Defenders are well aware that the Commission has to work within the confines of § 994(h). But again, the Commission has considerable discretion in defining the categories of individuals that Congress specified in § 994(h). And the Commission ultimately may find that it is compelled to ask Congress to amend § 994(h), as it did in 2016, or even to repeal that provision. This is consistent with 28 U.S.C. § 995(a)(20), which authorizes the Commission to make recommendations to Congress concerning statutory modifications “the Commission finds to be necessary to carry out an effective, humane and rational sentencing policy.”

Make Us Safer (2017), <https://tinyurl.com/ycyzkurs> (“[i]ncarceration is an expensive way to achieve little public safety”); Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054–72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 614–16 (2007); USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996), <https://tinyurl.com/3f6bbzy9> (recognizing imprisonment has criminogenic effects including: “contact with more serious offenders, disruption of legal employment, and weakening of family ties”).

²¹ See USSC, *Interactive Data Analyzer*, Sentence Imposed Relative to Guideline Range, FY2015-2021 (above guideline range computed by adding upward departure percentage to upward variance percentage; below range computed by adding §5K1.1, §5K3.1, Downward Departure Govt Motion, Non-Govt Downward Departure, Downward Variance Govt Motion, and Non-Govt Downward Variance)

²² See *id.*, Position of Within Guideline Range Sentences, FY2015-2021.

III. The categorical approach is a *solution* to a host of potential problems, not a problem in need of solving.

At this point, multiple alternatives have been discussed for altering the categorical approach as it is employed in the §4B1.2 context. This section first addresses the aspect of the Commission’s “listed guideline” approach that is about the definitions of the predicates: replacing definitions in §4B1.2 with a list of Chapter 2 guidelines. Then it addresses methodology: how courts determine whether a particular conviction fits within the definition.

The bottom line is that the categorical approach is not a problem that needs fixing, as was suggested at the recent hearing. No doubt, some judges do not like it, although not all of them.²³ But the categorical approach is like democracy in the famous Churchill quote—the worst form of government, except for all the others. The Supreme Court had good reasons for developing the categorical approach. And the Commission cannot abolish it; it is here to stay in the ACCA context, and in the context of other statutory recidivist provisions and immigration cases.

What the Commission can do is make sure the categorical approach is workable by retaining the categories that are already the subject of considerable caselaw and by providing training and guidance so that judges and practitioners can apply the approach faithfully and efficiently. And the Commission can clarify that a variance may be appropriate in individual cases where the categorical approach results in an anomalous outcome.

A. It is for good reason that Defenders and DOJ agree that the Commission should not compare prior offenses against listed guidelines.

The Department agrees with Defenders that the proposal to substitute the tailored definitions of “crime of violence” and “controlled substance offense” with a list of Chapter 2 guidelines is overly complicated.²⁴

²³ At the hearing, Attorney Juval Scott mentioned Judge Lohier’s concurrence in *United States v. Morris*, defending the categorical approach. See __ F.4th __, 2023 WL 2375951, at *6–7 (2d Cir. Mar. 7, 2023) (Lohier, J., concurring).

²⁴ The Department does not agree, however, that the list (which already includes more than half the Chapter 2 guidelines) is overly expansive. Indeed, it recommends

POAG and the Trial Issues Advisory Group (“TIAG”), by contrast, support the listed guideline approach and suggest that it will simplify application. For the reasons Attorney Juval Scott and the Department have articulated, we disagree. And, as stated, we do not believe that simplification warrants expanding the reach of the career offender guideline. But we would like to engage with the comments that have been made.

Although POAG ultimately favors the new approach, it expresses some ambivalence, noting that the new approach could either “function as designed,” or if not “it could overwhelm the system for a period of time with application issues and ensuing litigation for the foreseeable future.”²⁵ So POAG recommends that the Commission clarify that “one must refer to the specific federal guideline to determine if the offense meets the definition in the guidelines.”²⁶ Defenders do not understand what this means; most guidelines do not have a “definition” for comparison purposes. Rather USSG §1B1.2(a) directs courts to refer to the statutory index.

POAG’s testimony last week regarding which listed guidelines they may want the Commission to “consider refining/removing,” as they noted in their written testimony, was revealing.²⁷ When Vice Chair Mate asked the POAG witness, Joshua Luria, which specific guidelines gave cause for concern, Mr. Luria suggested that there was no consensus but some POAG members were concerned that some of the listed guidelines could sweep in non-violent conduct; he gave as an example that someone was concerned that the guidelines for “threatening or harassing communications, hoaxes,

that, if the Commission adopts the listed-guideline approach, it *add eight additional* Chapter 2 guidelines to the list. Among the additions the Department proposes is § 2B2.2 (burglary). *See* DOJ Written Testimony for March 2023 Hearings at 32. Under the listed-guideline approach, §2B2.2 would likely reach all burglaries (state and federal) as well as any felony trespassing or other “similar” offenses. *See, e.g.,* Colo. Rev. Stat. Ann. § 18-4-503(1)(a), (2)(a) (trespassing on fenced agricultural land with intent to commit felony). This, even though the Commission previously limited the enumerated offenses to “burglary of a dwelling,” and in 2016 decided, based on its data and expertise, to remove even that limited offense. The Department’s comments appear to have just one benchmark: expansion.

²⁵ POAG Career Offender Testimony 3 (Feb. 27, 2023) (“POAG Written Testimony on Career Offender”).

²⁶ *Id.* at 2.

²⁷ POAG Written Testimony on Career Offender at 2.

stalking, and domestic violence,”²⁸ would apply to a particular harassment offense that could be either a felony or a misdemeanor. Presumably, a POAG member has experience with this particular offense and how the state applies it, and thus has reason to be concerned that that particular listed guideline is overbroad.

Defenders practice in every district, in every state. And we all know state offenses (many of which are misdemeanor/felony wobblers) that would never count as a career-offender predicate under current law, and *should not count* given how states apply them, but might count under the listed guideline approach. This is untenable: at best, it will lead to excessive litigation; at worst, it will result in additional years, even decades, of lives behind bars.

TIAG, for its part, is not concerned that the listed-guideline approach would be overly complicated based on its likening the approach to §2X5.1, which directs courts to select the “most analogous guideline” for offenses for which no guideline expressly has been promulgated.²⁹ TIAG states that this approach works well.³⁰ Doubtless, TIAG’s members have significant expertise applying §2X5.1 in Major Crimes Act and Assimilated Crimes Act cases. But this is an entirely different context. We wouldn’t be dealing only with offenses that are serious enough for the federal government to prosecute them in federal court. We would be dealing with thousands (or hundreds of thousands) of distinct state offenses, some of which aren’t even always felonies. According to Commission data, in FY2017-2021, §2X5.1 was applied in 0.1% of sentenced cases annually.³¹ Employing this type of analysis in the tens of thousands of cases that will require it yearly for §4B1.2 purposes, on both the instant offense and multiple prior convictions in each case, would overwhelm the system.

At the recent hearing, TIAG’s witness Hon. Ralph Erickson explained that individuals who are charged in federal court with what would be state

²⁸ United States Courts, *Public Hearing – March 8 – Day 2*, YouTube, at 2:09:09 – 2:09:55, <https://tinyurl.com/bdrysj8u>.

²⁹ See TIAG Written Testimony on Career Offender 1–2 (Feb. 27, 2023).

³⁰ See *id.*

³¹ See USSC, *Sourcebook of Federal Sentencing Statistics*, Table 20, FY2017–2021.

offenses often complain that they would have been treated differently in state court. And he noted that in other regions, the opposite is true. This just underscores the difference in context: with the listed guideline approach, we are not talking about a state crime that was charged in federal court; we are talking about unknown, varied state crimes charged by state prosecutors in our nation's 3,000-plus counties (and county equivalents—*e.g.*, parishes) that all operate quite differently. There is no reason for optimism that this would be workable.

While the Department opposes the listed-guideline approach, it recommends that, if the Commission adopts that approach, the Commission should explain that, like §2X5.1, the approach will not require a “perfect match of elements” but “only an assessment of whether the guideline in question ‘covers the type of criminal behavior’ of which the defendant was convicted.”³² To be clear, §2X5.1 requires an elements-to-elements comparison between the elements of the instant offense and the elements of the offenses covered by the guideline, just not a perfect match.³³

The first case the Department cites, *United States v. Jackson*, amply illustrates that the listed guideline approach will generate significant litigation, cause confusion, and generate disparities. The opinion is 51 pages long, including a lengthy dissent, on whether a district court erred in determining that there was no sufficiently analogous guideline for the assimilated crime of New Jersey child welfare endangerment.³⁴ The majority sets forth three potential tests that could be used, before adopting an “elements-based approach.”³⁵ Ultimately, after engaging in an extensive analysis that included discussion of courts (and U.S. Attorney's Offices) reaching different conclusions with similar crimes, the Third Circuit concluded that the elements of New Jersey child welfare endangerment,

³² DOJ Written Testimony for March 2023 at 30 (quoting *United States v. Jackson*, 862 F.3d 365, 376 (3d Cir. 2017), and *United States v. Calbat*, 266 F.3d 358, 363 (5th Cir. 2001)).

³³ See, *e.g.*, *United States v. Clark*, 981 F.3d 1154, 1162 (10th Cir. 2020); *Jackson*, 862 F.3d at 372–73; *Calbat*, 266 F.3d at 363.

³⁴ See *Jackson*, 862 F.3d at 371–389, 403–415.

³⁵ *Id.* at 372 (internal quotation marks and citation omitted).

USSG §2A2.2, and the federal offense of simple assault were “within the same proverbial ‘ballpark.’”³⁶ That is, the district court had erred.³⁷

The second case the Department cites, *United States v. Calbat*, although much shorter, does not recommend this approach, either. In *Calbat*, the Fifth Circuit affirmed a determination that the Texas offense of assault by intoxication was “most analogous” to §2A2.2 (Aggravated Assault) —where the Texas offense involved “accident or mistake,” causing serious bodily injury, while intoxicated.³⁸ Under this analysis, and if the Commission were to accept the Department’s recommendation not to exclude reckless and negligent offenses, even an offense committed by *accident or mistake* would be a career offender predicate. Notably, §2A1.4 (Involuntary Manslaughter), a guideline that the Commission has *not* listed as a career offender predicate, specifically mentions driving while intoxicated; but the Fifth Circuit rejected the argument §2A1.4 was the most analogous offense, because manslaughter requires a death.³⁹ That is to say, under the listed-guideline approach and the Fifth Circuit’s analysis, driving while intoxicated would not be a career offender predicate if it causes death, but it would be a career offender predicate if it causes only serious bodily injury.

B. The elements-based categorical approach remains the best methodology for assessing prior convictions.

We strongly oppose the notion of using a list of guidelines as the comparator for determining whether a prior offense is a career-offender predicate. But regardless of whether the Commission decides to compare prior offenses to listed guidelines or to categories like those presently at §4B1.2, it must retain the elements-based categorical approach as the methodology for conducting that comparison. The Supreme Court developed the categorical approach for good reasons—not only (as the government has suggested) to avoid *Apprendi* problems.

The categorical approach is grounded in how criminal cases function in the real world: a person is not convicted of conduct, he or she is convicted of

³⁶ See *id.* at 371–389.

³⁷ See *id.*

³⁸ See *Calbat*, 266 F.3d at 363.

³⁹ See *id.*

crimes, according to their *elements*. And if an accused person tells their attorney that they did not commit some conduct that doesn't go to an element of the offense charged, the defense attorney will advise them that they should not, or even cannot, raise that in court. So, when a case resolves, all we can know is what crime, with what elements, the person was convicted of.

Also, we cannot separate the question of methodology from real-life consequences. As Justice Kagan explained in *Borden*, the categorical approach is “under-inclusive by design.”⁴⁰ The elements-based categorical approach avoids expanding the reach of the deeply problematic career-offender guideline. If the Commission chooses a methodology that sweeps in more convictions—and thus more individuals—the effect will be to subject more individuals to a guideline that everyone agrees is broken.

1. A methodology that relies on old court documents—or even worse, non-court documents—to discern “conduct” ignores the realities of state court practice and would be fundamentally unfair.

The Commission has proposed substituting the Supreme Court's narrow elements-based approach with one that relies on court documents' descriptions of conduct. The basic idea is that a court could use what are known as *Shepard* documents, but without any of the restrictions that *Shepard* and its progeny placed on such use.⁴¹ Attorney Juval Scott, in her written testimony, referred to this as an “accusation-based approach.”⁴²

The Department goes even further, suggesting that courts should be able to look at non-elemental facts—that is, accusations—that show up not only in court documents but also in other documents, like police reports.⁴³

⁴⁰ *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021).

⁴¹ *See Mathis v. United States*, 579 U.S. 500, 505–06, 510 (2016) (discussing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

⁴² Statement of Juval O. Scott at 13–14, 18–24.

⁴³ At the hearing, the POAG witness suggested that courts should also be able to rely upon non-public documents about third parties—specifically mentioning a victim's medical record. We assume that the Commission would not allow this. Defense counsel would never be able to access a non-public record related to a third party like this. If the government sought to use such a record, we presume they

Defenders are pleased that the Commission has not proposed to adopt the Department's approach, although the Department has recommended it repeatedly. Even if legal, it would be terrible policy. The Department suggests that permitting judges to determine the actual conduct on which a prior conviction is based, without any real restrictions on what could be used, is akin to sentencing determinations judges currently make about current offense conduct and personal history, consistent with the rules of relevant conduct and subject to §6A1.3.⁴⁴ This is not correct.

Information about prior convictions—sometimes decades old—will be documented in a uniquely partial way that has no comparison with information about the instant offense or an individual's personal history. As Attorney Juval Scott has discussed, this is true even of court documents, which generally memorialize only accusations—most of which the defendant has no incentive, and possibly no opportunity or ability, to contest.⁴⁵ This is of particular concern for the vast majority of criminal cases where the defendant is indigent. As both Attorney Juval Scott (a former state prosecutor) and the Practitioners Advisory Group ("PAG") witness Attorney Susan Lin explained at the recent hearing, state court practice is fast-paced. And as Hon. Chair Reeves noted, state indigent defense systems are overstretched and, in some cases, unfortunately, deficient.

The situation is even worse with police reports, which are produced (in this context) to explain an arrest, with an eye toward criminal charges. As Attorney Juval Scott explained at the hearing, police reports are not always truthful. But even if we accept that a particular report is truthful, that does not mean it would contain mitigating information.

If the Commission permits courts to impose career-offender sentences based on findings made from reviewing years-old police reports, the

would be required to share a copy with the defense, but of course they would not seek to use a third-party record that supports the defense position, rather than the government's position. So practically speaking, this kind of record could never help the defense; it could only help the government, exacerbating unfairness.

⁴⁴ See DOJ Written Testimony for March 2023 Hearings at 31.

⁴⁵ If our client had an actual defense—one related to an element of the charged offense—that would be memorialized. But the fact of conviction would reveal that any defense against the elements was unsuccessful. Factual disputes unrelated to the elements of the offense generally are not documented anywhere.

Commission's very legitimacy would be endangered. As then-Commissioner Rachel E. Barkow stated during the last amendment cycle, adopting a conduct-based approach would take the bad rule of relevant conduct and make it worse.⁴⁶ The Federal Guidelines stand alone in permitting courts to consider uncharged "real offense" conduct.⁴⁷ The fairness problems posed by the relevant-conduct rule would be exponentially exacerbated if the Commission were to require judges to look at "real offense" conduct for offenses commit long ago in different jurisdictions.⁴⁸

The fact is that none of the sources discussed, including but not limited to judicial records, is "reliable" in the sense that the Department asserts. These documents might not be tampered with and may accurately reflect complaints, reports, and accusations; but they do not reliably prove conduct. That is why, under the Federal Rules of Evidence, a judgment of conviction is admissible to establish, at most, facts "essential to the judgment," and the remaining documents would be wholly inadmissible under both the Rules of Evidence and the Sixth Amendment's Confrontation Clause.⁴⁹ Indeed, Rule 803(8)(ii) specially excludes from the public-records exception to the hearsay bar matters observed by law-enforcement personnel in criminal cases.

What's more, in the unlikely event that an alternative version of events is documented—what then? Let's say a defendant at a plea hearing in

⁴⁶ See Transcript of Public Meeting Before the U.S. Sentencing Comm'n, Washington, D.C., at 13 (Aug. 23, 2018) (Commissioner Rachel E. Barkow).

⁴⁷ See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1628 (2012) (sentencing guidelines adopted after the federal guidelines); Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 Fed. Sent'g Rep. 68, 69, 1995 WL 843512 (Sept/Oct. 1995) (sentencing guidelines adopted before and after the federal guidelines).

⁴⁸ TIAG suggests that "because a district court has the most complete understanding of a given defendant's criminal history, the sentencing judge can best ensure that prior eligible offenses 'match up' with the Guidelines set forth in the proposal." TIAG Written Testimony on Career Offender at 2. But the only understanding a district court has about an individual's criminal history that happened long ago and in other jurisdictions is from the Presentence Report, which itself is prepared based on police reports, probation reports, and court records. As stated, these documents contain the accusation, not the defense, and are not reliable as to non-elemental facts.

⁴⁹ See Fed. R. Evid. 802, 803(22); *Crawford v. Washington*, 541 U.S. 36 (2004).

an old case—where we are lucky enough to have a transcript—specifically says, “I am pleading to resisting/obstructing an officer but based only on the fact that I gave the officer a false name; I did not push the officer, like he claimed.” And then the prosecutor says, “Noted, but that doesn’t go to the elements of the offense.” How does the federal sentencing court resolve this? And if the court resolves it against the individual, will the court hold it against him that he raised the objection?

Finally, the Department does not explain how non-elemental facts could ever satisfy §4B1.1’s requirement that “the defendant has at least two prior *convictions* of either a crime of violence or a controlled substance offense.” The same goes for USSG §2K2.1, which also cross-references the definitions at §4B1.2—it refers to convictions, not conduct. Relatedly, the Department proposes that the definition of “crime of violence” should retain an elements clause. The elements clause defines “crime of violence” as an offense that “has as an *element* the use, attempted use, or threatened use of physical force against the person of another.”⁵⁰ This definition plainly requires an elements-based approach, and the government has never explained how it could be otherwise.⁵¹

2. A methodology that goes beyond documents, providing for true mini-trials, would come with its own problems.

The Department’s written testimony indicates that the primary difference between its methodology and the proposed amendment is that the Department’s methodology would not be limited by the idea of “*Shepard* documents,” indicating that it would like courts to be able to rely on non-court documents. But at the hearing, the Department’s witness suggested that they would not be opposed to more robust fact-finding proceedings to determine conduct related to a prior offense—that is, mini-trials.

This still runs up against the fact that §4B1.1 and §2K2.1 refer to prior “convictions,” not conduct. But also, mini-trials would just create new

⁵⁰ USSG §4B1.2(a).

⁵¹ See, e.g., *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022) (elements clause by its terms “asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force”).

problems. Most obviously, it creates a problem of administration. A major impetus for seeking an alternative to the categorical approach is a desire to simplify federal sentencing; it would not make sense to replace that approach with one that is more complicated, and more resource-intensive.

The other problem is that the individuals being sentenced and their attorneys—Defenders included—will be hesitant to raise objections related to prior-offense conduct out of fear that it will result in a higher sentence. Perhaps this could resolve some administrability problems, but it would come at a high cost to both accuracy and justice. As noted above, even pointing out that old court records call the government’s version of conduct into question, if the matter is resolved in the government’s favor, could militate toward a longer sentence. Asking for a hearing at which the parties would present witnesses would come with much greater risk.

Day in and day out, Defenders have to explain to our clients the potential benefits and risks of objecting to factual allegations at sentencing. In circuits where objections can result in losing the acceptance-of-responsibility reduction, one risk is concrete; the Commission is considering guidance on this, which we would appreciate. But in every district, this is risky; ceding time at sentencing that could be spent on mitigation, to instead engage in a factual dispute with the prosecution about an old crime, could well result in a higher sentence. If the draconian career offender guideline is on the line, more of our clients likely would take that risk. But this Commission should not require them to make that choice.

3. Anomalous cases can be addressed through variances.

It turns out that there is no perfect solution to the problems inherent in basing sentence enhancements on whether an offense fits within a specified category. As we have explained, the categorical approach is the best solution out there; it’s not perfect, and it’s certainly not popular, but it avoids the profound unfairness of a court finding non-elemental facts based on court records that would not memorialize the defense’s version of events that don’t impact the elements, or of requiring individuals to choose between mini-trials or mitigation at sentencing. And, as even the Department’s witness at the March 8, 2023, career offender hearing acknowledged, for the many issues that have already been resolved in categorical-analysis caselaw, there is ease of application.

The trade-off, of course, is that the categorical approach produces odd results in some cases. But courts can address that through individualized variances. The Department recognizes this, in suggesting that the Commission provide guidance regarding variances related to career-offender findings.⁵² Defenders would not object to guidance encouraging variances.

The Commission should not expand the reach of the career offender guideline and then rely on courts to vary downward. The penalties of such an approach will fall most heavily on individuals with the least experienced counsel. The guideline range that is determined to apply to an individual is the “anchor[]”; the “benchmark”; the “framework” for sentencing.⁵³ The Commission should avoid raising this benchmark into the stratosphere for many more individuals; courts can simply vary upward where appropriate.

IV. Arguments in favor of expanding the definitions of “controlled substance offense” and “crime of violence” in other ways are not persuasive.

A. There is no justification for expanding the reach of the definition of “controlled substance offense” (Proposals 4B, 6C, 6D).

Three of the Commission’s proposals would expand the reach of the career offender guideline to more individuals convicted of drug offenses:

- Proposal 4B, Option 2, would sweep in any prior felony for any substance a state chooses to regulate in any manner—and the Department proposes that even a state decriminalizing a substance should not matter for this analysis.
- Proposal 6C would sweep in attempts and conspiracies, plus an unknown number of unidentified and undefined inchoate offenses and accomplice theories.
- Proposal 6D would sweep in offers to sell, which need not involve any controlled substance at all.

⁵² See DOJ Written Testimony for March 2023 Hearings at 34.

⁵³ *Peugh v. United States*, 569 U.S. 530, 541–42 (2013).

Adopting Defenders' proposal to mirror 28 U.S.C. § 994(h) would moot all of these proposals, reduce unwarranted disparity, and greatly simplify application. It would also go a great distance toward removing drug-trafficking convictions from the reach of the problematic career offender guideline, which the Commission has previously advocated for.

1. The Commission should limit the definition of “controlled substance offense” to the federal felonies enumerated in 28 U.S.C. § 994(h)(2)(B).

a. This proposal is the most parsimonious and is consistent with the language of § 994(h).

As Attorney Caruso explained in his statement, the Commission should dial back the definition of “controlled substance offense” to those offenses listed in the career offender directive.⁵⁴ Mirroring § 994(h) in the definition of “controlled substance offense” would ensure that only federal felonies under the enumerated statutes would constitute a career offender predicate.

At the March 7, 2023 hearing, *ex officio* Member Wroblewski suggested that § 994(h)(2)(B)'s use of the phrase “described in” (“an offense described in section 401 of the Controlled Substances Act” etc.) requires the career offender guideline to reach state offenses. This suggestion is unfounded. To be sure, some courts have held that the Commission has the authority under either § 994(h) or its general promulgating authority to “include[e] prior state convictions as an additional basis for career offender status.”⁵⁵ But in the relevant cases, the courts were considering whether §4B1.2 as promulgated was permitted by the language of § 994(h), not whether it was *required* by that language.⁵⁶

⁵⁴ See Statement of Michael Caruso Before the U.S. Sentencing Comm’n on Acceptance of Responsibility and Controlled Substance Offenses 25–28 (March 7, 2023) (“Statement of Michael Caruso-CSO”).

⁵⁵ *United States v. Stewart*, 761 F.3d 993, 998–99 (9th Cir. 2014) (collecting cases).

⁵⁶ See, e.g., *United States v. Beasley*, 12 F.3d 280, 283–53 (1st Cir. 1993) (“the statutory provision authorizes the Commission to define ‘career offender’ as it has done, that is, to include those with prior state law convictions for offenses of the sort

Section 994(h)(2)(B) lists only federal offenses. And, reading § 994(h)(2)(B) in the context of § 994, the Sentencing Reform Act of 1984 (“SRA”) as a whole, and the entire Comprehensive Crime Control Act of 1984, reflects that, when Congress intended a recidivist provision to encompass non-federal convictions, it said so expressly.

Starting with § 994(h) itself, § 994(h)(2)(B) (the enumerated offenses for prior convictions) is worded identically to § 994(h)(1)(B) (the enumerated offenses for instant convictions). It is a certainty that § 994(h)(1)(B) identifies only federal offenses, as it identifies the instant offense of conviction, which could only be a federal offense. Under the canon of consistent usage, it is generally presumed that Congress meant the same thing when it used the identical phrase twice in a single subsection of a statute.⁵⁷

Strong evidence that Congress would have expressly listed non-federal convictions if it meant for them to be included can be found in 28 U.S.C. § 994(i), the very next subsection in the same statute. Subsection 994(i) directs the Commission to assure that the Guidelines specify a “substantial term of imprisonment”—but not “at or near the maximum”—for a person who “has a history of two or more prior Federal, state, or local felony convictions for offenses committed on separate occasions.”⁵⁸ Subsection 994(i) expressly includes prior “Federal, State, or local felony convictions,” while § 994(h)(1)(B) and (2)(B) do not.⁵⁹ “When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally

defined in the listed federal statutes”); *United States v. Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989) (“We believe the entire guideline is authorized, if not required, by section 994(h)”); *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994) (rejecting argument that § 994(h) permits the career offender guideline only to take account of federal controlled substance convictions); *United States v. Consuegra*, 22 F.3d 788, 789–90 (8th Cir. 1994) (holding Commission’s interpretation of § 994(h) was “sufficiently reasonable”); *United States v. Rivera*, 996 F.2d 993, 995 (9th Cir. 1993) (“Section 994(h) of the statute is ambiguous”); *United States v. Gonsalves*, 121 F.3d 1416, 1417–10 (11th Cir. 1997) (agreeing with other circuits that Commission did not exceed its authority in § 994(h) in including state convictions).

⁵⁷ See *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85 (2017).

⁵⁸ Compare 28 U.S.C. § 994(i)(1) with 28 U.S.C. § 994(h).

⁵⁹ In construing § 4B1.2(b), the Eighth and Tenth Circuits mistakenly turned to 28 U.S.C. § 994(i) as the career offender directive. See *United States v. Henderson*, 11 F.4th 713, 717 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1296 (10th Cir. 2021).

understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*).”⁶⁰ To interpret § 994(h)(2)(B) to mean something different from the exact same words in § 994(h)(1)(B), and something similar to entirely different words in § 994(i) would “def[y] this traditional rule of statutory construction.”⁶¹

Other parts of the SRA confirm that Congress expressly included non-federal convictions when that was its intention. For example, 18 U.S.C. § 3607(a), which provides for special probation for drug possessors, applies to those found guilty of “an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844),” so long as they have not, among other requirements “been convicted of violating a Federal or State law relating to controlled substance.”⁶² That is, in another section of the SRA, Congress used the “described in” language to identify federal offenses only, and then used “Federal or State law” to identify a broader category of prior controlled substance offenses.⁶³ “Conspicuously, the one place in the [SRA] where the government needs [non-federal] language to appear is the one place it does not.”⁶⁴ So, “the government’s [] theory faces not just a single *expressio unius* challenge but two.”⁶⁵

Really, it faces three. For in the same legislation that enacted the SRA, Congress also expanded the federal drug statute’s recidivist maximum

⁶⁰ *Bittner v. United States*, 143 S. Ct. 713, 720 (2023); see also *Department of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”) (citation omitted).

⁶¹ *Bittner*, 143 S. Ct. at 720.

⁶² Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 2003 (1984) (Chapter II of Comprehensive Crime Control Act of 1984).

⁶³ Where Congress has used the phrase offense “described in” to reach non-federal offenses, it has said so expressly. See, e.g., 18 U.S.C. § 3559(c)(2)(F)(i) (“a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111)”; 8 U.S.C. § 1101(a)(43) (“The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]”). As the Supreme Court made clear in *Torres v. Lynch*, 578 U.S. 452, 460–66 (2016), it is the coupling of “described in” with a reference to state offenses that expands a statute’s reach to non-federal offenses.

⁶⁴ *Bittner*, 143 S. Ct. at 721.

⁶⁵ *Id.*

penalties to reach those who had been convicted of non-federal offenses. Prior to 1984, the federal drug statute's recidivist penalties were triggered only upon previous conviction for federal drug felonies.⁶⁶ But in Chapter V of the Comprehensive Crime Control Act of 1984 (the SRA is Chapter II), Congress amended 21 U.S.C. § 841 to provide for recidivist penalties for previous felony convictions under certain federal statutes or "other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances."⁶⁷ Surely, being in the process of amending another statute expressly to include non-federal prior convictions to increase statutory maximums, Congress would have so specified if it intended § 994(h) to direct near-maximum sentences for those same non-federal prior convictions. We cannot infer the opposite.

It makes sense that Congress would direct the Guidelines to assure near-maximum sentences only for those with federal convictions, where Congress could be certain that they reflected federal legislative and executive priorities and that federal judicial and prosecutorial standards were met. Convictions under local and state laws would vary state-to-state, and legislative, prosecutorial, and judicial policies would also vary state-to-state. Although Congress included non-federal convictions in the recidivist enhancements for § 841, at the time, those enhancements increased only the *maximum* penalties. There were no mandatory minimums. But including non-federal convictions in § 994(h) would have directed mandatory guideline ranges at or near the increased statutory maximum for these local and state convictions. If Congress had intended that, it would have said so.

⁶⁶ See *United States v. Gates*, 807 F.2d 1075, 1081–82 (D.C. Cir. 1986) ("after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or Subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances") (citation omitted) (emphasis omitted).

⁶⁷ See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502, 98 Stat. 1837, 2068 (1984) (Chapter V of Comprehensive Crime Control Act of 1984).

b. This proposal would resolve most of the concerns raised this cycle with respect to the definition of “controlled substance offense.”

Mirroring § 994(h) would resolve not only the circuit split raised in Proposal 4B (by limiting the definition to federal offenses, which involve only federally controlled substances), but also the circuit conflict raised in Proposal 6C (by excluding most inchoate offenses). It would also moot both parts of Proposal 6D (by rejecting “offer to sell” and adding title 46 chapter 705 offenses).

It would also resolve any concerns with respect to disparate treatment between conduct in different states posed by both Options 1 and 2 of Proposal 4B. All individuals would be treated similarly: no state convictions would be considered controlled substance offenses; only convictions for enumerated federal offenses would qualify.⁶⁸ And whereas Options 1 and 2 both admittedly involve some complexity in application, our proposal does not.

2. At minimum, the Commission should clarify that “controlled substance” has its federal definition, and it should not otherwise expand the reach of “controlled substance offense.”

a. The Commission should clarify that “controlled substance” is federally defined (Proposal 4B).

DOJ and POAG have suggested that expanding “controlled substance” to include any substance controlled under applicable state law (Option 2) is faithful to the current language of §4B1.2(b). It is not.⁶⁹ But even if it were, this is irrelevant. It makes no difference what the current §4B1.2(b) covers, now that the Commission is proposing to amend it.

The statutory directive, § 994(h), clearly does not require inclusion of offenses involving substances that are not controlled federally. So, the

⁶⁸ This treats those with state and federal priors differently, but it is a reasonable difference. As discussed, Congress could well have wished to reserve near-maximum sentences for those who had been twice previously convicted of federal drug offenses in federal court, consistent with federal legislative and executive priorities, and federal prosecutorial and judicial standards.

⁶⁹ See Statement of Michael Caruso-CSO at 32–34.

Commission is faced with a policy choice. Given the problems with the career offender guideline, magnified in the context of drug-trafficking offenses, the Commission should choose the narrowest definition possible. It certainly should not expand the reach of this federal sentencing enhancement to offenses not involving federally controlled substances.

DOJ and a majority of POAG also suggest that Option 2 should be selected because Option 1 would lead to some state offenses being excluded.⁷⁰ Commissioners queried Attorney Caruso about this problem. But like the categorical analysis, this is not a problem to be solved. States are permitted to choose what substances to regulate, how to define those substances, and what jurors must find to convict. Indeed, our federalist system requires that states have these choices, which permit them to make it easier for state law enforcement and prosecutors to obtain convictions. But this means that some state convictions do not trigger career offender sentences. This is already true in the context of the INA, the ACCA, and 21 U.S.C. § 841.⁷¹

The Department claims that Option 1 would lead to unnecessary complexities at sentencing. To this, Defenders have three responses. First, regardless of this guideline definition, the complexities the Department references will continue in the context of ACCA, § 841, and challenges to prior deportations under 8 U.S.C. § 1326(d). One of the cases Assistant United States Attorney Carmen Mitchell referred to at the March 7, 2023 hearing—the case about Iowa coca convictions, *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022)—involved the ACCA. So, nothing the Commission does with respect to the Guidelines would alter its outcome. But if Option 1 is promulgated, answers courts provide in those contexts will apply equally here, which simplifies things.

Second, as set forth in Attorney Caruso’s statement, Option 2 will lead to *more* complexities and litigation.⁷² The only way to avoid that would be for

⁷⁰ See DOJ Written Testimony for March 23 Hearings at 21; POAG Written Testimony on Circuit Conflicts at 5.

⁷¹ See, e.g., *Mellouli v. Lynch*, 575 U.S. 798 (2015) (INA); *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020) (ACCA); *United States v. Oliver*, 987 F.3d 794 (8th Cir. 2021) (21 U.S.C. § 841). Defenders are unaware of the government ever seeking cert or even rehearing en banc to challenge these results.

⁷² See Statement of Michael Caruso-CSO at 34–38.

courts to conclude that literally every felony for any offense involving any random substance a state chooses to regulate in any way could be a career offender predicate. And neither Defenders nor our clients would accept that conclusion without pitched battle.

Third, simplifying application is no excuse for expanding the reach of the career offender guideline.

The Department also recommends that the Commission “clarify” that the substance at issue must have been controlled when the defendant committed the predicate offense.⁷³ Really, the Department’s position is that the substance need *only* have been controlled at that time—that is, where a state or the federal government later decides that the substance is not appropriate for control, a conviction based on that substance is still a predicate.⁷⁴ This would not be a clarification but a substantive change, and it is not one the Commission should adopt.

The Department suggests that “[b]ecause the ‘controlled substance offense’ definition applies to prior convictions, a federal sentencing court should look to the applicable drug schedules in effect at the time of the prior crime to determine whether the defendant engaged in conduct involving a ‘controlled substance.’”⁷⁵ But the Sentencing Reform Act explicitly provides that the Guidelines that apply are those that are in effect at the time of sentencing, not at the time of the prior conviction.⁷⁶ And this remains true when the guideline cross-references an external statutory definition. For example, although Congress has steadily expanded the definition of “aggravated felony,” courts applying §2L1.2 have looked to the definition of

⁷³ See DOJ Written Testimony for March 2023 Hearings at 22

⁷⁴ See *id.*

⁷⁵ *Id.* Although the Third and Sixth Circuits relied on *McNeill v. United States*, 563 U.S. 816, 820 (2011), to justify looking to the definition from the time of the prior state conviction to determine the scope of “controlled substance,” see *United States v. Lewis*, 58 F.4th 764, 772 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404, 409 (6th Cir. 2022), the Department does *not* cite *McNeill*, likely because it recognizes it is wholly inapposite. See, e.g., *United States v. Gibson*, 55 F.4th 153, 161–62 (2d Cir. 2022); *United States v. Abdulaziz*, 998 F.3d 519, 525–27 (1st Cir. 2021); *United States v. Batista*, 989 F.3d 698, 703–04 (9th Cir. 2021).

⁷⁶ See 18 U.S.C. § 3553(a)(4)(A)(ii).

aggravated felony on the date of the federal immigration offense, not the date of the prior conviction.⁷⁷

The Department provides no reason why drug offenses should be treated differently. The SRA charged the Commission with developing guidelines that not only provide certainty and fairness and avoid unwarranted sentencing disparities, but also “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”⁷⁸ What should matter—and what has always mattered—for recidivist enhancements is the current assessment of the prior conviction, not an assessment under an old standard that has since been rejected.⁷⁹ To accept the Department’s timing argument would be to permit low-THC marijuana offenses to trigger enhancements indefinitely, although our society’s assessment of that substance has evolved. In its testimony, the Practitioner’s Advisory Group provided several examples of the injustices that would result from this frozen-in-time sentencing analysis.⁸⁰

For its part, POAG recognizes that Option 2 will cause disparity because conduct that is legal in one state could be a career offender predicate in another. But a majority concluded that this is not important because “the defendant’s choice to violate these rules is the central issue that should be focused on.”⁸¹ This conflates using criminal convictions to increase criminal history category, which would be unaffected by defining “controlled substance” consistent with federal law, with using these convictions to trigger

⁷⁷ See, e.g., *United States v. Avila-Ramirez*, 170 F.3d 277, 278 (2d Cir. 1990) (per curiam) (holding that characterization of prior conviction as “aggravated felony,” for ex post facto purposes, depended on date of immigration offense); *United States v. Saenz-Forero*, 27 F.3d 1016, 1018–21 (5th Cir. 1994) (same); *United States v. Aldape-Mendoza*, 21 F. App’x 340, 341–42 (6th Cir. 2001) (same); *United States v. Estrada-Quijas*, 183 F.3d 758, 760–61 (8th Cir. 1999) (same); *United States v. Arzate-Nunez*, 18 F.3d 730, 733–35 (9th Cir. 1994) (same).

⁷⁸ 28 U.S.C. § 991(b)(1).

⁷⁹ See *Gibson*, 55 F.4th at 162; *Abdulaziz*, 998 F.3d at 528; *Bautista*, 989 F.3d at 703.

⁸⁰ See Testimony of Marlo P. Cadeddu on Behalf of PAG 9 (Mar. 7, 2023) (“PAG Written Testimony for March 7, 2023 Hearings”).

⁸¹ POAG Written Testimony on Circuit Conflicts at 5.

the draconian career offender penalty. It is the latter that the definition of “controlled substance” impacts.⁸²

Finally, although POAG understands that Option 2 would result in more defendants qualifying as career offenders based on “controlled substance offense” predicates, a majority concluded that “this may be the cost of creating a higher continuity of application.”⁸³ Defenders submit that the cost in human liberty is too high.

b. The Commission should exclude inchoate offenses, including “offers to sell” (Proposals 6B, 6D).

Both DOJ and POAG recommend expanding the definition of controlled substance offense (and crime of violence) to include any inchoate offense and any theory of accomplice liability a state decides to criminalize, as well as the specific inchoate offense of “offers to sell.” Again, neither reconciles this position with the recognition that the career offender guideline is overly punitive, has no empirical basis, and exacerbates racial disparity.

Both DOJ and POAG suggest that expanding career offender predicates to include unidentified, undefined, and unknown theories of inchoate and accomplice liability is consistent with the Commission’s long-held position stated in note 1 of the commentary. First, it is not: As Attorney Juval Scott’s testimony explains, the current commentary is far more limited.⁸⁴ Second, even the offenses currently included—generic attempts and conspiracies—are too much. One way the Commission could rein the career offender guideline in is by excluding less serious inchoate offenses and less culpable forms of accessorial liability.⁸⁵

If the Commission elects to continue to include attempts and conspiracies, it should make clear that these terms have content, such that a conviction is not for an attempt or conspiracy unless it matches the generic federal definition. Otherwise, for example, conspiracy convictions might count

⁸² See, e.g., *Abdulaziz*, 998 F.3d at 528.

⁸³ POAG Written Testimony on Circuit Conflicts at 4.

⁸⁴ See Statement of Juval O. Scott at 29–30.

⁸⁵ See *id.* at 28–30; Defender Comments on 2019 Proposed Amendments at 30–34 (Feb. 19, 2019), <https://tinyurl.com/4nm3zecy>.

without any agreement, and attempt convictions might count without any intent to commit the crime.⁸⁶

POAG notes that it would be “simpler” for *all* inchoate and accessorial offenses to qualify.⁸⁷ But, as discussed, simpler is not always better, especially when the cost is years in human liberty.

B. There is also no justification for expanding the reach of the definition of “crime of violence” (Proposals 6B, 6C, 6A- recklessness, force against property).

The proposals to expand the definition of “crime of violence” pose the same problems. Two of the Commission’s proposals would expand the definition of “crime of violence”: Proposal 6B would extend the definition to reach offenses that require neither immediate threats nor threats to the person; Proposal 6C, discussed above, would sweep in attempts and conspiracies, as well as unidentified, undefined, and unknown inchoate offenses and accomplice theories.

Both DOJ and POAG support these proposals to expand the definition.⁸⁸ The Commission has proposed one amendment that would preserve a constraint the Supreme Court has placed on the definition of violent felonies—to exclude offenses based upon a finding of recklessness or negligence—and DOJ objects to that one.⁸⁹ Finally, DOJ recommends the Commission reverse decades of policy and expand the elements clause to include offenses that have as an element the use of force “against property.”⁹⁰

⁸⁶ See, e.g., Wash. Rev. Code §9A.28.040(2)(f) (“It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired. . .[i]s a law enforcement officer or other government agent who did not intend that a crime be committed.”); *Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (holding Indiana attempts statute does not require intent).

⁸⁷ POAG Written Testimony on Career Offender at 4.

⁸⁸ See DOJ Written Testimony for March 2023 Hearings at 36; POAG Written Testimony on Career Offender at 4–5.

⁸⁹ See DOJ Written Testimony for March 2023 Hearings at 32–33.

⁹⁰ See *id.* at 31 n. 50.

DOJ and POAG suggest there's "confusion" over whether Hobbs Act robbery qualifies as a crime of violence.⁹¹ There is no confusion. Every circuit to address the issue has held that it does not qualify because it does not require an immediate threat of force and it does not require any force directed at a person.⁹² This distinguishes Hobbs Act robbery from most definitions of robbery (under state and federal law), which require "a type of force that creates 'an immediate danger to the person.'"⁹³ And, although Assistant United States Attorney Robert Zauzmer suggested at the recent hearing that Hobbs Act robbery was one of the two triggers of the original ACCA, that is not correct. The type of robbery conviction that triggered the original ACCA was a conviction for "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*."⁹⁴ The Commission, having expended significant resources to scale down the "crime of violence" definition, should not now step-by-step expand it.

Nor should the Commission provide that crimes with a mens rea of negligence or recklessness may constitute crimes of violence. The Supreme Court recently held, in *Borden v. United States*, that the use of physical force requires more than negligent or reckless conduct.⁹⁵ The Department complains that adhering to this exclusion would exclude more than a third of the states' aggravated assault statutes and a handful of robbery statutes.⁹⁶

⁹¹ POAG Written Testimony on Career Offender at 3–4; *see also* DOJ Written Testimony for March 2023 Hearings at 35–36.

⁹² *See United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 190 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

⁹³ *United States v. Rabb*, 942 F.3d 1, 5–6 (1st Cir. 2019) (quoting government).

⁹⁴ Pub. L. No. 98-473, 98 Stat. 2185 (18 U.S.C. app. § 1202(c)(8) (Supp. II 1984)) (emphasis added).

⁹⁵ *See* 141 S. Ct. at 1821–22 (plurality opinion).

⁹⁶ *See* DOJ Written Testimony for March 2023 Hearings at 32–33.

That is as it should be: those statutes are currently excluded,⁹⁷ and there is no sound reason to expand the definition.

The Department complains that court documents will not always reflect which portion of a statute a conviction was based on and recommends that, should the Commission adopt an exclusion for offenses committed recklessly, it place the burden on the defendant to show that the conviction was based on reckless conduct.⁹⁸ In view of the Department's desire that courts be permitted to rely on charging documents to find non-elemental facts for the purpose of imposing draconian sentencing enhancements, it is discordant for the Department also to complain that charging documents do not reliably describe actual conduct. In any event, in a criminal case, where the government bears the burden of proof, evidentiary gaps work against the government.⁹⁹

Finally, the Commission should not reintroduce "or property" into the elements clause. The original career offender guideline included force against property. In 1989, the Commission amended the definition, "in response to research that concluded that the definition in § 924(e) is more specific than the definition of a 'crime of violence' in 18 U.S.C. § 16, and more narrowly drawn and that linking the definitions of predicate crimes to those already approved, defined, and joined together by Congress for the heavy sanction of § 924(e) would facilitate both the acceptance of the guideline and its proper application."¹⁰⁰ Congress's most recent relevant enactment, the First Step Act of 2018, likewise adopts a force clause that is limited to "physical force against the person."¹⁰¹ The Department's suggestion that the Commission reverse this decision made over three decades ago defies explanation.

⁹⁷ See, e.g., *United States v. Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018) (excluding aggravated assault with element of ordinary recklessness); *United States v. Tagatac*, 36 F.4th 1000, 1004–05 (9th Cir. 2022) (including Hawaii robbery because conviction was for divisible portion of statute that required intent).

⁹⁸ See DOJ Written Testimony for March 2023 Hearings at 33.

⁹⁹ See *Pereida v. Wilkinson*, 141 S. Ct. 754, 766–67 (2021).

¹⁰⁰ 2016 *Career Offender Report* at app. A-9–A-10 (cleaned up).

¹⁰¹ 18 U.S.C. § 3559(c)(2)(F)(ii), as incorporated in 21 U.S.C. § 802(58).

V. Conclusion

In sum, Defenders suggest the Commission:

- Amend §4B1.2(b)(2) to define “controlled substance offense” as felony violations of the offenses listed in 28 U.S.C. § 994(h)(2)(B); and
- Delete from Application Note 1 to §4B1.2 the commentary that provides that “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

We urge the Commission to forgo further amendments impacting the career offender guideline until it has had an opportunity to review and study relevant data. Defenders are heartened by the Commission’s and the Department’s recognition that the career offender and other recidivist guideline enhancements call for sentences that are not necessary or appropriate, and we welcome the continued opportunity to work toward meaningful reform.

The following is excerpted from the March 2023 Statement of Michael Caruso.

* * * * *

I. Controlled Substance Offense

The Commission has proposed two options to resolve a circuit split regarding the definition of “controlled substance.” Option 1 would adopt the federal definition from 21 U.S.C. § 802(6) and provide that “controlled substance” means “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*).”⁸⁹ Option 2 would include those federally controlled substances and also substances “otherwise controlled under applicable state law.”⁹⁰

Long-documented problems with the career offender guideline are set forth in detail in the Statement of Juval Scott on the Commission’s proposed amendments to the career offender guideline, and although she will be testifying after me, I hope you will consider my comments in the context of her written testimony.⁹¹ These problems are magnified when the career offender guideline’s application is triggered by convictions for “controlled substance offenses.”⁹² The Commission should take this opportunity to define controlled substance offense to reach no further than what is required by the statutory directive, 28 U.S.C. § 994(h).⁹³ The simplest and most parsimonious

⁸⁹ 2023 Proposed Amendments, at 7201.

⁹⁰ *Id.*

⁹¹ See Statement of Juval O. Scott on Proposed Amendments to the Career Offender Guideline at 3-12.

⁹² See USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 3 (2016), <https://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements> (“2016 Career Offender Report”) (“Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.”).

⁹³ Section 994(h) reads:

way to achieve this is to define “controlled substance offense” to mirror the federal offenses enumerated in § 994(h)(1)(B), (2)(B):

The term “controlled substance offense” means an offense, punishable by imprisonment for a term exceeding one year, described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

If the Commission decides not to limit “controlled substance offense” to the mandate, then, at a minimum, it should limit the definition of “controlled substance” to the finite and known category of federally controlled substances, consistent with Option 1.

Option 2 would create unwarranted disparity, spawn new litigation, and vastly expand the number and variety of offenses that would trigger the career offender guideline and Chapter Two and Four recidivist enhancements. Judges already impose a below-guideline sentence in nearly 80% of cases identified by the career offender guideline; expanding its reach would further diminish its influence, when it is already at an all-time low.⁹⁴

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

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

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

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

⁹⁴ See USSC, Quick Facts: Career Offenders (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf (“2022 Career Offenders Quick Facts”); USSC, The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes,

A. The Commission should contract, not expand, the reach of the career offender guideline.

The career offender guideline calls for such high sentences because Congress, at 18 U.S.C. § 994(h), 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 felony drug-trafficking offenses, and who had previously been convicted of two or more felony crimes of violence or those same enumerated trafficking offenses. The Commission promulgated the career offender guideline, USSG §§4B1.1, 4B1.2, to implement this directive.⁹⁵

But, as set forth in more detail in Ms. Scott’s testimony, the directive and the guideline implementing it are highly flawed. The guideline calls for sentences that are too high for most of the individuals it captures. As a result, judges impose a sentence below the range called for by the career offender guideline in an increasing percentage of cases to which it applies.⁹⁶ And the gap between the average guideline minimum and the average sentence judges impose continues to widen.⁹⁷

The reason for the career offender guideline’s ever-waning influence is that it has no empirical basis. Commission research over decades reflects that recidivism rates are most closely correlated with total criminal history points, not career offender status, and the Commission has never stated any *other* empirical rationale for imposing near-maximum sentence on this category of individuals.⁹⁸

2005-2017 55–56 (2020), <https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing> (“*Influence Report*”).

⁹⁵ See *2016 Career Offender Report* at 14–15.

⁹⁶ See *id.* at 22.

⁹⁷ See *Influence Report* at 55–56.

⁹⁸ See *2016 Career Offender Report* at 43 (noting that Commission’s research over decades reflects that recidivism rates are “most closely correlated with total criminal history points”); USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 18-19 (2016), <https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>; USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing*

The guideline also exacerbates racial disparity in guideline sentencing, with Black individuals nearly six times as likely to be identified as career offenders as white individuals.⁹⁹ In light of these problems, the Commission should contract, not expand, the reach of this guideline, especially as applied to drug offenses.

In its *2016 Career Offender Report*, the Commission itself recommended to Congress that it amend the career offender directive to remove from its coverage those who qualify based solely on drug-trafficking offenses, and it also expressed concern about including those for whom drug-trafficking offenses played any role in their career offender status.¹⁰⁰ As it now stands, the career offender guideline is already the least influential guideline: In FY2021, judges imposed sentences below the recommended guideline range in nearly 80% of career offender cases.¹⁰¹ For the Commission to now expand the guideline by defining “controlled substance offense” to reach still more drug offenses would give judges even more reasons not to follow it. Instead, the Commission should follow the evidence and limit the definition to what is required by § 994(h).

B. The Commission should limit §4B1.2(b) to the offenses enumerated in § 994(h).

The specific directive that resulted in §4B1.1 identifies a short, discrete list of federal drug felonies for which Congress has mandated near-maximum guidelines ranges.¹⁰² The Commission should mirror this list in the guideline definition of a “controlled substance offense.” This limitation is consistent with the Commission’s 2016 recommendation to Congress that it remove those identified as career offenders solely on the basis of drug-trafficking

Guidelines 9, 37 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

⁹⁹ This figure was derived from USSC, *Individual Datafiles FY 2017-2021*, which reflect that 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).

¹⁰⁰ See *2016 Career Offender Report* at 43, 44.

¹⁰¹ See *2022 Career Offenders Quick Facts*.

¹⁰² See 28 U.S.C. § 994(h)(1)(B), (2)(B).

convictions from the reach of the career offender directive.¹⁰³ It would also respond to the Probation Officer Advisory Group’s suggestion that “limiting the number of controlled substance offenses that are included as predicate offenses will help create simplicity in guideline application and address sentencing disparities throughout the country.”¹⁰⁴ Only convictions for the enumerated offenses would qualify.

Limiting the definition to federal drug felonies enumerated in § 994(h) would also resolve several circuit splits and anomalies in the current guideline. It would resolve the circuit conflict addressed in Proposed Amendment 6C in favor of removing inchoate offenses not included in § 994(h), and it would moot the proposal in Proposed Amendment 6D to expand the definition of “controlled substance offense.” It would also resolve the anomaly that the guideline definition includes offenses like 21 U.S.C. § 952(b), which Congress deliberately excluded from § 994(h).¹⁰⁵

Further, it would remedy another anomaly, which appears to permit state offenses that would be misdemeanors if charged under 21 U.S.C. § 841 (the offense enumerated in § 994(h)) to constitute career offender predicates simply because a state chooses to classify those offenses as felonies.¹⁰⁶ For example, distributing a schedule V controlled substance and distributing a small amount of marijuana for no remuneration are misdemeanors under § 841, and thus not felonies described in any of the offenses enumerated in

¹⁰³ See *2016 Career Offender Report* at 3.

¹⁰⁴ Probation Officers Advisory Group’s Comments on the United States Sentencing Commission’s Proposed Priorities 9 (Oct. 17, 2022).

¹⁰⁵ See *United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009) (discussing Congress’s deliberate choice to direct that the career offender guideline “include[] 21 U.S.C. § 952(a), which prohibits the importation of schedule I and II controlled substances and narcotic drugs in schedule III, IV, or V, but [to] carefully exclude[] 21 U.S.C. § 952(b), which prohibits the importation of nonnarcotic schedule III, IV, and V substances”). Likewise, Congress did not include export offenses described in 21 U.S.C. § 953, but § 4B1.2 includes exporting a controlled substance in its definition of a “controlled substance offense.”

¹⁰⁶ Cf. *Lopez v. Gonzales*, 549 U.S. 47, 53, 60 (2006) (holding, for Immigration-and-Nationality-Act purposes, that when a state offense proscribes conduct that would only qualify as a misdemeanor under federal drug-trafficking law then that offense does not count as a “felony punishable under the Controlled Substance Act” even if the state classifies it as a felony).

§ 994(h).¹⁰⁷ But distributing many of those same schedule V substances is a felony in some states, and until recently distributing a small amount of marijuana for no remuneration remained a felony in most states.¹⁰⁸ Mirroring § 994(h) in the definition of “controlled substance offense” would ensure that only felonies under the enumerated statutes would constitute career offender predicates.

Finally, limiting the definition of “controlled substance offense” to the enumerated offenses is consistent with § 994(h)’s directive that the career offender enhancement should apply to individuals with felony drug convictions “described in” the enumerated list of exclusively federal statutes. As the Supreme Court has made clear, it is the coupling of “described in” with a reference to state offenses that expands a statute’s reach to non-federal offenses.¹⁰⁹ We recognize that this proposal, if adopted, would significantly narrow the reach of the career offender guideline. But, as the Commission acknowledged in its *2016 Career Offender Report*, the evidence plainly supports this restriction, especially when the career offender guideline is triggered by drug-trafficking convictions.¹¹⁰ Thus, now is the time to revise §4B1.2 to reflect, to the extent practicable, advancement in knowledge of

¹⁰⁷ See 21 U.S.C. § 841(b)(3), (4).

¹⁰⁸ See, e.g., Ala. Code §§ 13A-5-6, 13A-12-215 (distribution of any controlled substance in Alabama schedules I through V punishable as Class B felony with statutory range of 2 to 20 years); 720 Ill. Comp. Stat. Ann. 570/401(h) , 730 Ill. Comp. Stat. Ann 5/5-4.5-40(a) (punishing distribution of Illinois schedule V substance as Class 3 felony, punishable by determinate sentence 2 to 5 years); Ind. Code. Ann. §§ 35-48-4-4(e), 35-50-2-6(a) (punishing distribution of between 10 and 28 grams of Indiana schedule V substance as Level 5 felony, punishable by fixed term of 1 to 6 years); *Moncrieffe v. Holder*, 469 U.S. 184, 204 (2013) (noting that about half the states criminalized marijuana distribution through statutes that did not require remuneration or any minimum quantity of marijuana).

¹⁰⁹ See *Torres v. Lynch*, 578 U.S. 452, 460–66 (2016). Where Congress has used the phrase “described in” to reach non-federal offenses, it has said so expressly. See, e.g., 18 U.S.C. § 3559(c)(2) (“[T]he term ‘serious violent felony’ means . . . a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111). . . .”); 8 U.S.C. § 1101(a)(43) (“The term aggravated felony means . . . an offense described in . . . [§ 844(i)] . . . whether in violation of Federal or State law. . . .”).

¹¹⁰ See *2016 Career Offender Report* at 43, 44.

human behavior as it relates to the criminal legal process.¹¹¹ To do any less would be to continue to maintain the unsupportable status quo.

**C. At a minimum, the Commission should clarify that
“controlled substance” in §4B1.2 means *federally*
controlled substance.**

If the Commission insists on retaining state drug offenses as predicates, it should at minimum limit its definition of a “controlled substance offense” to state and federal offenses that can reasonably be said to be “described in” § 994(h)—*i.e.*, offenses that prohibit manufacturing, importing, or distributing, or possessing with the intent to manufacture, import, or distribute, *federally* controlled substances. As set forth above, § 994(h) enumerates only federal drug offenses, which by definition prohibit conduct involving only federally controlled substances. If the Commission declines to mirror § 994(h), it should elect Option 1, defining “controlled substance” consistent with federal law.

**1. Fairness and consistency support limiting the
definition of “controlled substance” to federally
controlled substances.**

Until recently, it was uncontroversial that “controlled substance” under the Federal Sentencing Guidelines referred to substances on the five federal drug schedules.¹¹² But this changed after the Supreme Court’s 2015 decision in *Mellouli v. Lynch*, which drew widespread attention to the fact that some states control substances that the federal government does not control.¹¹³ In *Mellouli*, the Supreme Court held that an immigrant’s

¹¹¹ See 28 U.S.C. § 991(b) (Commission to establish sentencing policies and practices “to assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)]” and to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”); *id.* § 994(o) (Commission to periodically review and revise the guidelines).

¹¹² See, e.g., *United States v. Gomez-Alvarez*, 781 F.3d 787, 794 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661–62 (8th Cir. 2011); *United States v. Leiva-Deras*, 359 F.3d 183, 189 (2d Cir. 2004); *United States v. Kelly*, 991 F.2d 1308, 1316 (7th Cir. 1993).

¹¹³ 575 U.S. 798 (2015).

conviction of a Kansas drug paraphernalia offense did not trigger removal under the Immigration and Nationality Act because Kansas controlled at least nine substances, including salvia and jimson weed, that were not included on the five federal drug schedules.¹¹⁴ Following *Mellouli*'s lead, defendants argued that convictions under these overbroad state statutes should not trigger enhanced penalties under the Armed Career Criminal Act, 18 U.S.C. § 924(e), or under the career offender guideline.

Every court to consider the question has recognized this to be correct with respect to the ACCA, which like the INA expressly incorporates the federal definition for “controlled substance” set forth at 21 U.S.C. § 802(6).¹¹⁵ But the courts of appeal are now split with respect to the career offender guideline, with the Second and Ninth Circuits reasserting that the federal definition controls, and the Third, Fourth, Seventh, Eighth, and Tenth Circuits defining “controlled substance” in a variety of other ways.¹¹⁶

To be clear, this new circuit conflict about the meaning of the phrase “controlled substance” in §4B1.2 is not about the correct interpretation of § 994(h). The words “controlled substance” appear in § 994(h) only as part of the titles of the Controlled Substances Act and the Controlled Substances Import and Export Act, both of which, of course, incorporate the federal

¹¹⁴ *Id.* at 808, 813.

¹¹⁵ See *United States v. Brown*, 47 F.4th 147, 149 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487, 498–99 (4th Cir. 2022); *United States v. Fox*, 2021 WL 3747190, at *4 (6th Cir. Aug. 25, 2021); *United States v. Perez*, 46 F.4th 691, 698–99 (8th Cir. 2022); *United States v. Cantu*, 964 F.3d 924, 927, 934 (10th Cir. 2020); *United States v. Latson*, 2022 WL 3356390, at *2–3 (11th Cir. Aug. 15, 2022).

¹¹⁶ Compare *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) (federal definition controls for guidelines purposes), and *United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (same), with *United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023) (“a drug regulated by either state or federal law”), *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) (“[W]e look to *either* the federal or state law of conviction. . . .”), *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (“any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law” (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987))), *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) (“no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law”), and *United States v. Jones*, 15 F.4th 1288, 1295 (10th Cir. 2021) (“substances not found in the CSA”).

definition of controlled substance.¹¹⁷ Indeed, courts that have interpreted “controlled substance” in §4B1.2 to include non-federally controlled substances understand their interpretation to result from what they perceive to be the Commission’s choice to include offenses beyond what is required by § 994(h).¹¹⁸

The Commission should resolve the circuit conflict by expressly clarifying that “controlled substance” refers only to substances prohibited by the federal Controlled Substances Act. *First*, defining “controlled substance” consistent with federal law is all that § 994(h) requires. Indeed, as explained above, it is *more* than § 994(h) requires, since Option 1 of the proposed amended guideline would encompass not just federal but also state offenses involving the trafficking of substances listed on the federal drug schedules. If the Commission elects to expand the highly problematic career offender guideline beyond what is required, it should do so in the most limited manner possible.

Second, restricting “controlled substance” to federally controlled substances conforms guideline recidivist enhancements to statutory recidivist enhancements and other federal consequences, ensuring that federal consequences are triggered by uniform definitions independent of the labels employed by the various states. For example, a conviction that could have been for salvia does not trigger deportation.¹¹⁹ It also does not serve as a predicate for the ACCA or for 21 U.S.C. § 841(b)’s recidivism enhancements.¹²⁰ But, because the Tenth Circuit holds that “controlled

¹¹⁷ See 21 U.S.C. § 802(6) (“The term ‘controlled substance’ [for purpose of both Controlled Substances Act and Controlled Substances Import and Export Act] means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.”).

¹¹⁸ See *Lewis*, 58 F.4th at 769; *Jones*, 15 F.4th at 1294–95; *Henderson*, 11 F.4th at 718–19; *Ward*, 972 F.3d at 371–72; *Ruth*, 966 F.3d at 652.

¹¹⁹ See *Mellouli*, 575 U.S. at 808, 813.

¹²⁰ See *Cantu*, 964 F.3d at 934 (ACCA); see also *United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021) (same analysis applies under § 841(b)); 21 U.S.C. § 802(57) (defining “serious drug felony”—which triggers § 841(b) enhancements—in relevant part as “an offense described in [the ACCA]”).

substance” under the Guidelines is not limited to federally controlled substances, it *does* trigger guideline enhancements.¹²¹

This anomaly is especially perverse for guidelines like USSG §2K2.1. The increased base offense levels in §2K2.1 triggered by prior convictions for controlled substance offenses were promulgated to provide “proportionality” with ACCA sentences.¹²² But the ACCA would never be triggered by a conviction for an offense involving a non-federally controlled substance. There is no good reason why the same should not be true for USSG §2K2.1.

Third, limiting the definition to federally scheduled substances places control over federal sentencing enhancements applied by federal judges in federal prosecutions for federal offenses where it belongs: in the hands of the federal government.

Finally, as explored in more detail below, any definition of “controlled substance” that goes beyond federally controlled substances will open the door to wildly divergent applications of these severe federal enhancements.¹²³ Conduct that is perfectly lawful in one state would constitute a career offender predicate in another. For example, distribution of Salvinorin A is legal in the District of Columbia. In Maryland, possession is legal for adults, but a citable offense for those under 21, and distributing to a person under 21 is a misdemeanor subject to a fine.¹²⁴ In Virginia, Salvinorin A is a schedule I controlled substance, and distribution is punishable by 5 to 40 years’ imprisonment.¹²⁵ Conduct that is perfectly legal in D.C. and subject only to a fine in Maryland, would make someone a career offender if done in Virginia. Likewise, because jimson weed is a schedule I controlled substance in

¹²¹ See *Jones*, 15 F.4th at 1290.

¹²² See USSC, *Firearms and Explosive Materials Working Group Report* 18–23 (Dec. 1990), <https://www.ojp.gov/pdffiles1/Digitization/145575NCJRS.pdf>.

¹²³ 28 U.S.C. § 994(f) (guidelines should reduce unwarranted sentencing disparities).

¹²⁴ See Md. Code Ann., Criminal Law § 10-130, *et seq.*

¹²⁵ See Va. Code Ann. §§ 54.1-3446, 18.2-248(C).

Kansas, but legal in Missouri, conduct legal in Kansas City, Kansas, would constitute a career offender predicate in Kansas City, Missouri.¹²⁶

2. The Commission should use a clarifying amendment to define “controlled substances” as federally controlled substances.

If the Commission amends §4B1.2 to define “controlled substance” consistent with the federal definition, it should identify this as a clarifying amendment. Over the years, the Commission has amended §4B1.2’s definition of “controlled substance offense” many times, but it has never expanded it to include non-federally controlled substances.¹²⁷ In the first Guidelines, the Commission enumerated several federal offenses “and similar offenses.”¹²⁸ There was no indication that the Commission believed “similar offenses” would include offenses that were not in fact similar because they involved substances not prosecutable as an enumerated federal offense. The Commission quickly amended the guideline or commentary twice, each time describing the changes as non-substantive.¹²⁹

In 1989, the Commission adopted a new definition of “controlled substance offense,” which is close to its current definition.¹³⁰ The Commission

¹²⁶ Compare Kan. Stat. Ann. §§ 65-4105(a), (d)(31), with Mo. Rev. Stat. § 195.017.

¹²⁷ See *2016 Career Offender Report* at app. A (describing history of career offender guideline).

¹²⁸ See Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18046, 18095 (May 13, 1987). In Commentary, the Commission explained that “‘controlled substance offense’ was defined to include the offenses described in 28 U.S.C. § 994(h), as these offenses have been modified by amendments to the Controlled Substances Act made by the Anti-Drug Abuse Act of 1986, Pub. L. 99-570.” *Id.*

¹²⁹ See Sentencing Guidelines for United States Courts, 52 Fed. Reg. 44674 (Nov. 20, 1987); Sentencing Guidelines for United States Courts, 53 Fed. Reg. 1286 (Jan. 15, 1988). Although it’s debatable whether the changes were non-substantive, they did not expand the definition to include non-federally controlled substances.

¹³⁰ This new definition defined “controlled substance offense” to mean an offense “under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute.” USSG App. C, amend. 268 (Nov. 1, 1989). The current guideline adds “dispensing” to the list of conduct. USSG § 4B1.2(b).

described this as a clarifying amendment, and it did not expand the reach of the guideline to non-federally controlled substances.¹³¹ In explaining its amendment, the Commission said that it “sought a definition that was well-established in legislative history and that had the prospect of cohesive case law development.”¹³² “The Commission concluded that the definition from 18 U.S.C. § 924(e) [the ACCA] would be preferable to the previous definition because the previous definition ‘introduces a new offense description into the drug law, one which will have no legislative history and less interpretive case law than would a term already adopted by Congress.’”¹³³ The new definition did not quite mirror § 924(e).¹³⁴ But, in seeking a well-established federal definition, which was itself limited to federally controlled substances, the Commission did not purport to expand the definition to include offenses that could not be prosecuted federally.

By amending §4B1.2 expressly to reach only federally controlled substances, the Commission would be clarifying what it has always meant.¹³⁵

¹³¹ See USSG App. C, Amend. 268 (Nov. 1, 1989) (“The purpose of this amendment is to clarify the definitions of crimes of violence and controlled substance offense used in this guideline.”).

¹³² 2016 *Career Offender Report* at app. A-9 (citing Memorandum from Gary J. Peters presenting the report of the career offender working group at 22–24 (March 25, 1988) (“*Peters Memorandum*”)).

¹³³ *Id.* (citing Peters Memorandum at 22).

¹³⁴ 18 U.S.C. § 924(e)(2)(A) defines “serious drug offense” as:

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law[.]

¹³⁵ See, e.g., *United States v. Jerchow*, 631 F.3d 1181, 1184 (11th Cir. 2011) (recognizing that a clarifying amendment “provide[s] persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline” (quoting *United States v. Descent*, 292 F.3d 703, 707–08 (11th Cir. 2002))).

To expressly say that the amendment is clarifying would help to ensure consistent treatment by courts.¹³⁶

D. Option 2 unnecessarily expands the definition of “controlled substance offense” and with no limiting principle.

Once again, the Commission should not expand the definition of “controlled substance offense” beyond what is required by § 994(h). But Option 2 goes much further. It wouldn’t just expand that definition; it would do so recklessly, by creating a category with no limiting principle, which neither Congress nor the Commission would control, and with unknown parameters.

Option 2 would define “controlled substance” as “a drug or other substance, or immediate precursor, either included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) or otherwise controlled under applicable state law.” The Commission has not released any data on how many more individuals would be subject to career offender or other recidivist enhancements under Option 2, nor do Defenders think it would be possible for it to estimate. But the numbers are likely to be enormous. Adopting Option 2 would mean that any offense prohibiting conduct involving any drug or substance (or an immediate precursor) that a State has chosen to regulate might qualify as a “controlled substance offense”—because those substances all would be, by definition, “controlled under applicable state law.” The Commission should not cede to the states the power to decide what triggers a severe federal sentencing penalty.

Option 2 broadens the definition of “controlled substance” as used to trigger federal guideline enhancements to include substances that the federal government has elected not to schedule—substances like hemp (an agricultural fiber),¹³⁷ mature stalks of cannabis,¹³⁸ salvia (a Oaxacan

¹³⁶ *Id.* at 1185 (in determining whether an amendment is clarifying, court looks to the Commission’s own description of it).

¹³⁷ *See Bautista*, 989 F.3d at 705.

¹³⁸ *See Said v. U.S. Att’y Gen.*, 28 F.4th 1328, 1333 (11th Cir. 2022).

ceremonial herb),¹³⁹ jimson weed (a traditional medicinal herb),¹⁴⁰ thenylfentanyl (an inert substance with no abuse potential),¹⁴¹ human chorionic gonadotropin (the pregnancy hormone),¹⁴² and morpholine (a food additive used as wax coating for fruit).¹⁴³

Indeed, Option 2 proposes to reach substances Congress affirmatively *descheduled* (like hemp),¹⁴⁴ substances the temporary scheduling of which the Drug Enforcement Administration deliberately permitted to expire (like thenylfentanyl),¹⁴⁵ and even substances the Food and Drug Administration has affirmatively approved under its regulatory authority (morpholine).¹⁴⁶

And these are just some of the substances we know about. We are unaware of any compilation of the many substances controlled by various states that are not federally scheduled. And of course, such a compilation (if it existed) would be subject to change whenever any state legislature or agency (depending on state law) chose to control some additional substance. Thus, Option 2 would have the consequence of expanding the reach of severe federal sentencing enhancements to an unknown—and unknowable—list of substances.

It is worth keeping in mind that “control” means “[t]o regulate or govern.”¹⁴⁷ States regulate and govern all manner of drugs, substances, and precursors under diverse statutory and regulatory schemes. Most states employ a broad definition of “drug,” like the one from Pennsylvania, which includes, among other things, “substances (other than food) intended to affect

¹³⁹ See *Mellouli*, 575 U.S. at 808.

¹⁴⁰ See *id.*

¹⁴¹ See *Hnatyuk v. Whitaker*, 757 F. App’x 10, 11 (2d Cir. 2018).

¹⁴² See *Townsend*, 897 F.3d at 74.

¹⁴³ See *Johnson v. Barr*, 967 F.3d 1103, 1106–07 (10th Cir. 2020).

¹⁴⁴ See Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908, 5018 (2018).

¹⁴⁵ See Schedules of Controlled Substances, 50 Fed. Reg. 43698-02, 43701 (Oct. 29, 1985); see also *Ragasa v. Holder*, 752 F.3d 1173, 1176 n.3 (9th Cir. 2014) (noting that temporary scheduling of thenylfentanyl in 1985 was allowed to expire after one year).

¹⁴⁶ See 21 C.F.R. § 172.235.

¹⁴⁷ *Control*, Black’s Law Dictionary 416 (11th ed. 2019) (second definition).

the structure or any function of the human body or other animal body.”¹⁴⁸ In Pennsylvania, selling any misbranded “drug,” where the drug has been misbranded with intent to defraud, is a crime punishable by up to three years’ imprisonment.¹⁴⁹ In Delaware, delivering or possessing with intent to deliver a *non-controlled* prescription drug is a crime punishable by up to two years’ imprisonment.¹⁵⁰ Option 2 is likely to spawn litigation over whether these are offenses that prohibit delivering a “drug . . . controlled under applicable state law.” And if they are, courts are likely to reject the application of the career offender guideline in even more cases, rendering the guideline even less influential than it currently is.

Nor would adding a qualifier like “dangerous” help narrow this definition’s reach. Whereas Montana defines “dangerous drug” to mean a drug, substance, or immediate precursor in Montana’s dangerous drug schedules,¹⁵¹ Texas defines “dangerous drug” to mean “a device or drug that is unsafe for self-medication and that is *not* included in schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act).”¹⁵² Delivering or offering to deliver a dangerous drug is a Texas jail felony, punishable by up to two years.¹⁵³ Parties will no doubt litigate whether a drug that is not scheduled, but is deemed by Texas to be unsafe for self-medication, is “controlled,” making delivery a career offender predicate.

Even requiring a substance to be considered a “controlled substance” under applicable law would not result in uniformity and would still likely spawn litigation:

¹⁴⁸ 35 Pa. Cons. Stat. Ann. § 780-102.

¹⁴⁹ See 35 Pa. Cons. Stat. § 780-113(a)(7), (8), (b).

¹⁵⁰ See Del. Code Ann. tit. 16, § 4761(a), (c) ; *id.* tit. 11, § 4205(b)(7).

¹⁵¹ Mont. Code Ann. § 50-32-101(6).

¹⁵² Tex. Health & Safety Code Ann. § 483.001(2) (emphasis added).

¹⁵³ See Tex. Health & Safety Code Ann. § 483.042(d) ; Tex. Penal Code Ann. § 12.35(a).

- Maine’s Health and Welfare Code has a definition of “controlled substance” that mirrors the federal definition,¹⁵⁴ but its Criminal Code does not include the term “controlled substance” at all.¹⁵⁵
- Vermont defines “controlled substance” as federally controlled substances in some specific statutes,¹⁵⁶ but describes the substances *it* regulates as “regulated drugs.”¹⁵⁷
- Tennessee defines “controlled substance” as a substance in one of its schedules, of which it has not five, but seven.¹⁵⁸
- Virginia has six schedules¹⁵⁹; South Dakota four.¹⁶⁰
- Long before Illinois legalized cannabis, that state regulated cannabis separately from its controlled substance schedules.¹⁶¹
- By contrast, in New Jersey, “controlled dangerous substance” means a drug, substance, or precursor in its schedule I through V, *or* marijuana, *or* hashish, *or* any substance the distribution of which is specifically prohibited by five separate statutes, *and* any drug or substance that, when ingested, is metabolized or otherwise becomes a controlled dangerous substance in the human body.¹⁶² The term further includes any substance that is an immediate precursor of a controlled dangerous substance (regardless of whether that

¹⁵⁴ See Me. Rev. Stat. Ann. tit. 22, § 7246(1).

¹⁵⁵ Cf. Me. Rev. Stat. Ann. tit 17-A, § 1102).

¹⁵⁶ See, e.g., Vt. Stat. Ann. tit. 18, § 4201(26).

¹⁵⁷ See *id.* § 4201(29).

¹⁵⁸ See Tenn. Code Ann. § 39-17-402(4). Distributing a schedule VII substance is a felony. See *id.* § 39-17-417(h).

¹⁵⁹ See Va. Code Ann. § 18.2-247(A).

¹⁶⁰ See S.D. Codified Laws § 34-20B-3. South Dakota places most federal schedule V substances in schedule IV, the distribution of which is a felony. See *id.* §§ 34-20B-25, 22-42-4.

¹⁶¹ Compare Cannabis Control Act, 720 Ill. Comp. Stat. 550/1 *et seq.* with Illinois Controlled Substances Act, 720 Ill Comp. Stat. 570/100 *et seq.*

¹⁶² See N.J. Stat. Ann. § 2C:35-2.

precursor is scheduled) *and* any controlled substance analogue (regardless of whether intended for human consumption).¹⁶³

Simply put, the proposed definition of any drug, substance, or precursor “controlled under applicable state law” (Option 2) is too broad, and there is no viable way to limit it to capture the same types of offenses across jurisdictions. Prior state felony convictions involving any random substance might constitute career offender predicates simply because, by definition, they will be convictions for an offense involving a substance controlled under the applicable state law—an expansive proposition that will surely invite fierce litigation. And should the courts decide this proposition is correct, below-range sentences will continue to increase.

The best way to define “controlled substance offense” and “controlled substance” is to follow § 994(h) and limit the offenses to the enumerated federal felonies. Or at minimum, to limit the substances to federally controlled substances.

¹⁶³ *See id.*

**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

March 8, 2023

**Statement of Juval O. Scott, Federal Public
Defender for the Western District of Virginia,
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission Public Hearing on
Proposed Amendments to the Career Offender Guideline**

March 8, 2023

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

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 goal⁷ 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

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

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

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 rate²⁶ closer to those in CHC III²⁷ 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 rate²⁹ closer to CHC III.³⁰

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 rate³² 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

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.

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

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

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 cities⁵² 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

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

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

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 organizations⁶⁷ 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

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

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)?

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

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

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

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

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

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,

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

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

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-Criminal* ¶ 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

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 principal¹³¹; 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.

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. LaFare, *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.

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).

Statement of Juval O. Scott

March 8, 2023

Page 32

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