



ANDREW S. BIRRELL
President

March 18, 2026

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

Re: Comments to the US Sentencing Commission on Proposed 2025-2026 Amendments

Dear Judge Reeves:

Thank you for the opportunity to present NACDL’s comments on these important proposed amendments. This submission addresses the Sentencing Commission’s proposed amendments regarding sentencing options and the career offender guideline. On the other proposed amendments and issues for comment not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

1. Proposed Amendment: Sentencing Options

NACDL is pleased to see the Sentencing Commission’s consideration of sentencing options that are alternatives to incarceration.

Proposed Chapter Five Amendments Continue to Recognize that the Continuum of Punishment for Federal Offenders Does Not Begin and End with Incarceration

In January of this year, the Supreme Court recognized that imposing restitution upon an offender under the Mandatory Victim’s Restitution Act of 1996 amounted to a “plainly criminal punishment, *Ellingburg v. United States*, 607 U.S. ___, 146 Sect. 564, 567 (2026) (since a criminal punishment, it is subject to *ex post facto* challenge). Today’s proposed amendments to Chapter Five of the Sentencing Guidelines do not so much recognize probation and other non-incarceration alternatives as criminal punishments as they offer a reminder of the role non-incarceration played prior to the creation of the Sentencing Guidelines and the role they were intended to continue to play under them following the enactment of the Sentencing Reform Act of 1984 (“SRA”).

That is, a probationary or other non-incarceration sentence once was a common—if not predominant—method of punishment in federal cases in the years leading up to the SRA and the implementation of the Guidelines in 1987:

<u>Year</u>	<u>Percentage of Defendants Receiving Probation/Other Non-Incarceration Sentences¹</u>
1945	52.2%
1950	56.9%
1960	51.8%
1970	55.9%
1980	53.8%
1987	46.9%

Yet, in the years that followed, there was a significant drop-off:

<u>Year</u>	<u>Percentage of Defendants Receiving Probation/Other Non-Incarceration Sentences²</u>
1996	19.2%
1999	16.4%
2002	14.1%
2005	12.1%
2015	9.8%

Indeed, some commentators have observed that even in the era of *Booker* (rendering the Guidelines “advisory”³) and *Gall* (which “reject[ed] an appellate rule that” circumstances had to “be ‘extraordinary’ ... to justify a sentence outside the Guidelines range” -- in this case, moving by variance from Zone D to probation⁴), “federal judges have imposed fewer probationary sentences in those cases where they have had wide discretion to do so.”⁵ Another found in 2015:

During the past ten years, rates of alternative sentences declined among U.S. citizen federal offenders who were eligible for such sentences despite 1) a steady overall increase in sentences below the guideline range due to downward departures or variances and 2) overall consistency in offense severity and criminal history among those offenders.⁶

These trends have taken place notwithstanding that, *on paper*, the Supreme Court continues to recognize the vitality of probation as a punishment alternative, on paper, remained in both the state and federal criminal justice systems.⁷ The Supreme Court has also reminded judges that probation

¹ See Brent E. Newton, *The Story of Federal Probation*, 53 Am.Crim.L.Rev. 311, 314-15 (2016) (summarizing data from respective years of the Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts).

² See *id.* (summarizing data from respective years’ United States Sentencing Commission Sourcebook).

³ *United States v. Booker*, 543 U.S. 220 (2005).

⁴ *Gall v. United States*, 552 U.S. 38, 47 (2007).

⁵ Newton, *supra*, at 342-43.

⁶ Courtney R. Semisch, U.S. Sentencing Comm’n, *Alternative Sentencing in the Federal Criminal Justice System* (2015).

⁷ See, respectively, *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (“Probation, like incarceration, is “a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.” ... [It] is simply one point (or, more accurately, one set of points) on a continuum of possible

is a real punishment and a substantial restriction on a person’s liberty.⁸

And more importantly, these trends have continued despite requirements by Congress in the SRA that non-incarceration alternatives—especially for first-time offenders—remain viable under the Guidelines, per 28 U.S.C. § 994(j):

The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense[.]⁹

Hence NACDL, as an organization representing the interests of over 10,000 criminal defense lawyers, on the one hand applauds the Commission for proposing to take a step in the right direction to enforce Section 994(j), to accomplish the goal of the Guidelines more broadly, to provide “a full range of sentencing options from which to select the most appropriate sentence in a particular case,”¹⁰ and to fulfill Congress’s mandate of “the parsimony principle”¹¹—*i.e.*, that a the sentence reached is “sufficient but not greater than necessary ... to comply with the purposes set forth” in 18 USC § 3553(a)(2). Our collective experience at NACDL, however, leads us to conclude that an amendment of this sort is only going to be as effective as the buy-in—be it compulsory or otherwise -- from the actors assigned the responsibility to carry it out. Therefore, on the other hand, we ask whether Chapter Five requires a little bit more of an impetus or “nudge” to all the parties than how the amendment appears in its current form in order to make it happen.

This Proposal has the Potential to Level the Sentencing & Punishment Playing Fields

The proposed amendments to Chapter Five expand from 58 to 83 the number of sentencing range combinations (“cells”) that present the possibility of at least a split sentence by expanding the reaches of Zones B and C (along with maintaining the scope of Zone A).

That notwithstanding, the Guidelines as applied currently retain the structure (and therefore impact) of Chapter Five being a somewhat passive recipient of a “points-based” system—driven by Chapters Two through Four of the Guidelines—that serves as the starting point for determining the sentence for a convicted offender. *See* Chapter Five, *Introductory Comment* (“Chapter Five sets forth the steps used to determine the applicable sentencing range based upon

punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.) (internal citations omitted) *and Gall, supra* 552 U.S. at 48-49 (“We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.”).

⁸ *Gall*, 552 U.S. at 48-49.

⁹ 28 U.S.C. § 994(j) (2012).

¹⁰ S. Rep. No. 98-223, at 35 (1983).

¹¹ *See, e.g., United States v. Rossignol*, 780 F.3d 475, 479 n.5 (1st Cir. 2015) (stating that the parsimony principle is “the ‘statutory directive that sentences should be no higher than necessary to achieve the statutory goals of sentencing’”); *United States v. Lacy*, 99 F. Supp. 2d 108, 119 (D. Mass. 2000) (“The Sentencing Guidelines mandate the parsimony principle: I am obliged to assign a sentence ‘sufficient, but not greater than necessary’ to comply with the purposes of sentencing.”).

the guideline calculations made in Chapters Two through Four.”) These figures—especially when stacked by, for example, upwards of twenty-plus Specific Offense Characteristics (*see* §2B1.1(b))—can quickly send this starting point soaring into a Zone D, incarceration-only starting (and likely ending) point. Too commonly, therefore, the burden is shifted first and foremost to the defense attorney to employ persuasion to attempt to reduce the sentence

The potential benefit of the proposed amendments to Chapter Five in their current form is a renewed recognition that incarceration is a point *along* the continuum of punishment rather than as a presumptive starting point. In turn, these amendments have the potential to make it *both* the defense’s *and* the government’s job to follow the aforementioned “parsimony principal.” In other words, the proposed amendments can help create a healthier environment for advocacy and more just sentencing outcomes by making it *as much incumbent upon the government* to make the argument as to why incarceration is the appropriate/only appropriate sentence, *as it is upon the defense* to make the argument why a non-incarceration or “split” sentence makes more sense.

Sentences within Zones A through C should begin with a presumption of a non-carceral or split sentence

To make this a reality, however, NACDL posits that further changes in Chapter Five should be made. It is a good starting point in the proposed § 5A1.1(b) language that “courts should consider which [sentencing] option(s) will best meet the purposes of sentencing and the needs of the individual defendant.” This should be combined with the *statutory* requirements of finding the setting that is “sufficient but not greater than necessary” to do so. Therefore, NACDL proposes Chapter Five further require that the least restrictive punishment option (be it probation, a split sentence, *etc.*) be the starting point for sentences with Guidelines scores that fall within Zones A through C. Moreover, the burden should be upon the government to establish that something more restrictive than a non-incarceration or split-sentence is necessary. (The exclusions to probation set forth in § 5B1.1(b) would, for such cases, carry the government’s burden.) The defense, of course, would then have the opportunity to rebut.

While ultimately it is the job of the district court to reach the “sufficient, but not greater than necessary” sentence, by dint of the structure of the Guidelines, it has *de facto* become the job primarily of the defense counsel to convince the court to take the step of (not reviewable) downward departure¹² or (reviewable) variance to go from a sentence of incarceration to a less restrictive punishment. And it is defense counsel who must, from the start, battle back against what should be considered “relevant conduct” which, in turn, can affect offense level and specific offense characteristics determinations alike. (Even if the defense is successful in doing so, the taint of now-deemed “irrelevant” conduct continues to reverberate in the sentencing atmosphere.)

It is within the purview of the Commission to introduce such a structural change, not just as part of its mission is to “promulgate ... guidelines ... for use of a sentencing court in determining [among other things] ... whether to impose a sentence to probation, a fine, or a term of

¹² *E.g., United States v. Angeles-Moctezuma*, 927 F.3d 1033, 1037 (8th Cir. 2019) (denial of a departure is not reviewable unless the trial court incorrectly believed that it lacked the authority to depart or the district court had an unconstitutional motive).

imprisonment -- 28 U.S.C. § 994(a)(1)(A) -- but also to make “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in” 18 U.S.C. 3553(a)(2) and 28 U.S.C. § 994(a)(2). In other words, the Commission has the authority to provide a structure within which judges don’t just make the sentencing decision, but also to provide a pathway suggesting (albeit advisory) how to get there. *See* 28 U.S.C. § 991(b)(1) (it is the Commission’s job to “establish sentencing policies *and practices* for the Federal criminal justice system that (A) assure the meeting of the purposes of sentencing ... [and] (2) develop means of measuring the degree to which the sentencing ... practices are effective in meeting the purposes of sentencing[.] ”)

Moving Toward Increased Access to Non-Incarceration Sentence Also May Improve Services and Conditions *Inside* the Bureau of Prisons

Finally, reducing the federal prison population, where appropriate, may assist in broader goals of improved sentence and post-sentence outcomes. Last year, the Justice Department Office of the Inspector General reported that it has “long identified management issues affecting the federal corrections system as a major challenge” facing the Department.¹³ The “most critical” of the challenges at BOP are staffing shortages, deteriorating infrastructure and the introduction of contraband, followed by deficiencies in the provision of healthcare to inmates and sexual abuse of inmates¹⁴. These problems do not make for a recipe of improving rehabilitation chances or post-incarceration outcomes, including reduced recidivism rates -- for those offenders whose punishments are entirely accomplished by/in federal detention.

2. Proposed Amendment: Career Offender

Introduction

NACDL appreciates that the Commission remains focused on improving the career offender guideline.¹⁵ As detailed below, the career offender guideline drives overincarceration and inequities in federal sentencing; it is very worthy of reform.

The Sentencing Commission’s own data consistently shows that, although only one-fifth to one-quarter of federal defendants are Black, they constitute more than half of defendants designated as career offenders.¹⁶ And defendants sentenced under the career offender guideline—again, the

¹³ U.S. Department of Justice Office of the Inspector General, *Top Management Challenges Facing the Department of Justice 2025*, at 2-3.

¹⁴ *Id.*

¹⁵ *See, e.g.*, U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf.

¹⁶ *See, e.g.*, Paul J. Hofer et al., U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [hereinafter, *Fifteen Years*]

majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.¹⁷

These disparities are unsurprising, given that the career offender guideline effectively bakes in systemic inequities that resulted in those prior convictions, particularly at the state level. Black communities and other communities of color face systematic and ongoing discrimination at every level. For example, Black people are more likely to have prior qualifying convictions in part because of overpolicing in their communities: “Police officers are more likely to stop [B]lack and Hispanic drivers for investigative reasons,” and “[o]nce pulled over, people of color are more likely than whites to be searched, and blacks are more likely than whites to be arrested.”¹⁸ In some jurisdictions, like Ferguson, Missouri, “these patterns hold even though police have a higher ‘contraband hit rate’ when searching white versus black drivers.”¹⁹ As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.²⁰

(showing that, in fiscal year 2000, Black people constituted 26% of defendants sentenced under the federal guidelines, but 58% of those subject to the career offender guideline); compare U.S. Sentencing Commission, *Quick Facts: Career Offenders 1* (2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2012] (showing that, in fiscal year 2012, Black people constituted 61.9% of those subject to the career offender guideline), with U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tbl. 4 (2013), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table04.pdf> (showing that, in fiscal year 2013, only 20.6% of federal defendants were Black); compare U.S. Sentencing Commission, *Quick Facts: Career Offenders 1* (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY24.pdf [hereinafter, *Quick Facts* 2024] (showing that, in fiscal year 2024, Black people constituted 59.1% of those subject to the career offender guideline), with U.S. Sentencing Commission, *Interactive Data Analyzer*, <https://ida.ussc.gov/analytics/saw.dll?Dashboard> (showing that in fiscal year 2024, only 24.5% of federal defendants were Black); U.S. Sentencing Commission, *Proposed Amendment on Individuals Sentenced under §4B1.1 Career Offender: Public Data Briefing* (Feb. 2026), <https://www.ussc.gov/education/videos/2026-career-offender-data-briefing> (59% of individuals sentenced under §4B1.1 in Fiscal Year 2024 were Black).

¹⁷ U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements 2* (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (noting that people sentenced under the career offender guideline were “sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months)”). “As a result of these lengthy sentences, career offenders [at the time of the report] account[ed] for more than 11 percent of the total BOP population,” *id.*, even though people sentenced under the career offender guideline “have consistently accounted for about three percent of the total federal offender population sentenced each year,” *id.* at 18 fig. 1; *see also id.* at 24. Due in part to these lengthy sentences, Black people constitute 38.9% of people incarcerated in federal prison right now. Federal Bureau of Prisons, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Jan. 18, 2025).

¹⁸ *See, e.g.* Nazgol Ghandnoosh, The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 4 (2015), <https://www.sentencingproject.org/app/uploads/2022/08/Black-Lives-Matter.pdf> [hereinafter, *Black Lives Matter*]; *see also Fifteen Years*, *supra* n.16, at 134.

¹⁹ *Black Lives Matter*, *supra* n.18, at 4.

²⁰ In 2005, Black people “represented 14 percent of current drug users, yet they constituted 33.9 percent

Moreover, Black and poor people are more likely to have pleaded guilty to a prior charge because of the coercive aspects of many state-level bail systems, and the difficulties in securing competent counsel in states with significantly overburdened public defender systems.²¹ These two features of many state-court systems reinforce one another. As the United States Commission on Civil Rights reported, 96% of all felony defendants who are held pretrial would be released if they had the means to post monetary bail—but 90% were unable to post it.²² The Commission further explained: “Research consistently shows Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants.”²³ One study has concluded that “pretrial detention resulted in a 40 percent difference in the Black-white sentencing gap and 28 percent in the Latinx-white sentencing gap,”²⁴ perhaps due in part to the fact that “similar felony pretrial detainees were more likely to plead guilty by 10 percentage points.”²⁵

During these long periods of pre-trial incarceration, defendants may face several collateral consequences, including the loss of a job, loss of housing, or loss of custody of their children.²⁶ In such circumstances, a defendant may plead guilty to an offense pursuant to a deal that would let them out with time served—not realizing that even though they did not serve an additional sentence, the offense itself could have imposed a punishment of more than a year, and thus qualify as a predicate felony conviction later on.

Because these inequities become baked into the career offender guideline, the result is significant overincarceration that in turn falls most heavily on Black defendants. As of fiscal year 2012, nearly 63% of career offenders would have had a criminal history category below VI

of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense.” Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, American Bar Ass’n (Oct. 1, 2010), <https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/have-we-overcome-obstacles-to-racial-equality.pdf>. This discrepancy is particularly salient to the career offender context, as the overwhelming majority—78.2% in fiscal year 2023—of defendants receiving the guideline enhancement are being sentenced for drug trafficking offenses. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, tbl. 26 (2023), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table26.pdf>.

²¹ See, e.g., Radley Balko, *The states of indigent defense: part one*, THE WATCH (Oct. 30, 2023), <https://radleybalko.substack.com/p/the-states-of-indigent-defense-part>; Radley Balko, *The states of indigent defense: part two*, THE WATCH (Apr. 17, 2024), <https://radleybalko.substack.com/p/the-states-of-public-defense-part>. Mr. Balko has released the first two parts of an intended report on the state of indigent defense in all 50 states.

²² U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail 3* (Jan. 2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf>.

²³ *Id.* at 33-34.

²⁴ *Id.* at 52.

²⁵ *Id.* at 51.

²⁶ See, e.g., Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>; Emily Yoffe, *Innocence is Irrelevant*, The Atlantic (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>; see also U.S. Commission on Civil Rights, *supra* n.22, at 53–54.

had the career offender provision not applied;²⁷ that remains true in fiscal year 2024.²⁸ Moreover, “[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores.”²⁹ Among defendants who would have been placed in criminal history categories II or III absent their career offender designation, the average guideline minimum was increased by 84 months after the career offender provisions were applied.³⁰

The long-standing pattern³¹ of federal judges choosing to sentence defendants with career offender sentencing enhancements below the guidelines range demonstrates the widespread recognition that the augmented penalties are too severe. In its December 2020 report, the Commission noted a “steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases,” which “demonstrates a continuing decline in the guideline’s influence.”³² Section 4B1.1 therefore “has among the lowest within-guideline rates each year.”³³

The Sentencing Commission’s data also confirms that there is no public safety reason to impose these career offender enhancements. One analysis, for instance, found that a model predicting days until recidivism showed a statistically significant difference between each criminal history category to which the defendants would have been assigned, absent the career offender enhancement.³⁴ The Commission therefore concluded that “assigning offenders to criminal history category VI, under the career criminal or armed career criminal guidelines, is for reasons other than their recidivism risk.”³⁵

²⁷ *Quick Facts* 2012, *supra* n.16, at 1.

²⁸ *Quick Facts* 2024, *supra* n.16, at 1 (59.2% of career offenders would have had a criminal history category below VI had the career offender provision not applied).

²⁹ *Report to the Congress*, *supra* n.17, at 21.

³⁰ *Id.* One study that worked to quantify the degree of overincarceration resulting from the career offender guideline analyzed cases in which defendants who had been sentenced under the residual clause of the career offender guideline were resentenced after the court of appeals governing their jurisdiction held (or assumed) that the guideline’s residual clause was invalid. A review of eight defendants (across eight different circuits) showed their sentences were collectively reduced by 288 months (or more than twenty-four years)—an average of three fewer years imprisonment for each. *See* Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in Beckles v. United States*, 165 U. Pa. L. Rev. Online 33, 35, 38 (2016).

³¹ *See, e.g.*, *Quick Facts* 2012, *supra* n.16, at 2 (chart); *Quick Facts* 2024, *supra* n.16, at 2 (chart); *see also Report to the Congress*, *supra* n.17, at 23 (“[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.”).

³² U.S. Sentencing Commission, *The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes, 2005-2017*, at 54 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf. For example, “the proportion of career offenders receiving a sentence within the applicable guideline range decreased from 43.3 percent in 2005 to 27.5 percent in 2014.” *Id.* at 55.

³³ *Id.* at 55.

³⁴ U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

³⁵ *Id.*

The disconnect between the career offender enhancement and recidivism risk is particularly pronounced for people whose prior qualifying convictions were for controlled substance offenses. In one Commission study, a “preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI”: indeed, the Commission concluded, “[t]he recidivism rate for career offenders [based on prior drug offenses] more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules.”³⁶

The Commission has therefore previously recommended that Congress amend its directive to “no longer includ[e] those who currently qualify as career offenders based solely on drug trafficking offenses,”³⁷ recognizing that the “normal operation of Chapter Four’s criminal history provisions adequately accounts for likelihood of recidivism and future criminal behavior of those [defendants] who are currently deemed to be career offenders, but who have not committed an instant or prior offense that is a ‘crime of violence.’”³⁸

NACDL is ready and willing to further contribute to this discussion as the Commission considers how to change the career offender guideline. Should this comment not touch on any of the Commission’s Issues for Comment, NACDL agrees with and incorporates the Federal Defenders’ comments.

Advantages and Disadvantages of Current Approach and Proposed Approaches

While imperfect and sometimes odd in its application,³⁹ the categorical and modified categorical approach has a major benefit: it is “under-inclusive by design,” and helps prevent some of the worst excesses of the career offender guideline.⁴⁰ NACDL remains fearful that some changes moving away from the categorical and modified categorical approach will increase the use of the career offender guideline.⁴¹ The racial disparities detailed above, taken together with the lack of evidence that the imposition of the career offender enhancement reduces recidivism or improves public safety, strongly caution against any action that would expand its reach. In addition, certain changes may create significant administrative difficulties in implementation, including mini-trials or other time-intensive stages, to prove that the career offender guideline applies.

³⁶ *Fifteen Years*, *supra* n.16, at 134 (emphasis in original).

³⁷ *Report to the Congress*, *supra* n.17, at 3.

³⁸ *Id.* at 44.

³⁹ See U.S. Sentencing Commission, 2026 Proposed Amendments: Career Offender at 1, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202601_prelim-RF.pdf (“Synopsis of Proposed Amendment,” referencing some opinions discussing odd results).

⁴⁰ *Borden v. United States*, 593 U.S. 420, 442 (2021).

⁴¹ See NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf; NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 3, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.

Other thoughts on the advantages and disadvantages of the current proposals as compared to the categorial and modified categorial approach are included below.

Crime of Violence

In light of the above, NACDL is uneasy with the Commission's proposal that would admittedly revise "crime of violence" "in an overbroad manner."⁴² The Commission's view is that "necessary and critical exclusions" will then be applied on the backend "[t]o counteract this overbreadth."⁴³ This is the exact opposite of the categorial and modified categorial approach which is narrow by design and at least limits some of the guideline's worst excesses.

The Commission's Data Brief bears out this concern, with several hundred additional defendants presumptively included under the revised federal definition, and over 1,000 more included under the expanded revised federal definition.⁴⁴ More concerning is the lack of available data on how the changes to state offenses would affect the number of defendants swept up into the career offender guideline. NACDL's uneasiness is especially pronounced here where data shows the career offender penalty is already applied in a racially disparate manner.

Practical concerns arise as well. The amount of time, effort, and evidence needed for the parties to prove or disprove what type of injury occurred, what was intended, and/or what *mens rea* the defendant had during the event to get out from under the new presumption could be significant.⁴⁵ Doing so could turn sentencing hearings into mini-trials, with concerns about unproven or acquitted conduct being utilized, the defendant needing to testify, and/or the standard of proof only being a preponderance standard.

Defense attorneys would consistently attest that criminal penalties that begin as overly punitive are not later ratcheted down. Flipping the presumption from the narrow categorial and modified-categorial approach to an overbroad presumption is not a welcome shift. If the Commission is intent on flipping the presumption, the single best limit it could add is a time served limitation, but with a time served of 13 months, matching §4A1.1(a), instead of either 30 or 60 days as proposed. Such a change would provide a meaningful limit on the seriousness of prior conduct swept in, better mirroring Congress's intent for the law to only capture the most serious offenders.

⁴² U.S. Sentencing Commission, 2026 Proposed Amendments: Career Offender at 17, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202601_prelim-RF.pdf.

⁴³ *Id.*

⁴⁴ Quick Facts 2024, *supra* n.16, at 1 (1,280 in FY 2024); U.S. Sentencing Commission, *Proposed Amendment on Individuals Sentenced under §4B1.1 Career Offender: Public Data Briefing* (Feb. 2026), <https://www.ussc.gov/education/videos/2026-career-offender-data-briefing> (1,650 in proposed definition and 2,342 in expanded definition).

⁴⁵ U.S. Sentencing Commission, 2026 Proposed Amendments: Career Offender at 25, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202601_prelim-RF.pdf.

Controlled Substance Offense

Fears regarding the overapplication of the guideline detailed above are particularly pronounced in drug cases where the defendant may have old predicates that render their current non-violent offense deserving of an extremely long penalty. Option 1 is therefore encouraging because it finally limits the guideline to the Congressionally-required boundary.⁴⁶ That respects Congress' requirements regarding which drug offenders should be included without unnecessarily risking overinclusion and the racially disparate impact that follows. Removing state predicates would be an especially important step towards limiting these perverse outcomes given the unfair structure and outcomes state defendants face in drug cases.

If the Commission is inclined to choose Option 2, then Suboption 2C, which limits prior convictions to time served, is best, with Suboption 2A still an improvement. Regardless of the Suboption chosen, a five-year limit helps raise the floor substantially and avoids sweeping in the types of convictions that drive the current expansiveness of the guideline.

3 and 4. Proposed Amendments on §4B1.2(b) and Human Smuggling

NACDL has no specific comments on these proposed amendments but agrees with the comments submitted by the Federal Defenders.

Conclusion

NACDL once again thanks the Commission for this opportunity to present our comments on the proposed amendments in this cycle.

Respectfully Submitted,

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⁴⁶ 28 U.S.C. § 994.