



July 16, 2025

Honorable Judge 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 Priorities

Dear Judge Reeves:

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

NACDL, with its diverse membership of more than 10,000 spanning state, federal, and military practice, wishes to express its views on preferred Commission priorities. The Commission puts forward multiple noteworthy priorities, and NACDL responded to those it views as most pressing. We concur with other advocates and stakeholders that current sentences are excessively long, and certain sentencing factors disproportionately affect racial minorities within the criminal legal system. Whatever issues the Commission determines to prioritize, these flaws should be foremost in considering potential amendments.

Priority 2 – Drug Sentencing: Eliminating Purity Distinctions in the Methamphetamine Guidelines.

NACDL supports the Commission's proposed priority of examining the penalty structure for certain drug offenses under Guideline Section §2D1.1, particularly the purity distinction for methamphetamine offenses. NACDL supports the elimination of purity distinctions in the methamphetamine guidelines, specifically eliminating references to "Ice" (Subpart 1) and "Methamphetamine (Actual)" (Subpart 2), thus erasing the empirically unjustifiable 10:1 ratio between methamphetamine-ice/actual and methamphetamine-mixture. This is an issue the Commission has previously considered and we urge the Commission to consider it again and act to reduce this unfair and unwarranted sentencing disparity.

The Commission's inclusion of this as a proposed priority rightly reflects the growing awareness among sentencing judges across the country that the methamphetamine guidelines—like the crack guidelines to which they were linked—lack any empirical basis. The U.S. Supreme Court's statements in *United States v. Kimbrough* about the crack cocaine guidelines, namely, that the Commission abandoned its usual empirical approach based on past sentencing practices for a weight-driven approach¹, applies with equal force to the methamphetamine guidelines.² In fact, it applies to all drug guidelines that are based on mandatory minimums, rather than empirical data.³ Like the former crack cocaine guidelines, the Sentencing Commission has consistently linked the meth guideline ranges to statutory penalties, even though it is not required to do so.⁴ None of these sentencing increases had anything to do with an examination of sentencing practices or any of the sentencing objectives set out in 18 U.S.C. § 3553. In fact, the severe penalties for methamphetamine are not justified by any purpose of sentencing. As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine is less physically dangerous or addictive than heroin or cocaine, yet methamphetamine is now punished more severely than any other drug.

Not only do the current methamphetamine guidelines lack a legislative basis, they also lack any empirical justification. In 1989, when the 10:1 ratio was developed, untested methamphetamine mixture typically received a presumed purity of 10%.⁵ Today, the Sentencing Commission has acknowledged that “methamphetamine is highly and uniformly pure.”⁶ Multiple analyses have shown that typical methamphetamine mixture hovers close to 95% purity.⁷ Thus, sentences now receive massive arbitrary enhancement based entirely on whether the methamphetamine received laboratory testing,⁸ something that is obviously beyond the control, and unrelated to the culpability, of any defendant. All else being equal, a 90% pure methamphetamine sample, untested, would lead to a Guidelines range of 51–63 months. But with testing, the same exact sample would lead to a Guidelines range of 97–121 months.⁹ The chances that a sample will receive testing is subject to factors unrelated to culpability, like whether the lab had a chance to complete testing or at what procedural juncture in the case the defendant entered a guilty plea.¹⁰

¹ 552 U.S. 85, 96 (2007)

² See, e.g., *United States v. Valdez*, 268 Fed. App'x 293, 297 (5th Cir. 2008); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1010–11, 1016 (D. Neb. 2008).

³ See *Gall v. United States*, 552 U.S. 38, 46 n.2 (2007) (noting that the “Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses”).

⁴ See, e.g., U.S. Sent'g Comm'n, Methamphetamine: Final Report of the Working Group 7 (1999), https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf.

⁵ *United States v. Weimer*, 2024 WL 2959187, at *2 (D. Idaho June 11, 2024).

⁶ U.S.S.C., Methamphetamine Trafficking Offenses in the Federal Criminal Justice System at 4 (June 2024).

⁷ See *id.* (finding median methamphetamine sample purity of 98%); see also *Weimer*, 2024 WL 2959187, at *2 (“Today, methamphetamine is almost always imported from foreign drug labs and the purity levels are much higher. A recent 2015–16 survey of drug purity levels in the District of Idaho revealed an average purity level of 92.6% with a low of 88% and a high of 100%.”); U.S. Dep't of Just., Drug Enf't Admin., Drug Enforcement Administration 2020 National Drug Threat Assessment 19–20 & fig. 12 (citing DEA sampling of methamphetamine seizures and finding it to average 97% purity) (Mar. 2021).

⁸ *Weimer*, 2024 WL 2959187 at *3 (Simply put, the presumed purity of 10% for untested methamphetamine is no longer valid. This, in turn, has led to substantial and unwarranted disparities in sentencing based solely on whether methamphetamine is lab tested.”).

⁹ *Id.*

¹⁰ *Id.* (“Today, most methamphetamine seized at all distribution levels is remarkably pure, which means that higher

The Sentencing Guidelines’ initial rationale for enhancements based on purity was that “controlled substances are often diluted and combined with other substances as they pass down the chain of distribution,” therefore postulating that “unusually high purity . . . is probative of the defendant’s role or position in chain of distribution.”¹¹ But this rationale is unsupported when, as explained above, nearly all methamphetamine is uniformly high in purity. Additionally, many low-level offenders do not know the quantity or quality of the product they are involved in distributing. A qualitative research study of federal prisoners charged with drug crimes shows that the organizational structure of drug trafficking includes smaller, decentralized units operating independently of one another.¹² Individuals had limited knowledge of others’ roles in the enterprise and the structure of the larger operation.¹³ It was common that members of the drug smuggling trade were involved in other enterprises, including legitimate means of employment, but found themselves in a tight spot that led to the drug world.¹⁴

Given the aforementioned disparities and resulting arbitrariness of this guideline, numerous courts have determined that the treatment of methamphetamine (actual) versus methamphetamine (mixture) produces inequitable and unusually long sentences and have elected to deviate from the guidelines.¹⁵ Indeed, the Commission’s own data reveals substantial and extensive below-guidelines sentences in methamphetamine cases.¹⁶

In sum, NACDL supports the Commission’s proposed priority of examining drug guidelines, in particular the actual vs. mixture disparity in methamphetamine sentencing. We urge the Commission to amend Guideline §2D1.1 to remove this distinction and to sentence all methamphetamine defendants under the more lenient “mixture” amounts on the drug quantity table.¹⁷

purity is not a good indicator of a defendant's place in the chain of distribution. The importance assigned to purity is even less justified for a low-level offender who has no knowledge or control of the purity level.”).

¹¹ USSG § 2D1.1, note 27(C).

¹² Jana S. Benson & Scott H. Decker, *The Organizational Structure of International Drug Smuggling*, 38 J. Crim. Just. 130, 135 (2010).

¹³ *Id.*

¹⁴ *Id.* at 136.

¹⁵ See e.g. *United States v. Celestin*, 2023 WL 2018004, at *3 (E.D. La. Feb. 15, 2023) (citations omitted); *United States v. Robinson*, 2022 WL 17904534, *3 (S.D. Miss. Dec. 23, 2022) (noting that in a recent case, “the United States conceded that there is no empirical basis for the Sentencing Commission’s 10-to-1 weight disparity between actual methamphetamine and methamphetamine mixture,” and that other district courts had concluded there was no empirical basis for the disparity); *United States v. Ferguson*, 2018 WL 3682509, at *8 (D. Minn. Aug. 2, 2018) (“[M]ethamphetamine purity is no longer a proxy for, and thus not probative of, the defendant’s role or position in the chain of distribution.”); *United States v. Hayes*, 948 F. Supp. 2d 1009, 1026 (N.D. Iowa 2013) (“This issue [of punishing a pure substance more than a mixed substance] is heightened when the offender was merely a courier or mule who has no knowledge of the purity of the methamphetamine he or she is transporting.”); *United States v. Ortega*, No. 8:09CR400, 2010 U.S. Dist. LEXIS, at *21 (D. Neb. May 17, 2010) (“To punish [a street-level distributor] as harshly as an upper-level distributor because of a presumptive ten-to-one ratio does not reflect his position in the hierarchy nor will it promote respect for the law.”).

¹⁶ See U.S. Sent’g Comm’n, *Methamphetamine Trafficking Offenses Quick Facts* (FY 2023) (in fiscal year 2023, 41% of all individuals convicted of methamphetamine trafficking received a non-guideline sentence; out of those, 99% were downward variances averaging a 35% reduction), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY23.pdf.

¹⁷ The proposed priority also includes possible consideration of “miscellaneous issues pertaining to drug trafficking offenses coming to the Commission’s attention, such as possible statutory changes relating to fentanyl.” On this issue, NACDL refers the Commission to the May 1, 2025 letter of the Drug Policy Alliance on fentanyl NACDL co-

Priority 3 – Role of Loss, Intended Loss and Gain, and the Loss Table in Sentencing

NACDL supports the Commission’s proposed priority to examine the guidelines relating to loss, intended loss and gain, and the loss table to ensure that they appropriately reflect the culpability of the individual and harm to the victim in theft, property destruction, and fraud cases. As we have previously said, NACDL supports a wholesale reevaluation of § 2B1.1 to address issues such as overlapping enhancements, the existence of a loss chart, and the problematic use of “intended loss” in lieu of “actual loss.”¹⁸ NACDL also believes a complete modification of § 2B1.1, similar to the framework proposed by the American Bar Association and submitted to the Commission in 2014, is needed.¹⁹

As a part of a comprehensive examination of § 2B1.1, NACDL believes the Commission should modify § 2B1.1 to reduce the extent to which offense levels are based on loss amount. Reliance on the loss table as a key driver of sentences in fraud cases has drawn widespread criticism from both bench and bar.²⁰ NACDL continues to believe that §2B1.1 should be reconceptualized to address these criticisms by reducing the outsized role that loss amount currently plays in sentencing determinations.

Additionally, NACDL has long advocated for the Commission to reconsider the use of “intended loss” in § 2B1.1. The current construction often produces unfair sentencing outcomes for defendants whose offenses have caused little or no losses, as those defendants often face years or decades in prison because of what they purportedly intended but failed to achieve. Along with the unjust result of a sentence so vastly disproportionate to the injury caused by the crime, this approach raises serious questions regarding a court’s ability to determine what a defendant intended in the absence of actual harm. NACDL recommends that the Commission consider decoupling “intended loss” from the loss table and instead treat any disparity between actual and intended loss as grounds for a potential sentence enhancement.

NACDL also continues to support modifications that would both (1) reduce the impact of the loss table for all defendants sentenced under § 2B1.1 who gain little or nothing from their

signed, available at: <https://www.nacdl.org/Document/CommentsUSSCEnhancementsFentanylOpioids-05012025>.

¹⁸ See NACDL, Comments on Proposed Amendments for 2015 Cycle, available at <https://www.nacdl.org/Document/Comments-USSC-2015Amend-03182015>, at 8-13 (2015).

¹⁹ American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf. (Nov. 10, 2014).

²⁰ See, e.g., *United States v. Gupta*, 904 F.Supp.2d 349, 350 (S.D.N.Y. 2012) (noting that “the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice”); *United States v. Parris*, 573 F.Supp.2d 744, 751 (E.D.N.Y. 2008) (“[W]e now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment.”); see also James E. Felman, The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes, 23 Fed. Sent. R. 138, 139 (2010) (describing the current high-loss guidelines as “overkill”); Frank O. Bowman III, Sentencing High-Loss Corporate Insider Frauds After *Booker*, 20 Fed. Sent. R. 167, 169 (2008) (“In sum, since *Booker*, virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high”); Samuel W. Buell, Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud, 28 Cardozo L. Rev. 1611, 1648-49 (2007) (discussing how the loss table often overstates the actual harm suffered by the victim).

conduct, and (2) better adhere to the statutory directive in 28 U.S.C. § 994(j) to ensure the Guidelines reflect the appropriateness of a non-custodial sentence for first-time, non-violent, non-serious offenders. Such a revision would promote fairness in sentencing for offenses that do not produce pecuniary harm (or that produce less harm than a defendant may arguably have intended).

Accordingly, NACDL supports the Commission’s proposed priority of examining the loss guidelines in § 2B1.1 to ensure that they produce fair sentencing outcomes consistent with an individual’s culpability.

Priority 4 – Career Offender

NACDL appreciates that the Commission remains focused on improving the career offender guideline.²¹ As detailed below, the career offender guideline drives overincarceration and inequities in federal sentencing; it is very worthy of reform. NACDL remains fearful that moving away from the categorical and modified categorical approach for the “crime of violence” definition will increase the use of the career offender guideline.²² While imperfect, the categorical and modified categorical approach is “under-inclusive by design,” and helps prevent some of the worst excesses of the career offender guideline. *Borden v. United States*, 593 U.S. 420, 442 (2021). Approaches suggested in prior amendment cycles also create significant administrative difficulties in implementation.

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.²³ And defendants sentenced under the career offender

²¹ See, e.g., U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 19, 2024), https://www.usc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf.

²² See NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2023), https://www.usc.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.usc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf.

²³ 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.usc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [hereinafter, *Fifteen Years*] (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.usc.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.usc.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 (2023), https://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2023] (showing that, in fiscal year 2023, Black people constituted 58.4% of those subject to the career offender guideline), with U.S. Sentencing Commission, *Interactive Data Analyzer*, <https://ida.usc.gov/analytics/saw.dll?Dashboard> (showing that in fiscal year 2023, only 24.5% of federal defendants were Black).

guideline—again, the majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.²⁴

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.”²⁵ In some jurisdictions, like Ferguson, Missouri, “these patterns hold even though police have a higher ‘contraband hit rate’ when searching white versus black drivers.”²⁶ As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.²⁷

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.²⁸ 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.²⁹ The Commission further explained: “Research consistently shows Black and Latinx

²⁴ 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).

²⁵ *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.23, at 134.

²⁶ *Black Lives Matter*, *supra* n.25, at 4.

²⁷ In 2005, Black people “represented 14 percent of current drug users, yet they constituted 33.9 percent 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>.

²⁸ *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>. Mr. Balko has released the first three parts of an intended report on the state of indigent defense in all 50 states.

²⁹ U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail 3* (Jan. 2022),

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.”³⁰ 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,”³¹ perhaps due in part to the fact that “similar felony pretrial detainees were more likely to plead guilty by 10 percentage points.”³²

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.³³ 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 had the career offender provision not applied;³⁴ that is still true in fiscal year 2023.³⁵ Moreover, “[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores.”³⁶ 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.³⁷

The long-standing pattern³⁸ 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

<https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf>.

³⁰ *Id.* at 33-34.

³¹ *Id.* at 52.

³² *Id.* at 51.

³³ *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.29, at 53–54.

³⁴ *Quick Facts* 2012, *supra* n.23, at 1.

³⁵ *Quick Facts* 2023, *supra* n.23, at 1.

³⁶ *Report to the Congress*, *supra* n.24, at 21.

³⁷ *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).

³⁸ *See, e.g.*, *Quick Facts* 2012, *supra* n.23, at 2 (chart); *Quick Facts* 2023, *supra* n.23, at 2 (chart); *see also Report to the Congress*, *supra* n.24, at 23 (“[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.”).

and the average sentence imposed in career offender cases,” which “demonstrates a continuing decline in the guideline’s influence.”³⁹ Section 4B1.1 therefore “has among the lowest within-guideline rates each year.”⁴⁰

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.⁴¹ 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.”⁴²

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.”⁴³

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,”⁴⁴ 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.’”⁴⁵

NACDL remains concerned that prior proposed amendments that move away from the categorical and modified categorical approach for the “crime of violence” definition will expand, rather than narrow, the scope of the career offender guideline. 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. Last year, NACDL welcomed the Commission’s

³⁹ 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.

⁴⁰ *Id.* at 55.

⁴¹ 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.

⁴² *Id.*

⁴³ *Fifteen Years*, *supra* n.23, at 134 (emphasis in original).

⁴⁴ *Report to the Congress*, *supra* n.24, at 3.

⁴⁵ *Id.* at 44.

efforts to ameliorate the effect of the drug guidelines on lower-level players through its addition of a mitigating role adjustment in the drug guideline itself. However, career offenders—who are often low-level players in the drug hierarchy—are not eligible for this adjustment, further increasing the potential disparities between sentences imposed under the drug guidelines and sentences imposed under the career offender guideline. NACDL is ready and willing to further contribute to this discussion as the Commission considers how to change the career offender guideline.

Respectfully Submitted,

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