February 3, 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: Proposed Amendments To The Sentencing Guidelines, Policy Statements, And Official Commentary

Dear Judge Reeves:

Thank you for the opportunity to present NACDL's comments on these important proposed amendments. This submission addresses the proposed amendments to the career offender guideline, firearms-related guidelines, and guideline simplification. On all other issues in the proposed amendment cycle not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

## I. Career Offender (Proposed Amendment 1)

NACDL appreciates that the Commission remains focused on improving the career offender guideline.[1] Unfortunately, NACDL's fear 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 remains.[2] 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.[3] In addition, the proposed amendments would create significant administrative difficulties in implementation. Put simply, the current proposal does not solve the perceived problems with the current career offender guideline, and will likely multiply them.

The Commission's proposed revisions to the "controlled substance offense" definition would significantly restrain the career offender guideline's application, however, and would address the administrability concerns driving the Commission's desire to amend the guideline. This proposal is a positive development, and NACDL supports it.

[1] 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 ("Proposed Amendments").
[2] *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.
[3] *Borden v. United States*, 593 U.S. 420, 442 (2021).

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If the Commission does decide to implement the proposed amendments, it should use the most restrictive option, Option 3A, so that only convictions that resulted in a sentence for which the defendant served five years or more in prison and that are counted separately under §4A1.1(a) qualify.

### A. The Current Career Offender Guideline Drives Overincarceration and Inequity in Federal Sentencing Without any Evidence That it Enhances Public Safety.

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.[4] And defendants sentenced under the career offender guideline—again, the majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.[5]

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

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[4] *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*] (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 (2023), https://www.ussc.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.ussc.gov/analytics/saw.dll?Dashboard (showing that in fiscal year 2023, only 24.5% of federal defendants were Black).

[5] 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).

likely than whites to be arrested."[6] In some jurisdictions, like Ferguson, Missouri, "these patterns hold even though police have a higher 'contraband hit rate' when searching white versus black drivers."[7] As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.[8]

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.[9] 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.[10] 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."[11] 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,"[12] perhaps due in part to the fact that "similar felony pretrial detainees were more likely to plead guilty by 10 percentage points."[13]

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.[14] 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

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[6] *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; *see also Fifteen Years*, *supra* n.3, at 134.

[7] *Black Lives Matter*, *supra* n.5, at 4.

[8] 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.

[9] *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.

[10] 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.

[11] *Id.* at 33-34.

[12] *Id.* at 52.

[13] *Id.* at 51.

[14] *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.9, at 53–54.

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;[15] that is still true in fiscal year 2023.[16] Moreover, "[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores."[17] 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.[18]

The long-standing pattern[19] of federal judges choosing to sentence defendants with career offender sentencing enhancements below the guidelines range demonstrates the wide-spread 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."[20] Section 4B1.1 therefore "has among the lowest within-guideline rates each year."[21]

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.[22] The Commission therefore concluded that "assigning offenders to

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[15] *Quick Facts* 2012, *supra* n.3, at 1.
[16] *Quick Facts* 2023, *supra* n.3, at 1.
[17] *Report to the Congress*, *supra* n.4, at 21.
[18] *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).
[19] *See, e.g.*, Quick Facts 2012, supra n.3, at 2 (chart); Quick Facts 2023, supra n.3, at 2 (chart); *see also Report to the Congress*, supra n.4, at 23 ("[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.").
[20] 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.
[21] *Id.* at 55.
[22] 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.

criminal history category VI, under the career criminal or armed career criminal guidelines, is for reasons other than their recidivism risk."[23]

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."[24]

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,"[25] 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.'"[26]

NACDL is concerned that the 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.

### B. The Proposed Amendments Changing the Definition of "Controlled Substances Offense" are Encouraging, but the Proposed Changes to "Crime of Violence" Would Exacerbate, Rather than Reduce, the Significant Racial Inequities in Federal Sentencing, and Still Lead to Practical Difficulties.

The proposed amendments would drastically alter Section 4B1.2 by moving from the current, elements-based approach of determining whether a prior conviction qualifies as a "crime of violence" or a "controlled substance offense" to: (1) a new definition of "crime of violence" "based on the defendant's own conduct"; and (2) a revised definition of "controlled substance offense" based on a list of "specific federal statutes relating to drug offenses."[27] In addition, the proposed amendments set forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense," each with two Suboptions.[28]

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[23] *Id.*
[24] *Fifteen Years*, *supra* n.3, at 134 (emphasis in original).
[25] *Report to the Congress*, *supra* n.4, at 3.
[26] *Id.* at 44.
[27] Proposed Amendments, *supra* n.1, at 2-3.
[28] Proposed Amendments, *supra* n.1, at 3.

### 1. The New Proposed Definition of "Crime of Violence" Implicates the Same Concerns as Prior Proposals.

The proposed amendments provide a broad new definition for the term "crime of violence" based on the conduct the defendant "engaged in" during the prior conviction: "the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[29] The definition provides a list of types of qualifying conduct that includes a "force clause," certain specific offenses that currently qualify as a "crime of violence," and a provision that would allow certain inchoate offenses to still qualify as "crimes of violence."[30]

The Commission also proposes permitting the government to use documents from the prior convictions to make a prima facie case that the prior convictions qualify. These may include the charging document, the jury instructions and accompanying verdict form, a plea agreement or transcript of a plea colloquy, the judge's formal rulings of law or findings of fact, the judgment of conviction, any explicit factual finding by the trial judge to which the defendant had assented, and "[a]ny comparable judicial record of the sources described."[31] By contrast, under the current categorical approach, courts are permitted to look to these sorts of documents (known as *Shepard* documents) only when the statute of conviction is divisible, in order to prevent unfairness.[32]

In short, rather than looking to an objective test to determine whether the elements of the prior offense "necessarily" involved a crime of violence, courts will look to a subjective test to determine whether, based on a variety of documents from the prior offense, the defendant "engaged in" conduct that fits the new definition. Moving to such an approach will expand the number of defendants who are sentenced under the career offender guideline based on a prior "crime of violence," and introduce additional inequities by permitting courts to rely more frequently on documents from prior convictions that may not accurately convey what had occurred years prior.

#### a) The Proposed Changes to the "Crime of Violence" Definition do not Solve the Problems of Over-incarceration and Racial Inequity.

NACDL is concerned that a "conduct" approach to prior convictions does not always result in a finding of the facts that truly occurred. Rather, it reflects the outcome of a process already weighted down by systemic inequities. Black and poor people are disproportionately likely to be represented by overburdened public defenders in state court, where their counsel may not have the resources to fully advise their clients about the future consequences of pleading guilty or to carefully negotiate a plea agreement that accepts guilt under the statute

[29] Proposed Amendments, *supra* n.1, at 3.
[30] Proposed Amendments, *supra* n.1, at 3.
[31] Proposed Amendments, *supra* n.1, at 6-7.
[32] *See Descamps* v. *United States*, 570 U.S. 254, 258, 267 (2013).

that was charged but denies the factual allegations in the charging document (even where the defendant may dispute some of those factual allegations).

Under a conduct-based system—and where witnesses to the actual prior conduct are unavailable or unreliable due to the passage of time and geography—courts are likely to expand their reliance on charging documents when determining whether or not prior convictions qualify as a "crime of violence." Although such documents are likely to set forth the most detailed account of the supposed "facts" of the prior conviction, they are typically based on a one-sided narrative, often drawn from police reports (or the testimony of police officers before a grand jury). Such documents are therefore likely to bake in any bias or inaccuracies contained in those police reports. Indeed, one need only look at the most high-profile recent cases to see examples of inaccurate police reports and statements.[33] At a subsequent federal sentencing hearing years later, where the Federal Rules of Evidence do not apply,[34] a defendant would face meaningful difficulties in gainsaying such sources of evidence.

NACDL is in good company with its concerns that using a conduct-based approach to determine whether a prior conviction is a crime of violence will result in injustice. The Supreme Court, in *Taylor v. United States,* has already set forth the reasons that "the practical difficulties and potential unfairness of a factual approach are daunting."[35] In *Taylor*, a unanimous Supreme Court raised numerous questions about such a process:

> Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed [a qualifying predicate offense]? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed [a qualifying predicate offense], could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, [non-qualifying] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [a qualifying offense].[36]

These questions and concerns have never been answered satisfactorily in the intervening three decades, nor are they addressed in the proposed amendments.

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[33] Jessica Jaglois et al., *Initial Police Report on Tyre Nichols Arrest Is Contradicted by Videos*, N.Y. Times (Feb. 1, 2023), https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html (detailing inaccuracies in the police report regarding the beating and killing of Tyre Nichols); Eric Levenson, *How Minneapolis Police first described the murder of George Floyd, and what we know now*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html (detailing the initial Minneapolis Police Department press release stating that George Floyd "Die[d] After Medical Incident During Police Interaction").

[34] Fed. R. Evid. 1101(d).

[35] *Taylor v. United States*, 495 U.S. 575, 601 (1990).

[36] *Id.* at 601–02.

The Supreme Court has also warned of the pitfalls of this approach, explaining that sentencing courts "would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense," even though "[t]he meaning of those documents will often be uncertain" and "the statements of fact in them may be downright wrong."[37] The "facts" contained "in the records of prior convictions are prone to error precisely because their proof is unnecessary."[38] After all, defendants "often ha[ve] little incentive to contest facts that are not elements of the charged offense—and may have good reason not to," including fears of confusing the jury, or, in the plea context, "irk[ing] the prosecutor or court by squabbling about superfluous factual allegations."[39] As a result, "a prosecutor's or judge's mistake . . . reflected in the record, is likely to go uncorrected."[40] *Mathis*, 579 U.S. at 512. Those "inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence."[41]

**b) The Proposed Amendments Would Exacerbate, Rather than Address, the Difficulties in Implementing the Current Career Offender Guideline.**

The proposed career offender guideline would also exacerbate the very practical difficulties in administering the guideline that the Commission purports to address. In the prefatory material explaining its proposed amendments, the Commission does not address the justice and equity issues outlined above. Instead, it focuses primarily on criticism the current career offender guideline has received—primarily, that it is difficult to apply, as evidenced by the amount of litigation resulting from disputes about whether certain prior state court convictions count as qualifying predicate offenses or not.[42] Although NACDL appreciates the Commission's efforts to take that feedback seriously in developing its proposed amendments, the proposal before the Commission now would not redress any of the concerns about the current guideline. Instead, it is likely to exacerbate the practical difficulties of the current practice.

First, as already discussed, the proposal will spur mini trials at sentencing for each prior offense that will suffer from a number of practical difficulties. Records and court documents will not always be available or of high quality. Those records will not necessarily reflect the truth of the underlying conduct given that defendants and their attorneys were focused on fighting a crime's elements. And the ability to challenge or investigate key aspects of the prior offense such as witnesses will be severely limited. This will be the reality for most if not all career offender cases under the proposed amendments, compared to the current landscape where categorical issues are briefed less frequently.

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[37] *Descamps* v. *United States, supra* n.31, at 270.
[38] *Mathis* v. *United States*, 579 U.S. 500, 512 (2016).
[39] *Descamps* v. *United States, supra* n.31, at 270.
[40] *Mathis* v. *United States*, *supra* n.35, at 512.
[41] *Id.*
[42] Proposed Amendments, *supra* n.1, at 2.

Second, the current approach has some efficiencies insofar as courts routinely interpret cases involving the categorization of predicate offenses as "crimes of violence" and "controlled substance offenses" (or not) under Section 4B1.1 to be coextensive with the similar analysis of predicate convictions under the Armed Career Criminal Act.[43] As a result, one controlling case can often answer the question. But if the Commission creates a separate track for the career offender guideline, all of the settled law categorizing prior state convictions as qualifying predicates (or not) will fall by the wayside. Instead, parties will take part in this new pattern of mini trials in every case, and given that the proposed amendment will create a question heavily reliant on specific fact patterns, one case will not settle the issue for following cases. Put simply, rather than reducing litigation, the proposed approach would multiply it.

The proposed amendments also contradict feedback the Commission has previously received about the feasibility of implementing the career offender guideline. Indeed, the Commission itself has acknowledged that, in previous stakeholder meetings, "the primary theme that emerged from the roundtable discussion was the desire to have one definition of 'crime of violence' that would apply throughout criminal law."[44] Moving further away from the categorical approach—by diverting from the approach used for the ACCA—directly contradicts that feedback.

Third, the Commission has expressed concerns that the current categorical approach is a "'legal fiction,' in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to 'odd' and 'arbitrary' results."[45] Under the proposed amendments, defendants will still run the risk of being found to have previously committed a "crime of violence" based on documents often drafted by the government, such as the charging document and plea agreement, for which the defendant would not have had the need, time, ability, or resources to meaningfully investigate, consider, or challenge. Our constitutional system does not view these two possibilities as equivalent; indeed, our criminal system is predicated on the notion that it is better to underincarcerate the guilty than to overincarcerate the innocent. To the extent that there is a particular concern in a particular case, sentencing courts remain free to impose an upward variance.

The Commission is well aware that the current career offender guideline is broken, and it has previously urged Congress to enact changes to minimize its harm.[46] The amendments it now proposes for the "crime of violence" definition, however, would do the opposite. The Commission should decline to adopt its proposed amendments to this facet of the career offender guideline.[47]

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[43] *See, e.g.*, *United States* v. *Womack*, 610 F.3d 427, 433 (7th Cir. 2010); *see also James* v. *United States*, 550 U.S. 192, 206 (2007) (noting that "the Sentencing Guidelines' career offender enhancement['s] definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"), *overruled on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015).
[44] *Report to the Congress*, *supra* n.4, at 50.
[45] Proposed Amendments, supra n.1, at 2.
[46] *See generally Report to the Congress*, *supra* n.7.
[47] If the Commission remains interested in changing the career offender guideline and decides against implementing its simplification amendments discussed below, NACDL strongly recommend a revision to Section 4A1.3(b)(3)(A) as well. That provision currently limits the downward departure for defendants sentenced as career offenders under Section 4B1.1 to one criminal history category. If the Commission elects to expand the career offender guideline—

2. **The Proposed Changes to the "Controlled Substances Offense" Definition and the Types of Prior Convictions that Qualify are Encouraging.**

The proposed amendments also provide a new definition for "controlled substance offense" by "listing specific federal statutes relating to drug offenses," thereby excluding "state drug offenses from the scope of its application."[48] The proposed amendments would also move the provision currently located in the Commentary stating that a violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense" to the guideline.[49]

In addition, the proposed amendments set forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense," each with two Suboptions. Option 1 would limit qualifying prior convictions to only convictions that are counted separately under §4A1.1(a), or §4A1.1(a) and §4A1.1(b). Option 2 would limit qualifying prior convictions to only convictions that resulted in a sentence imposed of more than five years, three years, or one year that are counted separately under §4A1.1(a), or §4A1.1(a) and §4A1.1(b).[50] Option 3 would limit qualifying prior convictions to only convictions that resulted in a sentence for which the defendant served more than five years, three years, or one year in prison and that are counted separately under §4A1.1(a), or §4A1.1(a) and §4A1.1(b). All three options include two suboptions where Suboption A would set the minimum sentence length requirement for purposes of both "crime of violence" and "controlled substance offense" and Suboption B would set the minimum sentence length requirement for purposes of "crime of violence" only.[51]

NACDL is encouraged by the Commission's proposal to remove state drug offenses from the application of the career offender guideline. As explained above, there are serious concerns regarding whether defendants receive appropriate representation in state drug offenses, and the racial inequities baked into the enforcement and charging decisions upon which they rely. Indeed, the Commission itself has previously acknowledged issues with regards to prior controlled substance offenses.[52] Removing state drug offenses is a significant means to attack those problems. Moreover, the proposal provides the simplest solution to the workability problems the Commission has highlighted in the categorical and modified-categorical approach by removing state convictions from consideration.

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despite all of the reasons not to do so—then the Commission should permit, and indeed, encourage district court judges to exercise their discretion to downward depart as many criminal history categories as they deem necessary to correct course for defendants who have been unjustly swept up in this expansion of the career offender guideline.

[48] Proposed Amendments, *supra* n.1, at 2-3.

[49] Proposed Amendments, *supra* n.1, at 3.

[50] Option 2 includes the possibility that the defendant can show that a conviction does not qualify as a prior felony conviction if he can establish that the conviction resulted in a sentence for which the defendant served less than three years, two years, or six months in prison.

[51] Proposed Amendments, *supra* n.1, at 3.

[52] *Fifteen Years*, *supra* n.3, at 133-34 (noting that lengthy incapacitation of drug-traffickers "prevents little, if any, drug selling," that recidivism rates for these cases "are much lower than other offenders who are assigned to criminal history category VI," and that the career offender guideline adversely impacts Black individuals in drug cases).

NACDL is similarly encouraged by the Commission's multi-option proposal that would further limit which prior convictions can qualify. The career offender guideline has been overinclusive,[53] and can dramatically increase both the criminal history category and offense level.[54] These devastating consequences are felt especially by people of color.[55] Limiting the types of prior convictions for both "crime of violence" and "controlled substance offense" to those prior convictions where the defendant actually served five years in prison and that are counted separately under §4A1.1(a) will help ensure the guideline is only applied to those small handful of cases where "a term of imprisonment at or near the maximum term authorized" is "sufficient, but not greater than necessary." 28 U.S.C. § 994(h); 18 U.S.C. § 3553(a).[56] And any concerns regarding certain defendants no longer qualifying as a career offender due to these changes could be contained by judges' ability to vary upwards, a power they will continue to have, as they do now.[57]

## II. Firearms Offenses (Proposed Amendment 2)

### A. Machinegun Conversion Devices

The Commission proposes amending Guideline §2K2.1 to address a statutory difference in the definition of "machinegun conversion devices" (MCDs) between the Gun Control Act (GCA), 21 U.S.C. § 921(a)(3), and the National Firearms Act (NFA), 26 U.S.C. § 5845(a). The Commission notes that MCDs fall within the NFA's definition of firearm, but that the GCA definition of firearms does not include MCDs.

The Commission proposes two possible options. NACDL respectfully opposes both of these changes and supports maintaining the existing definition. NACDL believes that these statutory differences in definition are intended by Congress and, further, do not present a problem in firearms sentencing.

The amendment proposal also notes that some commenters believe that the existing language insufficiently addresses offenses involving MCDs, which are allegedly becoming more common. However, the Commission's own data show that the average sentence

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[53] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 2 (detailing that in FY23, 20.2% of sentences relative to the guideline range were within the range); USSC, *The Influence of the Guidelines on Federal Sentencing* 55-56 (2020), https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing ("The Commission's §4B1.1 analysis demonstrates a continuing decline in the guideline's influence, as reflected by the steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases.").

[54] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 1 (detailing that in FY23, 40.1% of career offenders had an increase in both offense level and criminal history category).

[55] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 1 (detailing that in FY23, 58.4% of career offenders were Black).

[56] For instance, the Commission's Data Briefing accompanying the proposed amendment showed that the average time served in state custody for murder, rape, and other sexual assaults were all at five years or more, with robbery's average being very close at 4.8 years. U.S. Sentencing Commission, *Public Data Briefing: 2025 Proposed Amendment Relating to Individuals Sentenced Under §4B1.1* (Jan. 10, 2025), https://www.ussc.gov/education/videos/2025-career-offender-data-briefing.

[57] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 2 (detailing that in FY23, 1.2% of career offenders received an upward variance).

imposed for individuals sentenced with MCDs is, in fact, below the guideline minimum.[58] This is strong evidence that an amendment is not warranted and that the existing guideline is sufficient for district judges to impose appropriate sentences.

### B. Mens Rea

NACDL is pleased to see the Commission's proposal to strengthen the *mens rea* requirement for applying the enhancements for stolen firearms and modified serial numbers under Guideline section 2K2.1. As the Commission notes, these enhancements currently require no showing of the defendant's knowledge or mental state.

We are supportive of the Commission's goal to rectify this unfair situation. As the Commission is aware, the *mens rea*—or guilty mind—requirement is a fundamental element of criminal law. The requirement of a "guilty mind" protects a person from being convicted of a crime based on unintentional, accidental, and innocent conduct. The Supreme Court has repeatedly acknowledged the crucial protection the *mens rea* requirement provides in our legal system.[59]

The Commission's action on this issue is particularly important because a strong *mens rea* requirement is too often overlooked in criminal lawmaking. A recent study conducted jointly by NACDL and the Heritage Foundation found that over one-third of criminal bills introduced in Congress contained inadequate *mens rea* protections. [60] Strong intent standards are needed to ensure that unintentional conduct is not punished and to prevent overcriminalization.

Commission action here is warranted because there is currently no *mens rea* requirement for these enhancements. This is extremely harsh, punishing people for conduct they did not intend or, worse, had no knowledge of whatsoever. These enhancements are currently strict liability offenses. The Supreme Court has cautioned that a *mens rea* of strict liability is only appropriate for public welfare offenses, such as those relating to food or drug safety.[61]

The proposed amendment would apply the current *mens rea* requirement from Guideline §2K2.1(b)(4)(B)(ii) to all of subsection 2K2.1(b)(4). Under that proposed amendment, a defendant would be subject to a 2-level enhancement under §2K2.1(b)(4)(A) if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm was stolen." A defendant would be subject to a 4-level enhancement under §2K2.1(b)(4)(B)(i) if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is

[58] U.S. Sentencing Comm'n, Public Data Briefing: Proposed Amendment on Firearms, Part A: Machinegun Conversion Devices (Jan. 2025), at slide 8 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Firearms-MCD.pdf (showing "average sentence and Guideline minimum for individuals sentenced with MCDs for fiscal year 2023).

[59] *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 605 (noting that "the requirement of some *mens rea* for a crime is firmly embedded" in the common law).

[60] Heritage Foundation & NACDL, *Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later* (2021), https://www.heritage.org/without-intent-revisited.

[61] *See generally Morissette v. United States*, 342 U.S. 246 (1952).

rendered illegible or unrecognizable to the unaided eye."

NACDL also wishes to address the issue for comment the Commission noted for this amendment, which is whether there are particular evidentiary challenges to proving a defendant's mental state in firearms cases. We do not think that firearms offenses present evidentiary challenges to proving *mens rea* that are particularly difficult or insurmountable. Of course, it could be said that determining a defendant's mental state at the time of a crime's occurrence is always somewhat challenging. But even if firearms cases presented evidentiary challenges to proving *mens rea* that were particularly difficult—which we do not believe they do—district judges have significant experience in making such determinations and are certainly capable of doing so here.

As the Commission states in proposing this amendment, the intent standard proposed—"knew, was willfully blind to the fact, or consciously avoided" knowing—is in fact already used within this very guideline on sentencing firearms crimes.[62] This amendment would simply apply the exact *mens rea* standard already used in this subsection to a larger part of the subsection. There is no indication that district judges have particular difficulty in applying this *mens rea* standard in §2K2.1(b)(4)(B)(ii) such that they will not be able to do so for all of §2K2.1(b)(4). Finally, the fact that the Guidelines require a finding that meets a preponderance of evidence standard, rather than a more rigorous reasonable doubt standard for conviction at trial, also eases this determination.

## III. Simplification of the Three-Step Process (Proposed Amendment 4)

NACDL supports the Commission's proposal to streamline and simplify the sentencing process. The Commission's proposal aligns the Guidelines manual with the Supreme Court's *Booker* jurisprudence, reflects predominant federal practice across the country, and would promote robust, client-centered sentencing advocacy. The new simplification proposal is a significant improvement on last year's proposal about which NACDL had expressed strong concerns.[63] While we had previously proposed implementing the simplification project in stages pending additional empirical research and the development of effective training programs, we join with the Federal Defenders in concluding that this new iteration of the simplification mission can be adopted in this amendment cycle. We include below some suggestions as to how the new schema can be rolled out and supported to ensure its effectiveness in realizing the vision of federal sentencing embodied in *United States v. Booker*, 543 U.S. 220 (2005).

As the Commission notes in explaining Proposed Amendment 4, the proposed rewrites are necessary to bring the manual in line with the revolutionary changes wrought by the Supreme Court in *Booker*, which rendered the Guidelines advisory and established it as the

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[62] *See* U.S. Sent'g Guidelines Manual, § 2K2.1(b)(4). We also note that similar *mens rea* standards are used elsewhere within the Guidelines. *See id.* at 2B1.1(C)(iv) (knew or reasonably should have known); *id.* at 2K2.1(a)(4)(B); (a)(6)(C); (b)(5)(B); (b)(5)(C); (b)(6); 2K1.3(b)(3); 2M5.3(b)(1)(D) (knowledge, intent, or reason to believe).

[63] *See* NACDL Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (February 22, 2024), https://www.nacdl.org/getattachment/9d7cb66a-4466-4868-8c91-9e1eea2e5588/nacdl-comments-to-sentencing-commission-on-proposed-2024-amendments-02222024.pdf

first—albeit important—step in a larger analysis that requires the sentencing judge to consider the factors set forth in 18 U.S.C. § 3553. The change was so radical that time and again, the Court has admonished courts to recognize their broad power under *Booker* "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[64] Thus, the Commission's revisions to Chapter One reflect an accurate description of the post-*Booker* sentencing landscape that had replaced one where the Guidelines were not just the beginning point, but presumptively the end-point too. Post-*Booker*, sentencing courts may not presume that the applicable guideline range is reasonable; nor does it "fix the permissible range of sentences."[65] Rather, "the court must make an individualized assessment based on the facts presented and the other statutory factors."[66]

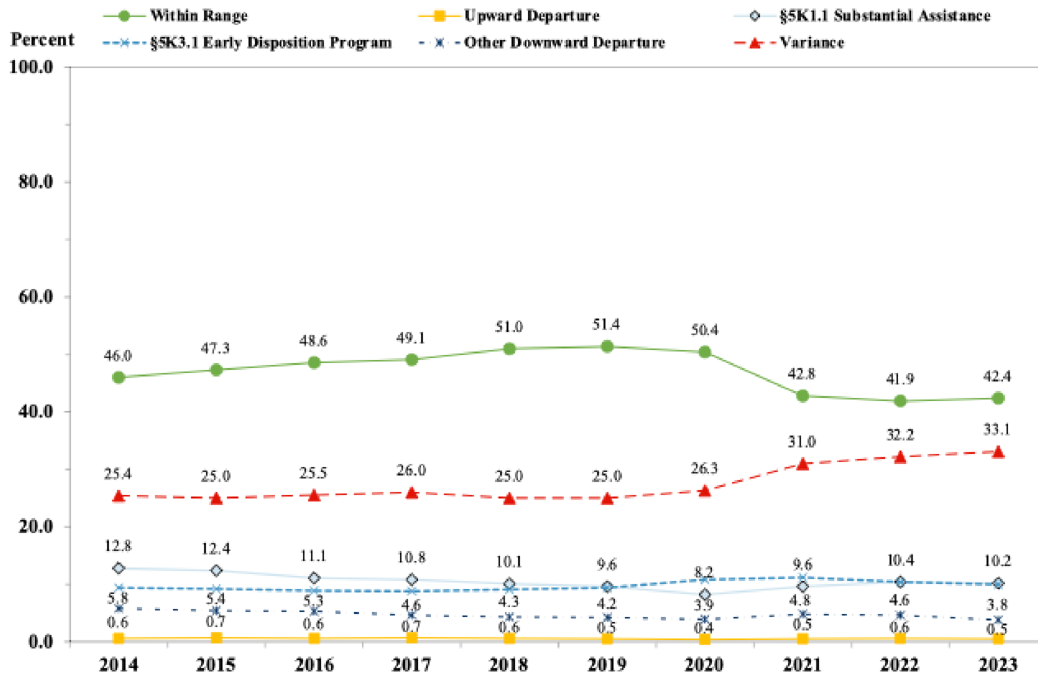
In this context, we welcome the elimination of both departures themselves and the concept of departures. The approved departures in the Guidelines have always been strictly rationed and narrowly crafted, sometimes requiring legal contortions to make them apply to a given case. The rhetorical gymnastics to apply the departure language become particularly absurd in the post-*Booker* world where a district court can simply side-step the restrictive departure ground and vary downwards for any reason. Moreover, the word "departure" frames the guideline range as the permissible endpoint, from which deviations are "departures" and, implicitly, something unusual or out of the ordinary. This is directly contrary to the *Booker* scheme outlined above. The deletion of departures and the departure language removes from the manual an anachronistic and improper privileging of the Guidelines in the manual.

Moreover, the Commission's simplification proposal is more consistent with *actual sentencing practices* in federal courts across the country. As the Commission notes, the trend across the country has been for judges to use their variance power more expansively and to use departures with less frequency. The table below, which shows sentencing trends over the past decade, reveals a steady increase in variances—now up to approximately one third of federal cases—while the use of the downward departure mechanism has remained consistently below 6% of cases, most recently dipping below 4% of cases.

[64] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (quotation omitted).
[65] *Beckles v. United States*, 580 U.S. 256, 263 (2017).
[66] *Id.* at 265 (*quoting Gall v. United States*, 552 U.S. 38, 49 (2007)) (quotation marks omitted).

**Figure 9**

**SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE OVER TIME**[1]
**Fiscal Years 2014 - 2023**




[1] Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2014 - 2023 Datafiles, USSCFY14 - USSCFY23.

*See* 2023 Annual report and Sourcebook of Federal Sentencing Statistics, Figure 9.[67]

The Commission's proposal, by dispensing with narrow departure grounds and the framing effect of the departure language, will also promote robust, client-centered sentencing advocacy. Once the guideline range is calculated, the focus of the sentencing court and the parties can immediately turn from the clinical mathematical calculations that characterize so many federal sentences to a more holistic and humane consideration of the unique circumstances of the individual being sentenced and their particular crime. Indeed, since 2005, NACDL and its partners, like the Federal Defenders, have devoted thousands of hours training its members on creative and client-centered plea bargaining and sentencing advocacy. As a result, the quality of sentencing advocacy across the country has improved considerably and the federal sentencing process has become closer to the ideal that the Supreme Court initiated with *Booker* and its progeny.

NACDL has the following suggestions for the implementation of this proposal:

*First*, we welcome the Commission's decision in this iteration of the simplification proposal to delete the departure provisions entirely and to dispense with a separate chapter listing and essentially codifying the 18 U.S.C. § 3553 factors. As we wrote last year, this

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[67] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Figure09.pdf.

would be directly contrary to the congressional directive, oft repeated in the Supreme Court's *Booker* jurisprudence, that there is "*no limitation*" on "information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[68] Nonetheless, there are important and informative sections of the current manual that would be lost in this exercise – the research on the development of young brains, for example, currently contained in U.S.S.C. §5H1.1. (Age (Policy Statement)). This research does not need to disappear, however. It could be incorporated into a series of primers for judges that set forth the latest scientific research on potential mitigating and aggravating factors. Examples could include neuroscientific research on the impact of prolonged drug use on cognitive abilities,[69] the impact of post-traumatic stress disorder on criminal conduct,[70] the limited deterrent effect of long sentences,[71] or the collateral consequences of convictions,[72] to name just some. These primers, or whatever mechanism the Commission adopts to preserve and advance this and similar research, would further the Commission's purpose to "establish sentencing policies and practices for the Federal criminal justice system" that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A) & (C).

*Second,* NACDL repeats its concern expressed in our letter last year about the first simplification version that the Commission consider and address how this proposal will impact the sentencing practices of those judges who persistently decline to grant variances but remain comfortable with downward departures. The Commission's own data indicates that such judges exist. Its most recent graph demonstrating sentences imposed relative to the guideline range over a ten-year period (reproduced above) reveals that there is a small but persistent percentage of individuals receiving downward departures rather than pure variances (4 to 6%), a statistic that represents thousands of individuals every year. The apparent resilience of this departure rate, which judges could have folded into a variance decision, suggests that there is a group of judges deeply anchored in a guideline-centric sentencing methodology. Psychological literature on decision-making teaches us that such anchors can be difficult to displace, and the elimination of departures could well result in more within-guidelines sentences by judges who view variances as less legitimate.[73] Thus, to ensure against the potential that thousands of criminal defendants receive higher sentences from judges who will refuse to embrace their variance authority as a substitute for their departure authority, the Commission must engage in a thoughtful and unstinting education campaign so that this proposal meets its goal of securing the two-step, individualized sentencing process envisaged

[68] 18 U.S.C. § 3661; *see also Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022) ("Accordingly, a federal judge in deciding to impose a sentence 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"), *quoting United States v. Tucker*, 404 U.S. 443, 446 (1972).
[69] *United States v. Hendrickson*, 25 F.Supp.3d 1166, 1172–73 (N.D. Iowa 2014) (Bennet, J.).
[70] *United States v. Polizzi*, 549 F. Supp. 2d 308, 411 (E.D.N.Y. 2008) (Weinstein, J.), *rev'd on other grounds, United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009)).
[71] *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006) (Rakoff, J.)
[72] *United States v. Nesbeth*, 188 F.Supp.3d 179 (E.D.N.Y. 2016) (Block J.),
[73] *See*, *e.g.*, *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J. concurring) (noting that the "so-called 'anchoring effects' long described by cognitive scientists and behavioral economists, show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point"), citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).

by *Booker*. For example, the Commission could conduct surveys, structured interviews and focus groups—perhaps engaging in particular with chief judges and former chief judges—to better determine how the elimination of the departure step in federal sentencing will be received and applied by judges across the country. Such research will inform a successful roll-out of the Commission's simplification proposal, and potentially identify alternative interventions – such as the use of respected judicial ambassadors – to ensure the proposal does not produce unintended consequences.

*Finally*, and related to the previous point, the Commission should ensure that its educational programs for judges include regular and forceful presentations on the judges' post-*Booker* duty to view each criminal defendant holistically as an individual, and the judges' power – and indeed duty in the appropriate case – to vary from the Guidelines. As the graph reproduced above illustrates, just as there is a persistent percentage of cases where departure rather than pure variance authority is used, there is a persistent and troublingly large percentage of cases (ranging from 42% to 51%) in which no departure or variance is granted at all. If judges were merely using the Guidelines as an initial benchmark, as the *Booker* jurisprudence requires, it is almost inconceivable that so many defendants would be sentenced each year *within* the applicable guideline range. If the Guidelines are only the starting point, after which the sentencing judge goes on to consider the wide range of mitigating and aggravating factors that make up an individual's life, conduct and future potential, common sense suggests that the mechanical guideline range will rarely represent the correct amount of time for a unique individual in their unique individual case. We submit that the persistence and prevalence of within-Guidelines sentences suggests the Commission's educational programs are deficient. Under *Booker*'s humane regime, the goal is individualized sentencing not national uniformity.

**Conclusion**

NACDL once again thanks the Commission for this opportunity to present our comments on the proposed amendments in this cycle. For any amendments not addressed in this letter, NACDL joins in the comments submitted by the Federal Defenders.

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