



Submitted Electronically

February 3, 2025

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

Re: The Sentencing Project Comment on “Career Offender” Guideline

Dear Judge Reeves:

The Sentencing Project appreciates the opportunity to comment on the Commission’s proposed amendments relating to §4B1.2, the “career offender” guideline, for the amendment cycle ending May 1, 2025. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just and equitable sentencing policies.

An individual is classified as a career offender under the Sentencing Guidelines if they commit a crime of violence or a controlled substance offense after two prior felony convictions for those crimes. The guidelines assign all individuals classified as career offenders to Criminal History Category VI and to offense levels at or near the statutory maximum for their offense, often resulting in lengthy sentence recommendations.¹ The career offender guideline has been widely criticized by practitioners, judges, and by those who must serve the long sentences that it can yield.² The long-standing pattern of federal judges choosing to sentence individuals with career offender sentencing enhancements below the guidelines range demonstrates the consensus that the guideline is often too severe.³ And its burden falls disproportionately on Black individuals. Roughly one quarter of all federally sentenced individuals in FY23 were Black,⁴ but over half of those subject to the career offender guideline were Black.⁵

¹ U.S. Sentencing Commission (2024). U.S. Sentencing Guidelines. [§4B1.2](#).

² See U.S. Sentencing Commission (2016). [Report to Congress: Career Offender Sentencing Enhancements; Sample of Public Comment on Proposed Amendments](#) (2023).

³ See, e.g. U.S. Sentencing Commission (2012). Quick Facts: Career Offenders; U.S. Sentencing Commission (2021). Quick Facts: Career Offenders; U.S. Sentencing Commission (2024). Quick Facts: Career Offenders.

⁴ U.S. Sentencing Commission (2023). [Annual Report 2023](#).

⁵ U.S. Sentencing Commission (2024). Quick Facts: Career Offenders.

These disparities are unsurprising, given that the career offender guideline effectively bakes in systemic inequalities that resulted in prior relevant convictions, particularly at the state level. “Police officers are more likely to stop Black 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.”⁶ As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.⁷ Moreover, Black and poor people are more likely to have pled guilty to a prior charge because of the coercive aspects of many state bail systems, and inadequate counsel in states with overburdened public defender systems.⁸ Those pleas, often to drug charges, then form the predicate felonies for sentencing under the federal career offender guideline.

Stakeholders, including The Sentencing Project, have offered extensive feedback on potential changes to the career offender guideline over the past decade. For example, in our March 14, 2023 letter on prior proposed amendments to the career offender guideline, we expressed strong concerns regarding the potential elimination of the categorical approach⁹ to defining crimes of violence, which, without other significant changes to the career offender guideline, would have expanded the reach of the career offender guideline and likely deepened racial disparities.¹⁰ We applaud the Commission for the robust revision of the career offender guideline that it now proposes as it again considers the elimination of the categorical approach – particularly the potential exclusion of state drug offenses.

If the Commission now chooses to eliminate the categorical approach we urge you to prioritize two principles. First, at minimum, the career offender guideline should not apply to more individuals. Ideally, it should apply to fewer. Given that the guideline makes already significant federal penalties even more punitive, its application should be restricted to those with the most substantial criminal records. Lengthening already long sentences typically does not reduce recidivism.¹¹ Individuals also naturally desist from crime as they age – lengthy sentences are rarely necessary for public safety.¹² Faced with a worsening staffing and infrastructure crisis,

⁶ See, e.g. Ghandnoosh, N. (2015). The Sentencing Project. [Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System](#).

⁷ 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 (2010). Justice for All? Challenging Racial Disparities in the Criminal Justice System. American Bar Ass’n.

⁸ U.S. Commission on Civil Rights (2022). [The Civil Rights Implications of Cash Bail](#).

⁹ The categorical approach is a form of legal analysis focused on the elements of the statute of conviction, not the individual’s actual conduct.

¹⁰ Comment from FAMM, the American Civil Liberties Union, Bend the Arc: Jewish Action, Equal Justice USA, the Japanese American Citizens League, Juvenile Law Center, The Leadership Conference on Civil and Human Rights, NAACP Legal Defense and Educational Fund, Inc., the National Association of Criminal Defense Lawyers, the National Center for Transgender Equality, the National Council of Churches, and The Sentencing Project (2023). [Proposed Amendments to the Career Offender and Criminal History Guidelines](#).

¹¹ Maurer, Marc (2018). The Sentencing Project. [Long-Term Sentences: Time to Reconsider the Scale of Punishment](#). 87 UMKC Law Review 1.

¹² Ghandnoosh, N. (2021). The Sentencing Project. [A Second Look at Injustice](#); Loeber, R., & Farrington, D. (2014). Age-crime curve. In G. Bruinsma & D. Weisburd (Eds.), Encyclopedia of criminology and criminal justice (pp. 12–18). Springer; Piquero, A., Hawkins, J., & Kazemian, L. (2012). Criminal career patterns. In R. Loeber & D. P.

federal prisons are also struggling to safely accommodate the existing prison population.¹³ We urge the Commission to work to ensure that the population does not further increase.

Second, the guideline should be revised in a manner to reduce racial disparities as much as possible, to address the longstanding inequities in career offender sentencing, which we discuss below.

As such, The Sentencing Project recommends that the definition of “controlled substance offense” in the federal career offender guideline be revised to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. Additionally, we recommend that for both drug offenses and crimes of violence, that predicate offenses triggering the career offender guideline be limited to those for which the individual served at least five years in prison.¹⁴

I. The career offender guideline should exclude state drug offenses to improve consistency in sentencing and to reduce the number of individuals given lengthier sentences solely based on prior drug offenses.

The plain language of 28 U.S.C. § 994(h)(2)(B) does not require the definition of “controlled substance offense” to include *state* drug offenses. As the Federal Public and Community Defenders articulated at length in their March 14, 2023 comment, read within the broader context of the Comprehensive Crime Control Act of 1984, it is clear that when Congress intended a provision to include non-federal convictions, it said so expressly.¹⁵ The Commission is well within its power to exclude state drug offenses from the career offender guideline.

Doing so would fulfill the purpose of the guidelines: bringing greater predictability and fairness to federal sentencing. The inclusion of state drug offenses injects substantial arbitrariness into career offender guidelines. State controlled substance laws may criminalize substances beyond those criminalized in federal law, or, in the case of marijuana, may decline to criminalize the same substances as other states.¹⁶ Statutory felony quantity thresholds differ.¹⁷ And charging and plea bargaining practices vary wildly even within state lines. Eliminating state drug offenses would increase the overall uniformity in the career offender guideline’s application.

Eliminating state drug offenses would also reduce the overall number of individuals who are subject to the career offender guideline solely based on drug trafficking offenses, which would be consistent with their considerably lower recidivism risk. As such, the Commission has previously recommended that Congress amend its directive to “no longer includ[e] those who

Farrington (Eds.), From juvenile delinquency to adult crime: Criminal careers, justice policy, and prevention (pp. 14–46). New York, NY: Oxford University Press, p. 40.

¹³ See Office of the Inspector General (2023). [Audit of the Federal Bureau of Prisons’ Efforts to Maintain and Construct Institutions](#).

¹⁴ Specifically, we recommend that the Commission adopt option 3, suboption A.

¹⁵ Federal Public and Community Defenders (2023). [Comment on Circuit Conflict re: Controlled Substance Offense \(Proposal 4B\) and Proposals to Amend Career Offender Guideline \(Proposal 6\)](#).

¹⁶ Knight, Carly (2023). [High Time to Revisit Federal Drug Sentencing: The Confusing Interplay Between Controlled Substances and Career Offender Sentence Enhancements](#). 39 Georgia St. Univ. L. Rev. 895.

¹⁷ See Ohio Criminal Sentencing Commission (2018). [50 State Low-level Drug Possession Review](#).

currently qualify as career offenders based solely on drug trafficking offenses,”¹⁸ recognizing that the guidelines existing criminal history rules adequately address their recidivism risk.¹⁹

Reducing the number of individuals given lengthier sentences based on prior drug convictions is vital if the Commission chooses to eliminate the categorical approach to defining crimes of violence. The categorical approach has played a significant role in limiting the application of the career offender guideline. The categorical approach is an analysis that looks to the statutory elements of an offense, rather than the potentially challenging-to-accurately-discern underlying facts of a prior conviction, when determining whether a conviction qualifies as a crime of violence.²⁰ In practice, the categorical approach excludes a significant proportion of convictions for violent crimes under state laws from being classified as crimes of violence for the purposes of guidelines. As we addressed in our March 2023 comment, were the Commission to eliminate the categorical approach and move to a conduct-based definition of crimes of violence without other significant amendments that limit the guideline’s applicability, the guideline’s reach would be harmfully overbroad. The Commission’s statistical analysis indicates that moving to an actual conduct approach to defining crimes of violence would potentially quadruple the number of individuals subject to the guideline based on such crimes of violence alone.²¹ In FY23, the Commission found that over 90% of individuals who were subject to the guideline received a longer sentence than they would have otherwise because they were classified as a career offender.²² Therefore broadening the application of the guideline would likely increase sentences for a significant portion of the federal docket, with limited (if any) public safety benefits and an added burden on the Bureau of Prisons and the loved ones of those serving the additional time. Excluding state drug offenses is one of two key ways the Commission can offset that increase.

II. The career offender guideline should exclude convictions which resulted in less than five years of imprisonment to ensure that they are of sufficient seriousness, to avoid a dramatic increase in the application of the guideline, and to reduce racial disparities.

We urge the Commission to ensure that this highly punitive sentence enhancement is limited to those who have caused the most harm by instituting a five year time served²³ requirement for predicate felonies. Not all felony crimes of violence are inherently serious offenses. A robbery, for example, can consist of shoving someone and running away with their purse. A five year time served requirement is not a perfect means of ensuring that only the most serious conduct is subject to the career offender guideline, but it will exclude a substantial portion of lower-level felony conduct. Likewise a five year time served requirement will ensure that the lowest federal drug offenses, which disproportionately arise out of Tribal communities where all drug offenses are prosecuted federally, do not qualify as predicate offenses.

¹⁸ U.S. Sentencing Commission (2016). [Report to Congress: Career Offender Sentencing Enhancements](#).

¹⁹ *Id.* at 44.

²⁰ *Id.* at 50.

²¹ U.S. Sentencing Commission (2024). [Data Briefing: Individuals Sentenced Under §4B1.2](#).

²² U.S. Sentencing Commission (2024). Quick Facts: Career Offenders.

²³ We recommend a five year time served, rather than five year sentence imposed, requirement given the significant disparity in proportion of sentence served across jurisdictions.

Given that the weight of the career offender enhancement, even after these recommended changes, will overwhelmingly fall on Black and Latino Americans, the Commission should follow the principle of parsimony in determining how many people will be exposed to even lengthier federal prison sentences. The Commission's statistical analysis based on FY22 data indicates that a proposed amendment excluding state drug charges, using actual conduct to define crime of violence, and excluding one and two criminal history point offenses would result in Black Americans comprising 50% of those subject to the career offender guideline, and Latinos making up another 21%.²⁴ Given these disparities, the Commission should ensure that it is wielding the career offender enhancement for a narrow set of cases.

We appreciate the Commission's openness to meaningful and significant reforms. As the Commission contemplates eliminating the categorical approach, we encourage you to learn from the career offender guideline's past failures and ensure that it is neither overbroad nor a driver of further racial disparities.

Thank you for this opportunity to provide feedback and please reach out to Liz Komar, Sentencing Reform Counsel, at lkomar@sentencingproject.org with any questions.

Sincerely,



Kara Gotsch
Executive Director
The Sentencing Project

²⁴ U.S. Sentencing Commission (2024). [Data Briefing: Individuals Sentenced Under §4B1.2](#).