Submitted electronically

March 14, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002
Attn: Public Affairs—Proposed Amendments

Re: Proposed Amendments to the Career Offender and Criminal History Guidelines

Dear Judge Reeves:

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 appreciate the opportunity to comment on the United States Sentencing Commission's proposed amendments to the career offender and criminal history guidelines.[1] Commenters include organizations dedicated to civil rights and racial equity, attorneys who represent people impacted by the proposed amendments, and non-profit organizations who serve them.

Commenters commend the Commission for its comprehensive and thoughtful approach to a variety of issues addressed in the proposed amendments. In particular, Commenters applaud the serious, data-driven approach that has led the Commission to propose eliminating status points when calculating defendants' criminal history. This proposed amendment represents the Commission at its best: following the data to create sensible policies that reduce racial sentencing disparities in the service of justice.[2] We urge the Commission to adopt this recommendation.

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[1] U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Feb. 2, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf ("Proposed Amendments").

[2] *See* U.S. Sentencing Commission, *About the Commission*, https://www.ussc.gov/ (last visited March 8, 2023) ("The U.S. Sentencing Commission . . . was created by Congress in 1984 to reduce sentencing disparities and promote transparency and proportionality in sentencing.").

Commenters encourage the Commission, however, to reconsider its proposed career offender guidelines, which run contrary to these goals. Commenters share significant concerns that the proposed career offender guidelines would greatly expand the application of the career offender sentencing enhancement, exacerbating the very problems of over-incarceration and racial inequity the Commission is charged with preventing. The proposed amendments would also create significant administrative difficulties in implementation, including by making mini trials necessary in many cases, and thus prove unworkable in practice. Put simply, the proposal does not solve any of the perceived problems with the current career offender guideline; rather, it would multiply them. For the reasons set forth below, and for the reasons provided by the Federal Defenders in their comments and testimony, Commenters urge the Commission to reconsider its proposed career offender guidelines.

I. The Proposed Career Offender Guidelines Would Exacerbate, Rather than Reduce, the Significant Racial Inequities in Federal Sentencing.

Commenters urge the Commission to reconsider its proposed changes to the career offender guidelines. The Commission states that the proposed amendments are intended to make the career offender guidelines easier to administer and fairer. But these changes, if implemented, would exacerbate, rather than reduce, racial disparities in federal sentencing.

The career offender guidelines provide for a significant sentencing enhancement for defendants who have "at least two prior felony convictions of either a crime of violence or a controlled substance offense," and are being sentenced for a third.[3] Once a defendant is designated a career offender, he generally (with some exceptions) will be placed in criminal history category VI, and receive a higher base offense level, which is intended to ensure that he will receive a guidelines range "at or near the maximum term authorized."[4] The terms "crime of violence" and "controlled substance offense" are, in turn, defined in Section 4B1.2, which currently includes both certain enumerated offenses and an elements-based approach to capture offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another."[5] Under the current law, courts apply a "categorical approach" to determine whether a prior conviction "necessarily" entailed a finding of guilt as to the required elements. *Taylor* v. *United States*, 495 U.S. 575, 599 (1990).

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[3] U.S. Sentencing Guidelines Manual §4B1.1(a).

[4] *Id.* §4B1.1(b) & Background Note (quoting 28 U.S.C. § 994(h)).

[5] *Id.* §4B1.2(a), (b).

The proposed amendments would drastically alter Section 4B1.2 by eliminating the categorical approach and instead defining "crime of violence" and "controlled substance offense" by reference to a list of federal sentencing guidelines, rather than by offenses or the elements thereof.[6] The proposed amendments would also specifically broaden the definitions of "robbery" and "controlled substance offense," and expand the guideline's application to inchoate offenses.[7] Taken together, these expansions of the career offender guideline are likely to significantly increase the length of incarceration faced by federal defendants—and this burden will fall disproportionately on Black people.

A. The current career offender guidelines already drive overincarceration and inequity in federal sentencing without any evidence that they enhance public safety.

It is well established that Black people sentenced in federal court receive inexplicably longer sentences than white people.[8] Indeed, data suggests that between 8,000 and 11,000 Black men are in federal prison at any given time due to this unexplained disparity.[9]

Black people are also disproportionately likely to be sentenced under the career offender guideline. 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.[10] And

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[6] Proposed Amendments, *supra* n.1, at 144.

[7] *Id.*

[8] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1321 (2014). For example, during 2008 and 2009, the average federal court sentence was 90 months for Black men, compared to 55 for white men. *Id.* One regression analysis concluded that, while some of this discrepancy may be related to factors such as the arrest offense and criminal history, even after controlling for these and other characteristics, "an unexplained black-white sentence disparity of approximately 9 percent remains," a disparity that rises to 13% in a broader sample that includes drug cases. *Id.* at 1323.

[9] *Id.*

[10] *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

defendants sentenced under the career offender guidelines—again, the majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.[11]

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. Commenters are all too familiar with the ways that Black communities and other communities of color face systematic and ongoing discrimination at every level. For example, Black people are more likely to have

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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 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf [hereinafter, *Quick Facts* 2021] (showing that, in fiscal year 2021, Black people constituted 58.2% of those subject to the career offender guideline), *with* U.S. Sentencing Commission, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard (choose "2021" from the 'Fiscal Year" dropdown; then select "Black" from the "Race" dropdown in the "Demographics" category) (showing that in fiscal year 2021, only 22.8% of federal defendants were Black).

[11] 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 guidelines 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 38.5% 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 March 4, 2023).

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."[12] In some jurisdictions, like Ferguson, Missouri, "these patterns hold even though police have a higher 'contraband hit rate' when searching white versus black drivers."[13]

One recent example of overpolicing: in 2019, Madison County, Mississippi entered into a (still ongoing) consent decree following allegations that its Sheriff's Department "methodically targeted Black individuals for unlawful searches and seizures, which were often accompanied by unjustified and excessive force."[14] During the course of the litigation, plaintiffs had submitted evidence that 77% of all arrests in Madison County between 2012 and 2017 were associated with Black individuals, although only 38.4% of the Madison County population was Black as of 2016.[15] Plaintiffs likewise submitted evidence that the Sheriff's Department used roadblocks to target Black communities: "the number of roadblocks per [1,000 people] in the census tracts with a substantially larger Black percentage of the population was twice the number of roadblocks per 1,000 residents in census tracts with a relatively low Black percentage of the population"—even controlling for differences in traffic-related arrest rates, traffic behavior, and socioeconomic factors.[16] As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.[17]

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[12] *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.10, at 134.

[13] *Black Lives Matter*, *supra* n.12, at 4.

[14] Amended Order Granting Motion for Entry of Consent Decree, Dkt. No. 374, at 1, *Brown* v. *Madison County*, Case No. 17-CV-347 (S.D. Miss. Oct. 11, 2019) (Reeves, J.).

[15] *See* Summary Declaration of Rahul Guha, Ph.D., Dkt. No. 231-2, at 3–5, *Brown* v. *Madison County*, Case No. 17-CV-347 (S.D. Miss. Mar. 14, 2018).

[16] *See* Report of Bryan Ricchetti, Ph.D., Dkt. No. 231-1, at 4–5, 27, *Brown* v. *Madison County*, Case No. 17-CV-347 (S.D. Miss. Mar. 14, 2018).

[17] 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),

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. These two features of many state-court systems reinforce one another.

For example, in Louisiana, a study found that 1,769 full-time public defenders were needed to provide reasonably effective assistance of counsel—but as of 2016, Louisiana employed approximately 363.[18] And in Mississippi, although around 85% of criminal defendants rely on public defenders,[19] Mississippi public defenders likewise "carry excessive caseloads that prevent the rendering of effective representation" and, as a result, almost "never hire investigators and have no time to investigate cases themselves."[20] Public defenders face similar challenges in far too many jurisdictions across the country and, even where they are comparatively well resourced, frequently have significantly fewer resources than private counsel.

Black people bear the disproportionate brunt of a system that leaves defendants locked up pre-trial for extended periods due to both inadequate public defense resources and the often insurmountable burden of paying even small amounts of bail. 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

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https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/justice_for_all_challenging_racial_disparities_criminal_justice_system/. This discrepancy is particularly salient to the career offender context, as the overwhelming majority—77.8% in fiscal year 2021—of defendants receiving the guideline enhancement are being sentenced for drug trafficking offenses. U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tbl. 26 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table26.pdf.

[18] Postlethwaite & Netterville, APAC & American Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards* 2 (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf.

[19] Univ. of Mississippi School of Law, *Thousands Stuck in Mississippi Jails with High Bail and No Lawyer* (Jan. 12, 2022), https://law.olemiss.edu/thousands-stuck-in-mississippi-jails-with-high-bail-and-no-lawyer/.

[20] Sixth Amendment Center, *The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services* 87, 92 (2018), https://courts.ms.gov/research/reports/6AC_mississippi_report_2018.pdf.

monetary bail—but 90% were unable to post it.[21] 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."[22] 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,"[23] perhaps due in part to the fact that "similar felony pretrial detainees were more likely to plead guilty by 10 percentage points."[24] According to a study from the Roderick and Solange MacArthur Justice Center at the University of Mississippi School of Law, as of January 2022, there were more than 5,800 people incarcerated in Mississippi county jails—and 2,716 (or 46.8%) of them had been in jail longer than ninety days. More than 1,000 (or 17.2%) had be incarcerated for more than nine months; and 731 (or 12.6%) had been incarcerated for more than one year.[25] Although the study does not plot the racial demographics against length of time incarcerated, there is no reason to believe that these national trends do not hold true in Mississippi.[26]

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. [27] 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

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[21] 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.

[22] *Id.* at 33–34.

[23] *Id.* at 52.

[24] *Id.* at 51.

[25] *Thousands Stuck in Mississippi Jails*, supra n.19.

[26] Although only 39% of Mississippi residents are Black, Black people constitute 57% of Mississippi's jail population; the incarceration rate of Black people in Mississippi jails has increased 85% since 1990, and as of 2015, Black people in Mississippi were incarcerated at 2.2 times the rate of white people. Vera Institute of Justice, *Incarceration Trends in Mississippi* 1–2 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-mississippi.pdf.

[27] *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.21, at 53–54.

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[28]; as of fiscal year 2021, that is still true for more than 56%.[29] Moreover, "[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores."[30] 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.[31]

The long-standing pattern[32] 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

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[28] *Quick Facts* 2012, *supra* n.10, at 1.

[29] *Quick Facts* 2021, *supra* n.10, at 1. In fiscal year 2014, the application of the career offender enhancement had an impact on the guidelines range for 91.3%—nearly all—of the people sentenced under that guideline; indeed, 46.3% saw an increase in *both* their criminal history category and final offense level. *Report to the Congress*, *supra* n.11, at 21.

[30] *Report to the Congress*, *supra* n.11, at 21.

[31] *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 guidelines 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).

[32] *See, e.g.*, *Quick Facts* 2012, *supra* n.10, at 2 (chart); *Quick Facts* 2021, at 2 (chart); *see also Report to the Congress*, *supra* n.11, at 23 ("[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.").

influence."[33] Section 4B1.1 therefore "has among the lowest within-guideline rates each year."[34] And the gap between the guidelines range and the sentence imposed is also ever-widening.[35] Indeed, as of 2016, the Commission was well aware of "concerns that the career offender directive fails to meaningfully distinguish among career offenders with different types of criminal records and has resulted in overly severe penalties for some offenders."[36] The Commission has previously expressed its view that consistent downward variances reflect sentencing courts' perception that the guidelines are too high, and that the guidelines should be lowered, where possible, to reflect court practice.[37] Expanding the reach of the career offender guideline, as Commenters believe the proposed amendment will do, is likely to result in the opposite outcome—and lead only to increased variances from the guidelines.

Although racial inequities and over-incarceration would be sufficient cause for concern, the issues with the career offender enhancement are compounded by the enhancement's lack of impact on public safety. Since the 1980s our prison population has grown exponentially, with much of this growth attributed to the increase in the number of people sentenced due to drug crimes and the increase in length of drug sentencing.[38] Despite the massive growth in incarceration, there is

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[33] 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.

[34] *Id.* at 55.

[35] *Id.* at 56 (showing the gap between the average guideline minimum and the sentence imposed to grow from 45.6 months in fiscal year 2005 to 66.9 months in fiscal year 2017). When the data was limited to "those cases in which judicial discretion can be meaningfully assessed," the difference between the average guideline minimum and average sentence imposed was slightly less than for Section 4B1.1 cases considered generally. *Id.* at 58. But that percentage difference has continued to increase "and, contrary to the [methodology accounting for all Section 4B1.1 cases], does not appear to be slowing." *Id.*

[36] *See Report to the Congress*, *supra* n.11, at 2.

[37] *Id.* at 8.

[38] *See, e.g.*, Nathan James, *The Federal Prison Population Buildup: Options for Congress* 1, 18, Congressional Research Service (May 20, 2016), https://crsreports.congress.gov/product/pdf/R/R42937; Charles Colson Task Force on Federal Corrections, Urban Institute, *Drivers of Growth in the Federal*

no indication that significantly longer sentences—like those imposed by the career offender enhancement—deter crime, protect public safety, or decrease drug use or trafficking. Increasing the severity of punishment has little impact on crime deterrence, and studies of federal drug laws show no significant relationship between drug imprisonment rates and drug use or recidivism[39]; instead, incarceration can actually increase the chances an individual may recidivate.[40] Excessive punishment and mass incarceration have thus produced lasting harm on individuals, families, and communities across the country while having little effect on actual drug use or crime.

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

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Prison Population 1–2 (March 2015), https://www.urban.org/sites/default/files/publication/43681/2000141-Drivers-of-Growth-in-the-Federal-Prison-Population.pdf.

[39] *See, e.g.*, Erik Luna, *Mandatory Minimums*, *in* 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 117, 127–130 (Erik Luna, ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf; National Institute of Justice, U.S. Dep't of Justice, *Five Things About Deterrence* (May 2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf; Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return (*Aug. 27, 2015), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return.

[40] *See, e.g.*, Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review,* 50 Crime & Justice 353, 357 (2021).

[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.*

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]

Commenters are deeply concerned that the Commission now seeks to expand, rather than narrow, the scope of the career offender guideline—even though the data underlying its previous recommendation remains materially unchanged. The racial disparities detailed above, taken together with the lack of evidence that the imposition of the guideline reduces recidivism or improves public safety, strongly caution against any action that would expand their reach.

B. The proposed amendments would likely exacerbate these inequities.

The proposed amendments to the career offender guideline would not address any of the disparities outlined above. Instead, the amendments are likely to deepen the harm to communities of color.

The proposal recommends 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 an accusation-based approach: that is, in determining whether a prior conviction qualifies as a predicate for the enhancement, courts will look to "the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted."[46] This determination will be "based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's

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[43] *Fifteen Years*, *supra* n.10, at 134 (emphasis in original).

[44] *Report to the Congress*, *supra* n.11, at 3.

[45] *Id.* at 44.

[46] Proposed Amendments, *supra* n.1, at 151.

conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means."[47] The commentary notes emphasize that "[t]he fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines . . . is not determinative."[48]

The Commission also proposes permitting sentencing courts to look to additional documents from the prior case to determine whether that prior conviction qualifies.[49] These may include the judgment of conviction, the charging document, the jury instructions, the judge's formal rulings of law or findings of fact, a plea agreement or transcript of plea colloquy, any explicit factual finding by the trial judge to which the defendant had assented, and "[a]ny comparable judicial record of the sources described."[50] 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. *See Descamps* v. *United States*, 570 U.S. 254, 258, 267 (2013). But under the proposed amendments, they would always be available to the sentencing court.

In short, rather than looking to an objective test to determine whether the elements of the prior offense "necessarily" involved a crime of violence or a controlled substance offense, courts will look to a subjective test to determine whether, based on a variety of documents from the prior offense, "any means" of committing a qualifying offense had been established. Commenters expect that moving to such an approach will both expand the number of defendants who are sentenced under the career offender guidelines (thus exacerbating the inequities already present in that system) 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. In other words: rather than addressing the inequities detailed above, the proposed expansion of the career offender guideline will make each of them worse.

Commenters are concerned that an "actual conduct" approach to prior convictions does not always result in a finding of the facts that truly occurred, but rather reflects the outcome of a process already weighted down by systemic inequities. As described above, Black and poor people are disproportionately likely to be represented by overburdened public defenders in state court, where their counsel

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[47] *Id.*

[48] *Id.* at 153.

[49] *Id.* at 153–54, 161.

[50] *Id.* at 153.

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 that was charged but denies the factual allegations in the charging document (even where the defendant may dispute some of those factual allegations). Based on Commenters' experience, expanding sentencing courts' ability to rely on *Shepard* documents even where the statute of conviction is indivisible is therefore flawed and likely to exacerbate the inequities detailed above.

Under an accusation-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 at sentencing whether or not prior convictions qualify as predicates for a career offender enhancement. 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).[51] Such documents are therefore likely to bake in any bias or inaccuracies contained in those police reports. For example, recent—and tragic—news reports revealed that "[a] police report written hours after officers beat Tyre Nichols was starkly at odds with what videos have since revealed."[52] The police report stated that Mr. Nichols was "an irate suspect who had 'started to fight' with Memphis police officers, even reaching for one of their guns"—even though the videos "showed nothing of the sort."[53] The police report also failed to mention "the powerful kicks and punches unleashed on Mr. Nichols," who died several days later from those injuries.[54] The videos, however, "captured police officers yanking Mr. Nichols from a car, threatening to hurt him and then—after he ran away—catching up with him and inflicting the deadly beating."[55] Based on Commenters' experience, even despite the availability of video evidence, a charging document

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[51] The Department of Justice goes one step further: in the March 7, 2023 hearing before the Commission, the DOJ witness proposed that courts be permitted to look beyond the set of *Shepard* documents currently captured in the proposed amendment and rely on the police reports themselves. Although the DOJ witness described these as "reliable police documents," that is simply inaccurate. As the example Commenters set forth here illustrates, police reports are at best one-sided, and at worst actively misleading—often in ways that fall disparately on Black defendants.

[52] 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.

[53] *Id.*

[54] *Id.*

[55] *Id.*

might well have reflected the police officers' narrative—and a court relying uncritically on that charging document might have come to the erroneous conclusion that Mr. Nichols, rather than the police officers, had committed a crime of violence. At a subsequent federal sentencing hearing years later, where the Federal Rules of Evidence do not apply,[56] a defendant would face meaningful difficulties in gainsaying such sources of evidence.

The Commenters are in good company with their concerns that using an accusation-based approach to determine whether a prior conviction is a crime of violence or a controlled substance offense will result in injustice. The Supreme Court has already set forth the reasons that "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor*, 495 U.S. at 601. 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]." *Id.* at 601–02. These questions and concerns have never been answered satisfactorily in the intervening three decades, nor are they addressed in the proposed amendments, or by the Department of Justice.[57]

Moreover, a career offender enhancement that uncritically accepts the convictions resulting from state-court systems cannot help but compound the inequities within those systems that Commenters detailed above. Expanding the career offender guideline to an accusation-based approach will only broaden the number of people who are affected. By relying on an increasing (and nebulous) set of sources outside the elements of the offense of prior conviction, the proposed amendment would set courts to a path of mini-trials.

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

[57] *See* U.S. Department of Justice, Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Feb. 27, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/DOJ4.pdf.

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." *Descamps*, 570 U.S. at 270. The "facts" contained "in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis* v. *United States*, 579 U.S. 500, 512 (2016). 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." *Descamps*, 570 U.S. at 270. As a result, "a prosecutor's or judge's mistake . . . reflected in the record, is likely to go uncorrected." *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." *Id.* Finally—and "[s]till worse"—an accusation-based approach "will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 570 U.S. at 271. Thus, "an elements-focus avoids unfairness to defendants." *Mathis*, 579 U.S. at 512.[58]

In sum, based on the Commission's own data, Commenters expect that adopting the proposed amendments would result in significantly heightened sentences across the federal system, without commensurate deterrence and crime prevention. And the overincarceration that will result will disproportionately impact Black defendants and communities. Commenters therefore strongly urge the Commission to follow its data to an outcome that is more just and equitable.

II. The Proposed Career Offender Guidelines Would Exacerbate, Rather than Address, the Difficulties in Implementing the Current Career Offender Guidelines.

The proposed career offender guidelines would also exacerbate the very practical difficulties in administering the guidelines that the Commission purports to address. In the prefatory material explaining its proposed amendment, 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

[58] For all of these reasons, the "actual conduct" method proposed by the Department of Justice, *see id.* at 31, is even less likely to allow courts to uncover what "actually" happened that led to decades-old state-court convictions.

qualifying predicate offenses or not.[59] Although Commenters appreciate 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—even as it deepens inequities and injustices. It is never appropriate to sacrifice fairness, justice, and racial equity for the sake of administrative efficiency. But the proposed amendments will not accomplish even that.

Although the Commission (and the critics it echoes) are certainly correct that the current categorical approach has spurred a high volume of litigation, there is no reason to believe that adopting the proposed amendments would reduce it. Instead, the Commission's proposal is likely to increase litigation. First, the proposal offers minimal guidance on how to accomplish the hard work of determining which Chapter Two guideline "covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted."[60] This difficulty will be particularly acute for categorizing prior state offenses, which will not fall as neatly into the federal guidelines as federal offenses will.

Imagine, for example, a defendant who was previously indicted in state court for "criminal gang activity" based on "drug trafficking *and/or* possession of marijuana."[61] The police had found some illegal substances in her apartment—according to the charging document, an amount just enough to cross the line from simple possession to intent to distribute—but it belonged to her juvenile son. She decided to say it was hers, to keep her son from getting in trouble.[62] She was held pre-trial, didn't have access to a public defender during that time, and couldn't afford the set bail amount.[63] She was worried about what would happen to her job, and her apartment, and her son if she remained in jail. Her attorney, when she got one, didn't have the resources to double-check whether lab tests confirmed the weight of the substances seized (which, in truth, were lower than the charging document had suggested).[64] So she made a deal with the prosecutor to plead guilty in exchange for time served, but that plea agreement was never reduced to writing.

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[59] Proposed Amendments, *supra* n.1, at 146.

[60] *Id.* at 151.

[61] Unlikely as it may seem, some state court proceedings do employ disjunctive indictments of this sort. *See, e.g.*, *United States* v. *Adkins*, 729 F.3d 559, 566 (6th Cir. 2013).

[62] *See* Yoffe, *supra* n.27.

[63] *See id.*

[64] *See* Sixth Amendment Center, *supra* n.20 (noting public defenders' inability to conduct investigations due to lack of resources).

She had a short hearing, in which she pleaded guilty to Count I of the indictment, and the precise amount of illegal substance at issue was not mentioned at the colloquy. She was released from jail, never appreciating that she had pleaded guilty to a felony that could have a significant impact on a future sentence. How, under the proposed amendment, would a sentencing court go about categorizing that prior conviction? How would it determine which Chapter Two guideline most closely matched the "conduct" of a woman who had, in actuality, neither possessed nor trafficked drugs? How would it apply the "by any means" test, where the charging document itself provides different means of committing the offense?

Even for federal offenses, questions abound: imagine, for instance, a situation in which a defendant had been charged with a federal offense that would be categorized under one Chapter Two guideline, agreed with the prosecution in a plea agreement to jointly request the application of a different guideline, and was ultimately sentenced under still a third. When a later court is trying to determine how to categorize this prior offense, which controls? Commenters thus expect that, if the proposal is adopted, significant litigation will ensue as prosecutors and defendants argue over which guideline presents the best match for various prior convictions.[65]

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. *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).[66] As a result, one controlling case can often answer whether a prior conviction qualifies under *either* enhancement. But if the Commission creates a separate track for the career offender guide, all of the settled law categorizing prior state convictions as qualifying predicates (or not) will fall by the wayside. In other words, parties will have to re-litigate the question of whether, under the new approach, convictions of

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[65] And, as described above, moving to an accusation-based approach will also lead district courts to undertake time-consuming and inefficient mini-trials at sentencing in an effort to determine what conduct underlay a prior conviction.

[66] Commenters thus commend the Commission for making clear in the proposed amendments that the *Borden* rule, holding that a prior conviction with a mens rea of recklessness is insufficient to count as a "violent felony" under the Armed Career Criminal Act, also applies in determining whether a prior conviction is a "crime of violence" under the career offender guideline. *Compare Borden* v. *United States*, 141 S. Ct. 1817 (2021), *with* Proposed Amendments, *supra* n.1, at 151.

certain crimes do or do not count as qualifying predicates. And if a question arises about a state-court offense that has not already been the subject of litigation, then two controlling cases, rather than one, will be required to resolve the issue: one under the revised career offender guideline, and one under the ACCA. And, to the extent litigation under the revised guideline relies heavily on a specific fact pattern, even one case may not suffice to settle the issue of whether a certain state-court offense will qualify or not in every circumstance. 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 guidelines. 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."[67] 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."[68] This is not a reason, however, to swing the pendulum all the way to the other side. As explained above, moving to an accusation-based approach, under which a defendant can receive a career offender enhancement if there are "any means" of committing a predicate offense in a way that would fall under an enumerated Chapter Two guideline, would sweep in people who truly had not committed a crime of violence. Or, to put things in parallel terms: it would create a "legal fiction" in which an offense that a defendant commits non-violently is deemed to be a violent offense because other defendants at other times could have been convicted of violating the same statute with violence. 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, however, sentencing courts remain free to impose an upward variance—as they have always been.

Finally, Commenters also note that, even under the current system, factual and legal errors in understanding and categorizing prior offenses do sometimes

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[67] *Report to the Congress*, *supra* n.11, at 50.

[68] Proposed Amendments, supra n.1, at 146.

happen—with devastating consequences for the defendant.[69] The confusion that will surely follow from the proposed amendments would all but guarantee that the number of such mistakes multiplies.

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.[70] The adjustments it now proposes, however, would do the opposite. The Commission should decline to adopt its proposed amendments to the career offender guideline. But, should the Commission proceed, Commenters strongly recommend that, at the very least, the Commission revise 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—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.

III. The Proposed Criminal History Guidelines Properly Eliminate Status Points.

Under the current Section 4A1.1(d), courts are instructed to add two points to a defendant's criminal history calculation "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." The Commission has now set forth three options for revising the way the guidelines address these "status points." Because Commenters agree with the Commission that the inclusion of status points is unsupported by its data, Commenters applaud the Commission's proposal to revise that guideline to minimize reliance on status points, and urge the Commission to eliminate status points entirely.

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[69] *See, e.g.*, John Patrick Bailey, Note, *Run-On Sentence: Remedies for Erroneous Career Offender Enhancements*, 65 Duke L.J. 1477, 1502–03 (2016) (collecting cases of factual error regarding predicate offenses); Joint Motion for Resentencing to Time Served and Request for Order of Immediate Release, Dkt. No. 115, *United States* v. *Pinckney*, Case No. 08-CR-909 (D.S.C. June 9, 2016) (noting legal error in categorizing prior conviction as a predicate offense under the Armed Career Criminal Act).

[70] *See supra* at 11; *see also generally Report to the Congress*, *supra* n.11.

This proposal is well supported by the Sentencing Commission's recent report on status points.[71] The report acknowledges that the inclusion of status points have a significant impact on defendants' guidelines calculations: for 61.5% of defendants—or 46,978 people between fiscal years 2017 and 2021—who received status points, those additions moved them into a higher criminal history category.[72] In most cases, this will meaningfully raise the applicable guidelines range.[73]

As the Commission recognizes, however, its data do not demonstrate that these additional years of incarceration serve the purpose of specific deterrence.[74] Analyzing people who were released from federal prison in 2010, the Commission found that "[t]hose who received status points were rearrested at similar rates to those without status points who had the same criminal history score."[75] In fact, among people with a criminal history score of seven, those without status points were slightly *more* likely to be rearrested within the eight years following release.[76] "While rearrest rates rose as the criminal history score increased, the differences in rearrest rates between status offenders and non-status offenders within each criminal history score were not statistically significant."[77] Overall, the inclusion of status points "only minimally improve[s] the criminal history score's successful prediction of rearrest—by 0.2 percent."[78] In other words, "status points improve the criminal history score's successful prediction of rearrest for only 15 out of 10,000" defendants.[79]

Although status points are not indicative of a propensity to recidivate, they are indicative of inequity. Between fiscal years 2017 and 2021, 32.7% of defendants

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[71] U.S. Sentencing Commission, *Revisiting Status Points* (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220628_Status.pdf.

[72] *Id.* at 11.

[73] *See* U.S. Sentencing Commission, *Sentencing Table* (Nov. 1, 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/Sentencing_Table.pdf.

[74] Proposed Amendments, *supra* n.1, at 177.

[75] *Revisiting Status Points*, *supra* n.71, at 3.

[76] *Id.* (69.6% of those with status points, compared to 70.4% of those with status points, were rearrested).

[77] *Id.* at 14.

[78] *Id.* at 3 (score correctly predicts rearrest 65.1% of the time with status points, and 64.9% of the time without); *see also id.* at 17.

[79] *Id.* at 18.

assigned status points were Black[80]—but during that time only 20.5% of all defendants sentenced in the federal system were Black.[81] The additional burden of status points therefore fell disproportionately on Black defendants. This is unsurprising, given that Black communities are more likely to be overpoliced[82]—even though the inclusion of status points has not been found to carry any benefit to public safety.

In its efforts to redress the injustices resulting from the use of status points, the Commission has offered three options for comment: (1) to add a downward departure provision for cases in which status points apply; (2) to decrease the criminal history status points added from two to one, and add a departure provision that could result in either an upward or downward departure; or (3) to eliminate the use of status points altogether, while providing elsewhere "an example of an instance in which an upward departure" may be warranted.[83] Commenters strongly support the adoption of Option 3. The Commission should no longer employ status points as a benchmark for determining a guidelines range when the evidence no longer supports their use. Option 3 is therefore the choice most consistent with the data the Commission has provided.

In sum, the proposal to eliminate the use of status points in calculating criminal history is precisely the right step forward—for all the reasons the career offender proposal is a step backwards. Commenters praise the Commission for the inclusion of Option 3, support the Commission in implementing that revision, and encourage a coherent, unified, and data-driven approach to the overarching issues the Commission considers.

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[80] *Id.* at 7.

[81] *See Interactive Data Analyzer*, *supra* n.10 (select "Sentencing Outcomes" from the top bar; then select years "2017" through "2021" in the "Fiscal Year" dropdown (note that the chart includes the 334,836 cases reported to the Commission during these years); then select "Black" in the "Race" dropdown in the "Demographics" category (note that the chart now includes the 68,798 cases reported to the Commission during these years, within the selected demographic.)).

[82] *See supra* at 5. It is worth noting, for instance, that "[t]he most common prior conviction[]" of defendants assigned status points was the category of "public order offenses." *Revisiting Status Points*, *supra* n.71, at 8. There is a stark discrepancy between the percentage of people assigned status points who had prior convictions for "other public order" offenses (54%) and those who were not assigned status points who had similar prior convictions (41.3%). *Id.* at 9, fig. 3.

[83] Proposed Amendments, *supra* n.1, at 178.

Commenters appreciate the opportunity to share our views on this matter, consistent with our missions of promoting justice and equity in our criminal system, and would be happy to provide further information as requested. If you have any questions or would like to discuss the information in this comment, please contact FAMM's counsel, Jessica Morton, Senior Counsel at Democracy Forward Foundation, at 202-448-9090, or jmorton@democracyforward.org.

Respectfully submitted,

FAMM
American Civil Liberties Union
Bend the Arc: Jewish Action
Equal Justice USA
Japanese American Citizens League
Juvenile Law Center
The Leadership Conference on Civil and Human Rights
NAACP Legal Defense and Educational Fund, Inc.
National Association of Criminal Defense Lawyers
National Center for Transgender Equality
National Council of Churches
The Sentencing Project