



March 18, 2026

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

Re: Proposed Amendments for the 2026 Amendment Cycle (Jan. 30, 2026)

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless individuals and families, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the proposed amendments announced by the Commission in January 2026.

I. *Proposed Amendment 1 – Sentencing Options*

FAMM is thrilled to support the proposed amendment for sentencing options which recognizes the statutory obligation to consider *all* sentencing types, not just prison. In so doing, the Commission helps counter the presumption of prison that has long dominated federal sentencing.

**The Proposed Amendments Advance the Law**

The proposed amendments would create a new introductory commentary to Chapter 5, Part A describing the Commission’s obligation to promulgate guidance regarding the type of sentence to be imposed, to emphasize that the Sentencing Reform Act does not include a presumption of incarceration, and to acknowledge that the Supreme Court consistently finds probations and fines to be punitive in nature. In addition, Part A creates a new guideline at §5A1.1, establishing steps that, for the first time, direct a court to determine the *type* of sentence



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before deciding the *terms* of the sentence. Part B of the proposed amendment would expand the Sentencing Table zones such that more individuals with a low criminal history category would be eligible for probation or a split sentence. For people with higher criminal history (II-VI), the probation and split sentence opportunities are more limited.

As an organization that, for nearly 35 years, has advanced the idea of individualized sentencing, the language proposed in the introductory comment and the new guideline is deeply meaningful and vindicating for the family members and people we represent; people who, for too long, have felt like just another cog in the machine of the federal criminal justice system. As the Commission acknowledged, Congress itself “decided against establishing a presumption in favor of any particular sentence type, wary that ‘[a] congressional statement of a preferred type of sentence might serve only to undermine the flexibility that the criminal justice system requires in order to determine the appropriate sentence in a particular case in light of increased knowledge of human behavior.’”<sup>1</sup> Words matter, and enshrining this language in the guidelines is an important acknowledgment for impacted people who have been burdened by what often feels like a presumption *in favor* of prison.

*FAMM Supports the Proposed Language in Part A* – These proposals advance Congress’ vision for sentencing. As the Commission acknowledged in its proposed introduction to Chapter 5, Part A,<sup>2</sup> Congress did not want to impose a presumption in favor of one sentence type over another; flexibility is key to the purposes of punishment. In fact, in the Commission’s enabling statute, sentencing options are front and center. Congress directed the Commission to promulgate guidelines that would determine the sentence imposed in a criminal case, which includes “a determination whether to impose a sentence to probation, a fine, or a term of imprisonment.”<sup>3</sup> Separately, Congress directed that these guidelines determine the “amount of a fine or the appropriate length of a term of probation or a term of imprisonment.”<sup>4</sup>

This emphasis on flexibility is seen not just in Congress’ instructions to the Commission, but in Congress’ instructions to judges as well. Congress made clear that judges, in imposing a “sentence sufficient but not greater than necessary, [. . .] shall consider [. . .] *the kinds of sentences available*[. . .].”<sup>5</sup> Taken together, these Congressional commands evidence the importance of the work the Commission is presently undertaking – adjusting the framework from the beginning so that all available sentencing options are considered, rather than presuming a term of imprisonment.

For too long, imprisonment has felt like the only option. Probation and other sentencing options are exceedingly rare. In FY 2024, 89.1% of sentenced individuals were sentenced to a

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<sup>1</sup> U.S. Sent’g Comm’n (USSC), Sent’g Guidelines for U.S. Ct.’s, 91 Fed. Reg. 5556, 5559 (proposed Jan. 6, 2026) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 92 (1983)).

<sup>2</sup> *See id.* at 5558–59.

<sup>3</sup> *Id.* at 5559. *See also* 28 U.S.C. § 994(a)(1)(A).

<sup>4</sup> 28 U.S.C. § 994(a)(1)(B).

<sup>5</sup> 18 U.S.C. § 3553(a)(3).

prison term only.<sup>6</sup> In comparison, 6.9% of people received probation only.<sup>7</sup> Even more striking is the Commission’s data showing that of the over 27,000 people eligible for probation, 81% received a sentence of prison only.<sup>8</sup> Thus, the presumption in favor of prison is felt throughout the system, and the Commission’s steps to recalibrate are much needed. Doing so also helps align the Guidelines with Congressional intent.

Accordingly, FAMM supports the Commission in adding the introductory language to Chapter 5 and also supports the new guideline at §5A1.1. We also urge the Commission to make the language modifications suggested by the Federal Defenders in their submitted comment.<sup>9</sup>

*FAMM Supports the Proposed Part B* – One of the most impactful tools used by the Commission that reinforces its misguided presumption of prison is the Sentencing Table. In its current form, the Sentencing Table does not even mention the possibility of probation and instead explicitly calls out that the Sentencing Table’s value is measured “in months of imprisonment.”<sup>10</sup> In fact, the possibility of a sentence to probation does not even appear until Part B in Chapter 5. And even when mentioned, probation is labeled as an “alternative” to incarceration.<sup>11</sup> But probation is a meaningful punishment option, and the availability of that option should be clear. The possibility of probation and split sentences should also be expanded to more groups of people who may be well suited to a term of probation rather than a term of imprisonment. With this in mind, we support the proposed expansion of zones B and C in Part B, which will hopefully, in conjunction with the language changes above, encourage judges to sentence eligible individuals to options other than just prison, where appropriate. We would also welcome the Commission’s addition of including probation eligibility explicitly on the sentencing table.

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<sup>6</sup> See USSC., *Figure 6: Sentence Type for Individuals*, U.S. Sent’g Comm’n Datafile (2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/Figure06.pdf>.

<sup>7</sup> *Id.* A very small number of people received split sentences.

<sup>8</sup> USSC., *Proposed Amend. on Sentencing Options Pub. Data Briefing* at 7, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2026-Sentencing-Options.pdf> (last visited Mar. 18, 2026).

<sup>9</sup> Federal Public and Community Defenders, *Comment on Sent’g Options* at 15–18 (Mar. 2, 2026), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/woehr.pdf>.

<sup>10</sup> USSC, GUIDELINES MANUAL, Ch. 5, Pt. A (Nov. 2025).

<sup>11</sup> Other commentors have also noted that the very structure of the Guidelines Manual contributes to imprisonment becoming the default sentencing option. See Federal Defender Sentencing Guidelines Committee, *Proposed Priorities for the 2025-2026 Amend. Cycle*, Comment to 2025-2026 Amend. Cycle, U.S. SENT’G COMM’N at 4 (July 18, 2025), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170\\_public-comment\\_R.pdf#page=118](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=118) (discussing the many ways the structure of Chapter Five solidifies prison as the norm and creates “a powerful cognitive effect anchored toward prison time.”). The proposed amendment’s changes to the structure of Chapter Five are a laudable first step toward changing this default presumption of incarceration.

We also want to be clear that probation is punishment.<sup>12</sup> Nothing in the revised table assures that any individual will receive probation as opposed to a term of imprisonment. Imprisonment will always be an option. However, together, these proposals can help make the possibility of probation more of a reality than the near guarantee of prison.<sup>13</sup> Doing so not only comports to Congress' vision but also promotes public safety.

### **The Proposed Amendments Advance Public Safety**

By expanding opportunities for people to receive probation and stay in the community, the Commission is not just ensuring the Guidelines are in accord with the spirit of the law but is also advancing public safety.

Spending time in prison is harmful. This is particularly true in the current BOP. People are subjected to physical abuse, sexual abuse, and persistent lockdowns where programming and other services are unavailable. Medical care is regularly withheld while individuals are forced to live in environments that have crumbling infrastructure and are infested with mold. People also incur harm from being forced to leave their communities. They are alienated from family members and cut off from social service programs that help ensure their wellbeing.<sup>14</sup> Some data has shown that even *one day* in custody can have lasting impact, let alone years in prison.<sup>15</sup>

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<sup>12</sup> Probation is rigorous. People under supervision are expected to follow a set of rules, such as keeping appointments with probation or parole officers, maintaining employment, not using alcohol or other drugs, and paying required fees. Failure to follow the rules—referred to as technical violations—may result in revocation of the supervision and in some cases a term of incarceration. Jake Horowitz, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, PEW RSCH. CTR. (July 16, 2019), <https://www.pew.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations>. See also Dr. Shaneva D. McReynolds, Testimony at Pub. Hearing on Proposed Amend.'s to Fed. Sent'g Guidelines, U.S. SENT'G COMM'N (Mar. 9, 2026), <https://www.usc.gov/policymaking/meetings-hearings/public-hearing-march-9-2026> (discussing the onerous terms of supervision both her daughter and her husband were given for their respective federal offenses that Dr. McReynolds witnessed and experienced firsthand, for example, probation officers coming to their home and compliance checks during family gatherings).

<sup>13</sup> See source cited *supra* note 6.

<sup>14</sup> See Marta Nelson et al., *A New Paradigm for Sent'g in the U.S.*, VERA INST. OF JUST. (Feb. 2023) at 28–29, <https://vera-institute.files.svcdcdn.com/production/downloads/publications/Vera-Sentencing-Report-2023.pdf?dm=1676058378> (explaining that incarceration breeds disruption and trauma that make communities less safe because “the loss of so many men in the prime of their lives destabilizes the neighborhoods they leave behind” and “[f]amilies lose providers, children lose parents, and people lose current and potential intimate partners” while “employers also lose employees, churches lose members, and neighborhood groups lose contributors”).

<sup>15</sup> Brian Nam-Sonenstein, *Research roundup: Evidence that a single day in jail causes immediate and long-lasting harms*, PRISON POL'Y INITIATIVE (Aug. 6, 2024),

In her testimony to the Commission, Dr. Shaneva D. McReynolds courageously shared the experience of her own daughter who was facing time in prison for a federal criminal case but was instead sentenced to probation.<sup>16</sup> According to Dr. McReynolds, the judge’s sentencing decision – probation, and not prison – actually helped her daughter heal. She was able to get a steady job, escape an abusive and manipulative partner, and strengthen her relationship with her family and her community. None of this would have been available to her had she been sentenced to prison. And worse yet, she likely would have suffered more had she been sentenced to prison time.<sup>17</sup>

It is no surprise then, that if people are sentenced to non-prison sentences, they tend to do better and so do their communities. This idea is not just supported by stories like that shared by Dr. McReynolds, but by quantitative data as well.

The Commission released data as part of this amendment cycle showing that the rearrest rates for individuals with non-imprisonment sentences were significantly lower as compared to individuals who were released from prison but were eligible for a sentence to probation.<sup>18</sup> This dramatic difference in rearrest rates, 19% for people with non-imprisonment sentences compared to 42% for people with prison sentences who were probation eligible, underscores the reality that prison creates harm. People whose low criminal history categories and offense levels made them probation-eligible, but who were nonetheless sentenced to prison, recidivated at a rate of more than twice of that compared to those sentenced to non-imprisonment sentences. Why? As one researcher put it, “prison is painful, and incarcerated persons often suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others.”<sup>19</sup> These conditions often lead to time in prison being “criminogenic” itself.<sup>20</sup>

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[https://www.prisonpolicy.org/blog/2024/08/06/short\\_jail\\_stays/](https://www.prisonpolicy.org/blog/2024/08/06/short_jail_stays/). We acknowledge that this discusses the impact of jail, not prison, but many of the issues raised about employment, health, housing, and government benefits apply to people in prison with equal force as to those in jail).

<sup>16</sup> See McReynolds, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Proposed Amend. on Sent’g Options Pub. Data Briefing, supra* note 8, at 8.

<sup>19</sup> Katie Rose Quandt & Alexi Jones, *Rsch. Roundup: Incarceration can cause lasting damage to mental health*, PRISON POL’Y INITIATIVE (May 13, 2021),

<https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> (quoting professor Craig Haney, an expert on the psychological effects of imprisonment).

<sup>20</sup> “Prison itself can be a crime-creating environment” where “custodial sentences not only do not prevent reoffending, but they can actually increase it.” Marta Nelson et. al., *supra* note 14, at 29. Moreover, “[a]s data from the fallout of mass incarceration has accumulated, researchers have increasingly concluded that incarceration itself can be ‘criminogenic’—that the prison environment, separation from community, or even the process of returning to the community is so destabilizing that it increases the likelihood of continued encounters with the criminal legal system.” *Id.*

In oral testimony before the Commission on March 9, 2026, the Department of Justice and the Probation Officers Advisory Group (POAG) took the Commission’s data<sup>21</sup> and spun it on its head. According to the witness for the Department of Justice, Mr. Linder, this data shows that judges are succeeding and thoughtfully selecting cases appropriate for probation.<sup>22</sup> But that is a twisted interpretation of the data. The data published by the Commission demonstrates that people who are probation eligible and sentenced to probation are far less likely to recidivate than people who are probation eligible and sentenced to prison, revealing that prison is the problem that dramatically impacts recidivism rates. Thus, are judges truly discerning those who can succeed on probation from similarly situated defendants, as DOJ asserts, or is judicial overreliance on prison causing more harm to people who could otherwise fare far better in the community than in custody? The data supports the latter.

And yet, the witness from POAG went as far as to say that the Commission’s proposals could actually *increase* recidivism rates.<sup>23</sup> Mr. Luria, POAG’s witness, testified that expanding home confinement for low-risk defendants will increase their contact with supervision and make it more likely that they will recidivate.<sup>24</sup> He also noted that “lengthy periods of home detention appear to have diminishing returns after six months, and more so past twelve months.”<sup>25</sup> POAG and DOJ’s comments are not supported by the Commission’s data, and they are not even supported by the studies that they cite to in their own comments.<sup>26</sup> Their comments are also not

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<sup>21</sup> See source cited *supra* note 18.

<sup>22</sup> Joshua Luria, Testimony at Pub. Hearing on Proposed Amend.’s to Fed. Sent’g Guidelines, U.S. SENT’G COMM’N (Mar. 9, 2026), <https://www.uscc.gov/policymaking/meetings-hearings/public-hearing-march-9-2026>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3:52:53.

<sup>26</sup> POAG relies on studies that encourage low-intensity supervision instead of high-intensity supervision to reduce recidivism, but never encourage incarceration. See, e.g., Thomas H. Cohen et al., *The Supervision of Low-Risk Fed. Offenders: How the Low-risk Pol’y Has Changed Fed. Supervision Practices without Compromising Comty. Safety*, FED. PROB. J. at 9 (vol. 80, no. 1, June 2019), [https://www.uscourts.gov/sites/default/files/80\\_1\\_1\\_0.pdf](https://www.uscourts.gov/sites/default/files/80_1_1_0.pdf). (explaining that “[l]ow risk [individuals] should be provided with minimal supervision services, because . . . correctional interventions aimed at reducing recidivism . . . can actually produce higher recidivism rates for this risk group.” (citations omitted)); Haci Duru et al., *Does Reducing Supervision for Low-risk Probationers Jeopardize Comty. Safety?*, FED. PROB. J. at 21 (vol. 84, no.1, June 2020), [https://www.uscourts.gov/sites/default/files/84\\_1\\_2\\_0.pdf](https://www.uscourts.gov/sites/default/files/84_1_2_0.pdf) (“The following study examines the relationship between supervision intensity and supervision outcomes . . . among low-risk [individuals].”). In their witness statement for the Sentencing Commission Hearing on March 9, 2026, the DOJ cites to a study with approval that actually opposes mass incarceration. See Nick Linder, *Sentencing Options* at 7, <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20260309/linder.pdf>. The cited study calls for further study of “the problem of probation’s impact on jail populations” so that jurisdictions may take “more targeted steps to reduce the use of jail for probation violations,” which is “essential not only to reduce the number of people in jail, but also to reverse the trend of probation being used

supported by a recent real life “large-scale experiment.”<sup>27</sup>

The clearest demonstration that probation rather than incarceration benefits society is the success of the individuals on CARES Act. In 2020, at the height of the pandemic, the CARES Act allowed the BOP to expand the eligible population for extended home confinement. Some people served terms of home confinement under CARES that were four or even five years long.<sup>28</sup> Of the over 12,000 people placed on home confinement during this time period, the recidivism rate was **less than 1%**.<sup>29</sup> It is impossible to square Mr. Luria’s and Mr. Linder’s statements with this recent data, which shows that people who are given more autonomy through non-custodial sentences like probation and home confinement actually succeed in the community.<sup>30</sup>

It is clear from the stories and the data that more time in the community benefits public safety and the people who are impacted by the criminal justice system.

## II. Proposed Amendment 2 – Career Offender

Last year, when the Commission was considering amendments to the career offender guideline, we wrote about Paul Fields. His story remains useful this year because it belies the image conjured by the label “career offender” and demonstrates the value of excluding prior state drug offenses from the career offender guideline.

Paul Fields illegally sold marijuana while he was traveling around the country following bands as a “deadhead.” Mr. Fields received a 15 ½ year sentence for growing 256 marijuana plants. He had zero history of violence. But, Mr. Fields was a “career offender” because he had two prior convictions for nonviolent drug offenses sustained in state courts. One of the convictions involved merely 34 grams of marijuana.<sup>31</sup>

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as an [. . .] auxiliary of mass incarceration.” Alex Roth et al., *The Perils of Probation: How Supervision Contributes to Jail Populations*, VERA INST. OF JUST. (Oct. 2021) at 31 (calling for  
<sup>27</sup> See Senator Corey A. Booker, *CARES Act Home Confinement: Three Years Later* (June 2023), [https://www.booker.senate.gov/imo/media/doc/cares\\_act\\_home\\_confinement\\_policy\\_brief1.pdf](https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf).

<sup>28</sup> *Id.* at 8. Many people who were released via CARES Act home confinement had lengthy prison sentences remaining on home confinement. But those sentences were commuted by President Biden at the end of his time in office. Walter Pavlo, *Biden To Commute Sentences Of Those On CARES Act Home Confinement*, FORBES (Dec. 12, 2024), <https://www.forbes.com/sites/walterpavlo/2024/12/12/biden-to-commute-sentences-of-those-on-cares-act-home-confinement/>.

<sup>29</sup> Booker, *supra* note 27, at 4.

<sup>30</sup> The contact with supervision that someone has on home confinement or probation is not to be understated – it is burdensome and significant. *See Gall v. United States*, 552 U.S. 38, 48 (2007) (explaining that people “on probation are nonetheless subject to several standard conditions that substantially restrict their liberty”) (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)). However, this level of supervision is still far less burdensome and oppressive than the constant supervision that someone is subject to in prison.

<sup>31</sup> *U.S. v. Paul S. Fields*, No. 2:10cr17, *Sentencing Memorandum 2*, ECF 12 (July 22, 2010).

At the time of sentencing, his defense counsel argued that “there has been no effort by the Sentencing Commission to grade [. . .] the felony offenses that will trigger the career offender status.”<sup>32</sup> Counsel explained that as to Mr. Fields’ case:

a defendant previously convicted of possessing with the intent to distribute 34 grams of marijuana as one of two predicate offenses is punished for manufacturing over 100 marijuana plants just as severely as the defendant previously convicted of possessing with the intent to distribute 500 grams of cocaine as one of two predicate offenses.<sup>33</sup>

This was particularly acute in a case like Mr. Fields’, whose two predicate convictions were in state court for possession of nominal amounts of marijuana. Those marijuana offenses “increase[d] by a factor of eight what he would otherwise be looking at with the current offense.”<sup>34</sup> Had Mr. Fields not been a “career offender” he would be serving no more than two years in prison; the “career offender” guideline added 13 years to his sentence.

Mr. Fields knew that he broke the law. He understood what he did was wrong. But the punishment did not fit the crime. President Obama agreed and commuted Mr. Fields’ sentence in January 2017.

Mr. Fields’ story is unfortunately quite common. A 2016 report from the Sentencing Commission reveals that many people convicted of drug offenses with nonviolent criminal records are punished under the career offender guideline, serving lengthy prison sentences that carry huge costs for taxpayers and do not serve the purposes of punishment.<sup>35</sup>

The career offender directive has been around for a long time. What was originally conceptualized as a congressional amendment directing sentencing courts to impose a stiff penalty for “career criminals”<sup>36</sup> ultimately became a congressional directive to the Commission.<sup>37</sup> Thus, the Commission is obliged to provide for a guideline range “at or near” the statutory maximum for recidivists.<sup>38</sup> For some time now, the Commission has been wrestling with how to comply with this directive while also creating a fairer career offender guideline.<sup>39</sup> The Commission has observed that “in practice, determining which prior convictions should result in substantially increased sentences raises complex policy issues.”<sup>40</sup>

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<sup>32</sup> *Id.* at *Sentencing Transcript*, ECF 21.

<sup>33</sup> *Id.* at *Sentencing Memorandum*, ECF 12 at 2.

<sup>34</sup> *Id.* at *Sentencing Transcript*, ECF 21.

<sup>35</sup> USSC, Report to the Congress: Career Offender Sentencing Enhancements (2016) (“2016 Career Offender Report”), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607\\_RtC-Career-Offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf).

<sup>36</sup> *See S. Rep. No. 98–225, at 175 (1983) reprinted in 1984 U.S.C.C.A.N. 3182; see also U.S. Sentencing Commission, Report on Career Offender 2016.*

<sup>37</sup> 28 U.S.C. § 994(h).

<sup>38</sup> 28 U.S.C. § 994(h).

<sup>39</sup> *See generally* 2016 Career Offender Report.

<sup>40</sup> *Id.* at 7.

The Commission’s 2016 report demonstrated that the current career offender guideline misses the mark:

- Nearly 75% of all career offenders in 2014 were convicted of drug offenses;
- Because they spend so long in prison, career offenders make up 11% of the federal prison population;
- While they receive very long sentences, these sentences are often below those called for by the career offender guideline – only 27.5% of career offenders today receive the recommended career offender sentence; these reductions are often sought by the government;
- Career offenders who committed an instant or prior crime of violence have more serious and extensive criminal histories and commit crimes at a higher rate than career offenders with only drug trafficking offenses; and
- Federal law and the sentencing guidelines currently contain a variety of definitions of what constitutes a crime of violence or a violent felony, including for offender purposes. These different approaches lead to confusion in the application of laws that depend on the definitions.<sup>41</sup>

In the proposed amendments, the Commission advances several changes to the career offender guideline to address some of the underlying issues highlighted by this data, while remaining faithful to its statutory obligation.

Reform is necessary. Reform must begin from the understanding that the BOP is in crisis and making changes to the career offender guideline is critical as part of the Commission’s statutory obligation, not just under section 994(h) but also under section 994(g). To this end, we urge the Commission to adopt changes to the career offender guideline only if those changes are likely to reduce the overall number of people who are subject to the stiff penalties that follow. Any proposal that increases the number of people who will receive a sentencing range under the career offender guideline should be rejected.

#### **A. Crime of Violence definition**

The Commission once again strives to find a workable solution to define “crime of violence” that responds to stakeholder feedback criticizing the complex categorical approach, while remaining dutiful to the Congressional directive. To this end, the Commission has proposed two options.

Option 1 would eliminate the use of the categorical approach in exchange for an approach based on how the offense is “labeled.” A list of offense labels is provided, with the understanding that this approach is overbroad but that the overbreadth will be addressed with exclusions and various limitations. Option 2 would use definitions to identify predicate state offenses by focusing on statutory offenses. The focus would be on whether the state statute of conviction meets the elements of an offense in the proposed definition, regardless of whether the state statute includes additional elements broader than the definition.

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<sup>41</sup> *Id.*

In both options proposed this year, the acknowledged concern is overbreadth – capturing more crimes than would otherwise be captured in the approach we currently have.<sup>42</sup> Neither solution proposed is perfect, and both are perplexing. In some ways, we prefer to use the categorical approach, as it is a complexity that many system actors have taken time to understand. But in considering the two approaches and their potential consequences, we believe that the best path forward is Option 2 with meaningful prior-sentence exclusions.

The Federal Defenders have written to the Commission in its most recent submission dated March 18, 2026, asking for a significantly higher prior-sentence exclusion of five years. As the Federal Defenders argue, this exclusion will help ensure that non-violent conduct is excluded as a predicate offense. It will also help address some of the racial injustices that have plagued the career offender guideline.

The Federal Defenders are in the trenches fighting these cases every single day and are far better equipped than we are to know the intricacies of how predicate offenses align or misalign with the proposed statutory definitions. To that end, we support their comment and their approach to find a workable solution that addresses the concerns with the crime of violence definition, while not sweeping in far more people than necessary.

#### **B. Changes to definition of “controlled substance offense” – eliminating prior state drug offenses**

For some time now, the Commission has aimed to reduce the impact of the career offender guideline on drug offenses. In 2016, the Commission concluded that “drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.”<sup>43</sup> The Commission called on Congress to restructure the career offender directive, but Congress did not do so. That does not, however, mean the Commission is without options to narrow the impact of the career offender guideline on drug trafficking offenses.<sup>44</sup>

Last year, the Commission proposed eliminating state drug offenses as a predicate for the career offender guideline, and this year it does so again in Option 1. We believe, as we said last year, that this is a smart proposal that achieves multiple goals. First, it reduces the reliance on state convictions that are not always a good proxy for culpability. Second, it responds to stakeholder concerns about complex application of the career offender guideline. Lastly, it resolves a circuit split.

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<sup>42</sup> *Supra* note 1.

<sup>43</sup> 2016 Career Offender Report at 27.

<sup>44</sup> *Id.*

- i. State drug offenses are not a good proxy for defining a “career offender”

In our experience, and as evidenced by Mr. Fields’ story, state drug convictions likely involve less serious drug offenses than those prosecuted at the federal level.<sup>45</sup> These state and local drug prosecutions often criminalize very small quantities of a controlled substance. As such, prior convictions for controlled substance offenses are not a good proxy for the people Congress intended to punish with the career offender directive.<sup>46</sup>

Moreover, Congress did not direct that predicate offenses include state drug convictions. The directive refers to a drug predicate as “an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959), and Chapter 705 of Title 46.1”<sup>47</sup> The Commission adopted state drug offenses although they are not referenced in the statutory directive.<sup>48</sup> Thus, the Commission has no obligation to include state drug offenses in the federal career offender guideline. This should be enough for the Commission to eliminate state drug priors. But there are also good policy reasons for doing so.

State drug convictions likely involve smaller quantities of drugs, and these offenses are more likely to sweep in people with a history of substance abuse. People with a history of substance abuse may find themselves repeatedly impacted by the criminal justice system because of a mental health condition, rather than an economic aim to traffic large quantities of drugs.<sup>49</sup>

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<sup>45</sup> See Alexi Jones & Wendy Sayers, *Arrest, Release, Repeat*, PRISON POL’Y INST. (Aug. 2019) (“Ultimately, our analysis confirms that people who are repeatedly arrested and jailed are arrested for lower-level offenses, have unmet medical and mental health needs, and are economically marginalized. Arrest and incarceration of these individuals neither enhances public safety nor addresses their underlying needs. Our findings underscore the need to redirect dollars wasted on repeatedly jailing people toward public services that prevent justice involvement in the first place: education, employment assistance, public health, medical and mental health services.”), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

<sup>46</sup> See USSC, *Fifteen Years of Guideline Sentencing, An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) (“The career offender guideline thus makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses”), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf).

<sup>47</sup> 28 U.S.C. § 994(h).

<sup>48</sup> For more detailed information on the Commission’s authority to exclude state drug offenses see Federal Defenders Comment to USSC, *Controlled Substance Offense and Career Offender* at 23 (March 2023).

<sup>49</sup> See *supra* note 40 (observing that over half of people arrested multiple times reported a substance use disorder compared to 36% of people arrested just once and 7% of people who were not arrested but reported a substance use disorder in the past year).

According to the 2016 Bureau of Justice Statistics, 49% of people in state prisons have a diagnosed substance use disorder, as compared to 31.8% in federal prisons.<sup>50</sup>

Relying on state drug offenses also exacerbates the racial disparities that result from the career offender guideline. Surveys have demonstrated that drug use between black and white communities is roughly the same.<sup>51</sup> People who use drugs often purchase drugs from people of their own race.<sup>52</sup> And yet, 62% of people in state prisons for drug offenses are people of color.<sup>53</sup> Thus, when the federal guidelines incorporates state drug offenses, it is incorporating this “baked-in” racial disparity in state drug offenses.

Finally, augmenting a federal sentence based on a crime that was not punished at the federal level defies basic principles of federalism.<sup>54</sup> Surely Congress wanted the Guidelines to assure near-maximum sentences only for those with federal convictions where Congress has control over the federal legislative priorities. Moreover, relying on only federal drug convictions assures that federal prosecutorial standards were met for these convictions. State and local prosecution standards and practices vary by jurisdiction and incorporate unwarranted variance into a federal system that strives to be uniform.

- ii. Excluding state drug offenses would simplify application of the career offender guideline pertaining to controlled substance offenses and resolve a circuit split

Today, in a case with two predicate state controlled substance offenses and an instant offense that meets the career offender definition under §4A1.2, a court must undergo the categorical approach to determine whether the state controlled substance offenses can be used to increase the federal sentence.<sup>55</sup> Determining which state drug offenses can serve as a predicate for the career offender enhancement has taken a lot of time and resources away from all actors in the relevant cases. The Commission has received feedback about how complex the application of the career offender guideline has been.<sup>56</sup> Excluding state drug offenses directly responds to stakeholder concerns and eases the application of this guideline.

Finally, it has the benefit of resolving the circuit split. In recent years, an intractable circuit split has emerged over the question of whether the definition of “controlled substance

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<sup>50</sup> Emily Widra, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More than they Treat It* (Jan 30, 2024), <https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use/>.

<sup>51</sup> Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing* (Nov. 2023), <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *United States v. Townsend*, 897 F. 3d 66 at 71 (2d Cir. 2018) (discussing the *Jerome* presumption).

<sup>55</sup> See, e.g., *United States v. Descamps*, 570 U.S. 254 (2013).

<sup>56</sup> USSC, *Proposed Amendments to the Sentencing Guidelines* (2026).

offense” looks to federal law or to relevant state law.<sup>57</sup> Most recently, the Supreme Court denied certiorari in a case that could have resolved the split, because “[i]t is the responsibility of the Sentencing Commission to address this division.”<sup>58</sup> The Court recognized that “the resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants’ sentences.”<sup>59</sup> We agree. The split also results in conflicting sentencing guideline ranges across the country, something the Commission is instructed to avoid.<sup>60</sup>

The Commission is well within its authority to exclude prior state drug offenses in the career offender enhancement. There are wise policy reasons for doing so. Moreover, eliminating the use of state controlled substance offenses has the benefit of resolving the circuit split. Finally, excluding state prior drug offenses simplifies the process and helps “ensure fair and uniform application of the Guidelines.”<sup>61</sup> We supported this proposal last year and we support it once again. We hope that this is the year the Commission adopts this proposal, set out in Option 1.

### III. Conclusion

FAMM thanks the Commission for considering our input on issues critical to federal sentencing.

Sincerely,



Shanna Rifkin  
General Counsel

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<sup>57</sup> Compare *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018), with *United States v. Jones*, 15 F.4<sup>th</sup> 1288 (10th Cir. 2021); *United States v. Henderson*, 11 F. 4<sup>th</sup> 713, 718-719 (CA8 2021); *United States v. Ward*, 972 F. 3d 364, 371-374 (CA4 2020); *United States v. Ruth*, 966 F. 3d 642, 651-654 (CA7 2020).

<sup>58</sup> See *Guerrant v. United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., along with Barrett, J., respecting the denial of certiorari).

<sup>59</sup> *Id.*

<sup>60</sup> 28 U.S.C. §994(f).

<sup>61</sup> *Guerrant*, 142 S. Ct. 640.