

**FEDERAL DEFENDER  
SENTENCING GUIDELINES COMMITTEE**

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February 19, 2019

Honorable Charles R. Breyer  
Honorable Danny C. Reeves  
Commissioners  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

**Re: Public Comment on Proposed 2019 Amendments**

Dear Judge Breyer and Judge Reeves:

The Federal Public and Community Defenders are pleased to comment on the proposed 2019 Amendments. We appreciate the Commission's consideration of our views on the important issues presented this year.

**I. Proposed Amendment: Career Offender**

The Commission has a critical role to play in ensuring fairness at sentencing. In light of this, Defenders were pleased when, not that long ago, the Commission called on Congress to make the career offender directive more equitable.<sup>1</sup> Defenders were encouraged by the Commission's recommendation to exclude defendants with only drug-related convictions.<sup>2</sup> Unfortunately, the Commission's current proposal diverges from this path. The proposed amendment fails to heed the recommendations contained in the Career Offender Report and the data underlying them. Instead of reserving the career offender guideline for the most serious repeat offenders, the Commission's proposal would expand this already over-inclusive

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<sup>1</sup> See USSC, *Report to the Congress: Career Offender Sentencing Enhancements* (2016) ("Career Offender Report").

<sup>2</sup> See *id.* at 43-44.

penalty. Defenders urge the Commission to stay the course it charted a few years ago and not promulgate any part of the proposed amendment.

The career offender guideline (§4B1.1) is among the most problematic in the federal system. In FY 2017, just 21.7% of individuals deemed to be career offenders were sentenced within the guideline range, with nearly all the rest sentenced below the range.<sup>3</sup> Despite this high below-range rate, sentences are long (in recent years averaging over 12 years), and individuals classified by the guidelines as career offenders account for over 11% of the federal prison population.<sup>4</sup> Moreover, the career offender guideline has a severe adverse impact on black defendants. In FY 2017, over 60% of individuals classified as career offenders were black—nearly three times their share of the overall federal defendant population.<sup>5</sup> Because, as discussed below, the career offender guideline sweeps in far more defendants than necessary to protect the public or advance any other purpose of sentencing, this adverse impact is rightly considered a form of racial discrimination.<sup>6</sup> Indeed, as

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<sup>3</sup> USSC, Individual Datafiles FY 2017.

<sup>4</sup> See USSC, *Career Offender Report*, at 2.

<sup>5</sup> USSC, Individual Datafiles FY 2017. Among all FY 2017 individuals for whom the Commission received complete information, 21.6% were black, while 61.6% of those deemed career offenders were black.

<sup>6</sup> For a discussion of racial disparity research methods and of structural rules that are properly viewed as a form of racial discrimination, see Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231-261 (2013). Incapacitation of especially dangerous offenders is generally recognized as the justification for recidivist enhancements such as the career offender guideline and other “three strikes” laws. The Commission has occasionally suggested in passing that the guideline might be justified on some other ground. See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004) (“*Measuring Recidivism*”) (“In sum, it appears 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.”). But no other justification has been offered by Congress or the Commission, and none seem available. As discussed in previous Defender comment, longer incarceration of defendants does not serve deterrence or rehabilitation. Nor are there grounds to believe repeat drug or violent offenders are somehow more culpable than other repeat offenders. See Rhys Hester, *et al.*, *Prior Record Enhancements at Sentencing: Unsettled Justifications & Unsettling Consequences*, 47 CRIME & JUST. 209, 220-31 (2018). Of the various rationales that have been proposed for treating repeat offenders more severely, none would single out repeat

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noted fifteen years ago, next to the now-discredited 100-to-1 quantity ratio between powder and crack cocaine, the career offender guideline is one of the greatest sources of racial disparity in federal sentencing.<sup>7</sup>

Commission research over several decades has made clear that the offenses singled out by the career offender guideline—both drug-related and violent—do a poor job of identifying defendants at the greatest risk of recidivism and actually make the Criminal History Category (CHC) a worse predictor of recidivism.<sup>8</sup> Defendants classified as career offenders are automatically placed in CHC VI. But defendants in CHC IV, V, and VI, based on point calculations under §4A1.2, all have higher rates of recidivism than do persons classified as career offenders and armed career criminals taken as a whole.<sup>9</sup> While the over-prediction of recidivism is worst for defendants qualifying as career offenders or armed career criminals based on drug offenses, the Commission’s latest report shows that the over-prediction is true for those with violent offenses as well.<sup>10</sup>

The Commission’s proposal to expand the scope of the career offender guideline is inconsistent with decades of evidence and its own previous recommendation to Congress.<sup>11</sup> We urge the Commission to turn its attention to its earlier

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drug or violent offenders for uniquely enhanced punishment. This means the current rule is both discriminatory and arbitrary.

<sup>7</sup> See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 131-34 (2004) (“*Fifteen Year Review*”).

<sup>8</sup> See *id.* at 134; USSC, *Measuring Recidivism*, at 9; USSC, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19, figs. 7A & 7B (2016) (“*Recidivism Report*”); USSC, *Recidivism Among Federal Violent Offenders* 14, fig. 2.9 (2019) (“*Recidivism: Violent Offenses*”); *id.* at 36, fig. 4.7.

<sup>9</sup> See USSC, *Recidivism Report*, at 19, figs. 7A & 7B (2016); USSC, *Recidivism: Violent Offenses*, at 14, fig. 2.9 (2019); *id.* at 36, fig. 4.7.

<sup>10</sup> USSC, *Recidivism: Violent Offenses*, at 14, fig. 2.9.

<sup>11</sup> See USSC, *Career Offender Report*, at 44.

recommendation to narrow the scope of the guideline,<sup>12</sup> and thus reduce racial disparity and increase fairness in federal sentencing.

### A. Part A: Categorical Approach

Next year marks the thirtieth anniversary of *Taylor v. United States*,<sup>13</sup> in which the Supreme Court interpreted the Armed Career Criminal Act (ACCA)<sup>14</sup> to require the categorical approach. Since then, courts have used the categorical approach as the analytical framework to determine whether an individual is subject to enhanced penalties under recidivist enhancements such as the ACCA and the career offender guideline.<sup>15</sup> And Congress, in the recently enacted First Step Act, once again identified certain categories of convictions, not underlying facts, as triggers for recidivist enhancements.<sup>16</sup>

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<sup>12</sup> *See id.* at 44 (recommending that Congress amend its directive to the Commission to exclude defendants with only drug convictions).

<sup>13</sup> 495 U.S. 575 (1990).

<sup>14</sup> 18 U.S.C. § 924(e).

<sup>15</sup> *See, e.g., Taylor*, 495 U.S. at 602 (interpreting the ACCA to require the categorical approach); *Walker v. United States*, 595 F.3d 441, 443, n.1 (2d Cir. 2010) (“[W]e apply the same categorical approach irrespective of whether the enhancement is pursuant to the ACCA or the Guidelines.”); *United States v. Jonas*, 689 F.3d 83, 86 (1st Cir. 2012); *United States v. Wilson*, 880 F.3d 80, 83-84 (3d Cir. 2018); *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018); *United States v. Johnson*, 880 F.3d 226, 234 (5th Cir. 2018); *United States v. Harris*, 853 F.3d 318, 320 (6th Cir. 2017); *United States v. Mancillas*, 880 F.3d, 297, 303 (7th Cir. 2018); *United States v. Harper*, 869 F.3d 624, 625 (8th Cir. 2017); *United States v. Werle*, 877 F.3d 879, 881 (9th Cir. 2017); *United States v. Kendall*, 876 F.3d 1264, 1267-68 (10th Cir. 2017); *United States v. Lipsey*, 40 F.3d 1200, 1201 (11th Cir. 1994); *United States v. Brown*, 892 F.3d 385, 402 (D.C. Cir. 2018).

<sup>16</sup> First Step Act of 2018, Pub. L. No. 115-391, §§ 401-02, 132 Stat. 5194 (2018) (referring to “serious violent felony,” “serious drug felony,” and “violent offense”). The categorical approach is used for other recidivist and prior-record enhancement statutes as well. *See, e.g., Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567-68 (2017) (applying categorical approach to 8 U.S.C. § 1101(a)(43)(A) as incorporated in 8 U.S.C. § 1227(a)(2)(A)(iii)); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986-87 (2015) (applying categorical approach to 8 U.S.C. § 1227(a)(2)(B)(i)); *United States v. Castleman*, 572 U.S. 157, 168 (2014) (applying categorical approach to 18 U.S.C. § 922(g)(9)); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575-78, n.11 (2010) (applying the categorical approach to 8 U.S.C. § 1101(a)(43)(B) as incorporated in 8 U.S.C. § 1229b(a)(3)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (applying categorical approach to 18 U.S.C. § 16 as incorporated in 8 U.S.C. § 1101(a)(43)(F) and 8

Against this backdrop, the Commission proposes amending the guidelines to provide that the categorical approach does not apply when determining whether a conviction is a “crime of violence” or a “controlled substance offense.”<sup>17</sup> Instead, the Commission proposes a “Conduct-Based Inquiry,” directing courts to consider “conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such elements.”<sup>18</sup> The Commission wisely has not proposed considering *all* ancient, unreliable allegations of conduct, as the Department of Justice requested.<sup>19</sup> The Commission’s proposal, however, directing consideration of unproven allegations in documents such as complaints, assertions in plea agreements that defendants had no incentive to contest, and any “comparable” records, would still significantly undermine the fairness and consistency of the well-established categorical approach. Defenders oppose this proposal.

Defenders’ opposition to the Commission’s proposal is not made lightly. We recognize that some courts and stakeholders have lodged complaints about the categorical approach. We believe, however, the Supreme Court got it right almost 30 years ago when it interpreted the ACCA to require the categorical approach and its central feature: “a focus on the elements, rather than the facts, of a crime.”<sup>20</sup>

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U.S.C. §1227(a)(2)(A)(iii)); *United States v. Beardsley*, 691 F.3d 252, 259 (2d Cir. 2012) (applying categorical approach to 18 U.S.C. § 2252A(b)(1)); *United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (same); *United States v. Leaverton*, 895 F.3d 1251, 1253-54 (10th Cir. 2018) (applying categorical approach to 18 U.S.C §3559(c)); *United States v. Berry*, 814 F.3d 192, 195-97 (4th Cir. 2016) (applying categorical approach to 34 U.S.C. § 20911(4)(A)).

<sup>17</sup> 83 Fed. Reg. 65400, 65401 (Dec. 20, 2018).

<sup>18</sup> *Id.*

<sup>19</sup> Letter from David Rybicki, Commissioner, *ex officio*, Dep’t of Justice, U.S. Sentencing Comm’n, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 12 (Aug. 10, 2018); Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 26-28 (Dec. 13, 2018).

<sup>20</sup> *Descamps v. United States*, 570 U.S. 254, 263 (2013).

Abandoning the categorical approach not only “threaten[s] to undo all its benefits,”<sup>21</sup> but also carries serious costs.

Below we begin with an explanation of why the categorical approach is the best available rule. We then discuss some of the many costs of the Commission’s proposal. Finally, we describe why, in the end, even if the Commission wanted to abandon the categorical approach, doing so is inconsistent with Congress’s directive in 28 U.S.C. § 994(h), and would exceed the Commission’s authority.

### **1. The Case for the Categorical Approach**

The Supreme Court has repeatedly articulated three driving reasons for the formal categorical approach. “First, it comports with ACCA’s text and history. Second, it avoids the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries. And third, it averts ‘the practical difficulties and potential unfairness of a factual approach.’”<sup>22</sup> These three reasons first identified in *Taylor* when interpreting the ACCA are no less true today than they were in 1990, and apply with equal force to the career offender guideline.

#### **a. The Text: Congress Says What It Means**

The Supreme Court in *Taylor* recognized that Congress enacted enhanced penalties for “a person . . . who has three previous *convictions*’ for—not a person who has committed—three previous violent felonies or drug offenses.”<sup>23</sup> The word Congress chose—“conviction”—shows, “as *Taylor* explained, that ‘Congress intended the

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<sup>21</sup> *Id.* at 267.

<sup>22</sup> *Id.* at 267 (quoting *Taylor*, 495 U.S. at 601); see also *Mathis v. United States*, 136 S. Ct. 2243, 2252-53 (2016).

<sup>23</sup> *Taylor*, 495 U.S. at 600 (quoting 18 U.S.C. § 924(e)(1)) (emphasis added). Title 18 U.S.C. § 924(e)(1) states in pertinent part:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.”<sup>24</sup> The *Taylor* Court declined to interpret the ACCA to permit courts to look to the particular facts underlying a defendant’s prior offense because that approach could not be reconciled with the text.<sup>25</sup>

Congress made the same choice when directing the Commission, in 28 U.S.C. § 994(h), to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for *categories* of defendants in which the defendant . . . has been *convicted*” of a felony and “has previously been *convicted* of two or more prior felonies” where those felonies are a “crime of violence” or a drug offense “described” in specified statutes.<sup>26</sup> With nearly identical language, Congress indicated the critical inquiry in both provisions is “about whether ‘the defendant had been convicted of crimes falling within certain categories,’ and not about what the defendant had actually done.”<sup>27</sup>

Section 994(h) was enacted in the same Public Law as the original version of the ACCA.<sup>28</sup> The ACCA was subsequently amended in 1986, but Congress did not alter its choice to trigger the enhanced penalty only with categories of convictions.<sup>29</sup>

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<sup>24</sup> *Descamps*, 570 U.S. at 267 (quoting *Taylor*, 495 U.S. at 601).

<sup>25</sup> *Taylor*, 495 U.S. at 600-01. The Supreme Court has made clear that the categorical approach applies to both the enumerated offense clause, *see Taylor*, 495 U.S. at 602, and the force clause. *See Leocal v. Ashcroft*, 543 U.S. at 7 (“the statute directs our focus to the ‘offense’ of conviction. . . . Th[e] [force clause] language requires us to look at the elements and the nature of the offense of conviction, rather to the particular facts relating to petitioner’s crime.”).

<sup>26</sup> 28 U.S.C. § 994(h)(1)-(2) (emphases added). Congress imposed the categorical approach even more explicitly in § 994(h), requiring a guideline that applies to “categories” of defendants with a particular kind and number of “convict[ions].” *Id.*

<sup>27</sup> *Mathis*, 136 S. Ct. at 2246 (quoting *Taylor*, 495 U.S. at 600).

<sup>28</sup> *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1837 (1984) (§ 994(h) directive); Armed Career Criminal Act of 1984, Pub. L. No. 98-473, §§ 1801-03, 98 Stat. 1837 (1984) (Armed Career Criminal Act, repealed and recodified in 1986 by Pub. L. No. 99-308, § 104, 100 Stat. 449 (1986)).

<sup>29</sup> *See* Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207 (1986).

Nearly 30 years have elapsed “without any action by Congress to modify the statute[s] as subject to [the Supreme Court’s] understanding” that they require the categorical approach.<sup>30</sup> This passage of “time has enhanced even the usual precedential force” of *Taylor*’s interpretation.<sup>31</sup>

**b. The Sixth Amendment: Conviction not Conduct**

The Supreme Court also adheres to the categorical approach because a conduct-based approach would run afoul of the Sixth Amendment.<sup>32</sup> Sixth Amendment concerns were briefly mentioned in *Taylor*,<sup>33</sup> which predated both *Apprendi v. New Jersey*<sup>34</sup> and *Alleyne v. United States*.<sup>35</sup> After *Taylor*, however, the Court confirmed that a primary benefit of the categorical approach is that it avoids the Sixth Amendment concerns that would attend a conduct-based inquiry.<sup>36</sup> As the Court explained, a sentencing judge “can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.”<sup>37</sup>

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<sup>30</sup> *Shepard v. United States*, 544 U.S. 13, 23 (2005).

<sup>31</sup> *Id.*

<sup>32</sup> *See, e.g., Mathis*, 136 S. Ct. at 2252.

<sup>33</sup> *Taylor*, 495 U.S. at 601 (“If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?”).

<sup>34</sup> 530 U.S. 466 (2000) (holding that, “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum” is an element that must be submitted to the jury and proven beyond a reasonable doubt).

<sup>35</sup> 570 U.S. 99 (2013) (holding that the same constitutional protections that apply to facts that raise the statutory maximum also apply to facts that increase the penalty for a crime beyond the prescribed statutory minimum).

<sup>36</sup> *See Descamps*, 570 U.S. at 269; *Mathis*, 136 S. Ct. at 2252; *Shepard*, 544 U.S. at 24-26 (plurality opinion).

<sup>37</sup> *Mathis*, 136 S. Ct. at 2252. *See also Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that the fact of a prior conviction may be found by a judge by a preponderance of the evidence, even if it increases the penalties for a defendant’s crime).

The Commission’s proposed amendment also implicates the Sixth Amendment in at least two ways. First, while the guidelines were rendered advisory to avoid Sixth Amendment problems,<sup>38</sup> career offender sentences imposed under the Commission’s proposal would in many cases violate the Sixth Amendment. As three Supreme Court Justices explained not long ago: “We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.”<sup>39</sup>

The fact-findings the Commission proposes would significantly increase the guideline-recommended sentences of those deemed to be career offenders. This is borne out in Commission data. In FY 2017, over 1,500 individuals were deemed career offenders under the guidelines.<sup>40</sup> The average sentence was 144 months imprisonment.<sup>41</sup> Almost all (over 91%) of these individuals were placed in a higher guideline range due to application of the career offender guideline than they would have been without it.<sup>42</sup> For 48.4% of these defendants, the career offender guideline increased the average guideline minimum by 169% (from 70 to 188 months); for 30.8% of defendants, the career offender guideline increased the average guideline minimum by 124% (84 to 188 months); and for 12.6% of defendants, the career offender guideline increased the average guideline minimum approximately 25%.<sup>43</sup>

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<sup>38</sup> *United States v. Booker*, 543 U.S. 220, 245 (2005).

<sup>39</sup> *Jones v. United States*, 135 S. Ct. 8 (Mem) (2014) (Scalia, J., joined by Thomas, J. & Ginsburg, J., dissenting from denial of certiorari to address whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be substantively unreasonable) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)).

<sup>40</sup> USSC, *Career Offender Quick Facts* 1 (2018) (identifying 1,593 cases in which defendants were deemed to be career offenders).

<sup>41</sup> *Id.* at 1.

<sup>42</sup> *Id.* at 1-2.

<sup>43</sup> *Id.*

The average sentence imposed on career offenders was 2.2 times that imposed on non-career offenders convicted of the same offense types.<sup>44</sup>

Individuals subject to the career offender guideline based only on drug trafficking offenses may be particularly affected by these judge-found facts. The Commission found that “drug trafficking only career offenders are often impacted more substantially by the career offender guideline. “This impact is further increased by the fact that drug trafficking offenders are less likely to have otherwise fallen into Criminal History Category VI absent application of the career offender guidelines.”<sup>45</sup> Because “drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders,” and do not warrant the significant increases in penalties provided under the career offender guideline,<sup>46</sup> there is little question that, but for the findings that these individuals are career offenders, their sentences would be substantively unreasonable. And if those findings were based on prior *conduct* as the Commission proposes, their sentences would violate the Sixth Amendment.

Second, the Commission’s proposal implicates the Sixth Amendment because the words “conviction” and “convicted” must be read consistently.<sup>47</sup> Congress used the word “conviction” in the ACCA, and the word “convicted” in § 944(h). This language “impos[es] the categorical approach.”<sup>48</sup> Indeed, while these two provisions are in separate titles of the United States Code (albeit both recidivist provisions originally enacted at the same time in the same Public Law), the Supreme Court has

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<sup>44</sup> USSC, Individual Datafiles FY 2017 (considering only career offenders and non-career offenders convicted of the eight major offense types found among career offenders (murder, sexual abuse, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion), the average guideline minimum was 145 months for career offenders, and 67 months for non-career offenders).

<sup>45</sup> USSC, *Career Offender Report*, at 32.

<sup>46</sup> *Id.* at 27.

<sup>47</sup> See generally 28 U.S.C. § 994(a) (requiring that all guidelines be “consistent with all pertinent provisions of any Federal statute”).

<sup>48</sup> *Shepard*, 544 U.S. at 19.

consistently interpreted the word “conviction” to require the categorical approach across similar sections of the United States Code.<sup>49</sup>

In other words, “conviction” must mean the same thing in both the ACCA and § 994(h). But the Commission’s proposed interpretation—directing a conduct-based approach—is constitutionally untenable as to statutes like the ACCA. Accordingly, the only possible, consistent meaning to give the word requires the categorical approach.<sup>50</sup>

### **c. Practical Concerns: The Difficulties and Unfairness Are Daunting**

Last but not least, the Supreme Court rightly endorsed the categorical approach because it avoids the serious impracticalities and unfairness that would accompany a conduct-based approach. The Court identified several impracticalities and inequities that make judicial fact-finding about the conduct underlying a prior conviction implausible. First, courts would rely on unreliable facts because “[s]tatements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary.”<sup>51</sup> Second, a conduct-based approach would require mini-trials often regarding what happened long ago, and in other jurisdictions.<sup>52</sup> Third, and “still worse,” a conduct-based approach would

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<sup>49</sup> See, e.g., *Taylor* 495 U.S. at 600 (interpreting “conviction” and applying the categorical approach to 18 U.S.C. § 924(e)); *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1567-67 (interpreting “conviction” and applying the categorical approach to 8 U.S.C. § 1227(a)(2)(A)(iii)); *Mellouli v. Lynch*, 135 S. Ct. at 1986-87 (interpreting “conviction” and applying categorical approach to 8 U.S.C. § 1227(a)(2)(B)(i)); *United States v. Castleman*, 572 U.S. at 168 (applying categorical approach to determine whether defendant had been “convicted” of a misdemeanor crime of domestic violence as required under 18 U.S.C. § 922(g)(9)); *United States v. Carachuri-Rosendo v. Holder*, 560 U.S. at 576 (“The text [of 8 U.S.C. § 1229b(a)(3)] thus indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged.”).

<sup>50</sup> See *Shepard*, 544 U.S. at 25-26 (plurality opinion) (“The rule of reading statutes to avoid serious risks of unconstitutionality therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury’s verdict.” (internal citations omitted)).

<sup>51</sup> *Mathis*, 136 S. Ct. at 2253.

<sup>52</sup> See generally *Taylor*, 495 U.S. at 601; *Descamps*, 570 U.S. at 270.

“deprive some defendants of the benefits of their negotiated plea deals.”<sup>53</sup> It would look behind the deals and “allow a later sentencing court to rewrite the parties’ bargain.”<sup>54</sup>

Nothing has happened since *Taylor* to allay these practical concerns. If anything, developments in the criminal justice system have made them even more formidable. And they are just as significant for the guidelines as they are for the ACCA. The conduct-based approach the Commission proposes, though limited to documents identified in *Shepard*,<sup>55</sup> raises all the same concerns the Court determined would be avoided with the categorical approach.

**Unreliable Facts.** The Supreme Court recognized that records from a prior conviction will often include both elemental and non-elemental facts.<sup>56</sup> But “the only facts the court can be sure the jury so found are those constituting elements of the

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<sup>53</sup> *Descamps*, 570 U.S. at 271.

<sup>54</sup> *Id.*

<sup>55</sup> The Commission proposes that “the court shall look only to the statute of conviction and the following sources—

- (i) The charging document.
- (ii) The jury instructions, in a case tried to a jury; the judge’s formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.
- (iii) Any explicit factual finding by the trial judge to which the defendant assented.
- (iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).”

83 Fed. Reg., at 65409; *see also Shepard*, 544 U.S. at 16, 20-21, 26.

<sup>56</sup> *See generally Descamps*, 570 U.S. at 259 (rejecting district court’s review of plea colloquy to consider prosecutor’s proffer of defendant’s conduct); *Mathis*, 136 S. Ct. at 2250 (rejecting district court’s review of *Shepard* records to discern the means by which defendant committed the offense).

offense—as distinct from amplifying but legally extraneous circumstances.”<sup>57</sup> This is because “[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he ‘may have good reason not to’—or even be precluded from doing so by the court.”<sup>58</sup> The Commission’s proposed conduct-based approach, directing courts to look to means, would require courts to rely on these inherently unreliable, misleading, and often incorrect factual allegations to increase a defendant’s sentence.

The Commission’s proposal to limit its conduct-based approach to *Shepard* documents would not avoid the unfairness, impracticality, or undue burden the Supreme Court warned against because the documents would be used in an entirely different way than the Court approved and in every case (except where no such documents exist). The Court specifically limited the use of these documents to “a

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<sup>57</sup> *Descamps*, 570 U.S. at 269-70 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

<sup>58</sup> *Mathis*, 136 S. Ct. at 2253 (quoting *Descamps*, 570 U.S. at 270). While most defendants sustain prior convictions through pleas, *see infra* notes 82 & 83 and accompanying text, those who elect to go to trial are equally at risk to have unproven and uncorrected facts in their records. As first recognized in *Taylor*, the charging documents will not always accurately or completely reflect the theory or theories of the case presented to the jury. 495 U.S. at 601; *see also Mathis*, 136 S. Ct. at 2553. What if multiple theories were alleged in the indictment and presented at trial? *See* Fed. R. Crim. P. 7(c)(1). A later sentencing court has no way to know which of the theories ultimately informed the jury’s verdict or even if all jurors agreed on one theory. *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality opinion) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)) (“[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no requirement that the jury reach agreement on preliminary factual issues which underlie the verdict.”). What if a charging document alleges non-elemental facts along with the elements essential to the crime? A subsequent guilty verdict does not prove that the jury adopted the non-elemental facts. *Descamps*, 570 U.S. at 269-70; *see also Schad*, 501 U.S. at 659 (Scalia, J., concurring) (“It has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.”). And seldom will *Shepard*-approved documents include information on a defendant’s theory of defense, prompting defendants to present these theories at impractical sentencing hearings years later. *See, e.g., Aguila-Montes de Oca*, 655 F.3d 915, 962 (9th Cir. 2011) (Berzon, J., concurring in judgment only), *maj. op. overruled by Descamps*.

narrow range of cases,”<sup>59</sup> not in “case after case.”<sup>60</sup> The Court also directed that the documents should not be “repurposed as a technique for discovering whether a defendant’s prior conviction . . . rested on facts (or otherwise said, involved means) that could have satisfied the elements of a generic crime.”<sup>61</sup> The purpose of consulting *Shepard* documents is limited: “It [is] not to determine ‘what the defendant and the state judge must have understood as the factual basis for the prior plea,’ but only to assess whether the plea was to the version of the crime . . . corresponding to the generic offense.”<sup>62</sup>

Looking to *Shepard* documents in case after case for non-elemental conduct would waste resources and fail to identify actual conduct. “[E]xpend[ing] resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy . . . facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense,” would lead to unreliable findings.<sup>63</sup> A defendant simply has no incentive to correct facts that do not impact his conviction; and why would he? “At trial, extraneous facts and arguments may confuse the jury. . . . And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.”<sup>64</sup> Consequently, “[f]ind them or not, by examining the record or anything else, a court still may not use [surplus facts] to enhance a sentence.”<sup>65</sup>

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<sup>59</sup> *Taylor*, 495 U.S. at 602.

<sup>60</sup> *Descamps*, 570 U.S. at 270.

<sup>61</sup> *Mathis*, 136 S. Ct. at 2254.

<sup>62</sup> *Descamps*, 570 U.S. at 262-63 (quoting *Shepard*, 544 U.S. at 25 (plurality opinion)); see also *Mathis*, 136 S. Ct. 2553-54.

<sup>63</sup> *Descamps*, 570 U.S. at 270.

<sup>64</sup> *Id.* (recognizing that a defendant “likely was not thinking about the possibility that his silence could come back to haunt him in a [federal] sentencing 30 years in the future”).

<sup>65</sup> *Mathis*, 136 S. Ct. at 2253.

Non-elemental facts are not made reliable simply because they appear in *Shepard* documents.<sup>66</sup> *Shepard* documents may not reveal “actual conduct” at all. Surplus facts—regardless from where they come—will often be uncertain in their meaning, unreliable, or “downright wrong.”<sup>67</sup> And facts that are “prone to error precisely because their proof is unnecessary”<sup>68</sup> should not be used to determine that a defendant is a career offender.

**Mini-Trials.** The *Taylor* Court also warned against mini-trials and protracted sentencing proceedings that would become routine if courts considered extra-elemental facts as a matter of course.<sup>69</sup>

The Commission’s proposed approach would be as time-consuming and impractical as the Supreme Court feared. While the sources the courts would consider may be limited, courts would consider them in every case in which they are found. For old convictions or for convictions in courts with poor recordkeeping, obtaining these documents would take time and result in disparity.<sup>70</sup> Reviewing, deciphering, and disagreeing about facts other than the elements of the offense would consume significant resources.

Relatedly, defendants would fight to test the reliability of non-elemental facts contained in the *Shepard* documents. Both the guidelines and due process afford defendants the right to challenge disputed facts that the court may rely on prior to

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<sup>66</sup> *Descamps*, 570 U.S. 270 (discussing the pitfalls of consulting a plea colloquy to discern non-elemental facts).

<sup>67</sup> *Id.*

<sup>68</sup> *Mathis*, 136 S. Ct. at 2253.

<sup>69</sup> See *Taylor*, 495 U.S. at 601 (warning of mini-trials with fact-based approach); *Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013) (citing *Chambers v. United States*, 555 U.S. 122, 125 (2009), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015)) (same).

<sup>70</sup> For example, what if only a charging document is available, but the facts contained therein are incorrect as demonstrated in a plea colloquy of which there is no record? See generally *United States v. Rosa*, 507 F.3d 142, 155 (2d Cir. 2007) (“[W]e do not think that every document properly classified as a charging document in a state case to which a defendant pleads guilty is *ipso facto* probative on the issue of whether the defendant necessarily pleaded guilty to a [crime of violence].”).

imposing a sentence.<sup>71</sup> Presented with non-elemental facts in, for example, an indictment, defendants would seek to refute them by submitting affidavits,<sup>72</sup> and requesting evidentiary hearings<sup>73</sup> at which they would present witnesses<sup>74</sup> and put on experts.<sup>75</sup> In some cases, the defense would have no ability to effectively challenge alleged, unreliable, surplus facts contained in documents like an indictment because refuting documents would have been destroyed and witnesses would be unavailable. It would be unfair to subject a defendant to the severe additional penalty of the career offender guideline simply because he did not object to a legally extraneous fact that had no bearing on his prior conviction.

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<sup>71</sup> See §6A1.3 (“When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor . . . provided that the information has sufficient indicia of reliability to support its probable accuracy.”); see also *United States v. Juwa*, 508 F.3d 694, 700-01 (2d Cir. 2007) (recognizing a due process right to be sentenced on accurate information) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948)).

<sup>72</sup> *United States v. Pless*, 982 F.2d 1118, 1127-28 (7th Cir. 1996) (“Due process entitles defendants to fair sentencing procedures, especially a right to be sentenced on the basis of accurate information. If a defendant raises the possibility of reliance on misinformation in the PSI, the court must provide an opportunity to rebut the report. That may take a number of forms: by allowing defendant and defense counsel to comment on the report or to submit affidavits, or other documents or by holding an evidentiary hearing.” (internal citations omitted)).

<sup>73</sup> See, e.g., *United States v. Jimenez Martinez*, 83 F.3d 488, 494-95 (1st Cir. 1996); *United States v. Fatico*, 603 F.2d 1053 1057, n.9 (2d Cir. 1979).

<sup>74</sup> Fed. R. Crim. P. 32(i)(2); see also *United States v. Johnson*, 554 Fed. App’x 139, 141 (4th Cir. 2014) (per curiam) (vacating sentence where court denied defendant’s petitions for writs of habeas corpus *ad testificandum* for two inmates to testify at defendant’s sentencing hearing).

<sup>75</sup> See, e.g., *United States v. Chase*, 499 F.3d 1061, 1066-68 (9th Cir. 2007) (holding that the district court abused its discretion when it denied defendant’s request to retain an expert to testify about drug quantity at the sentencing hearing); *United States v. Hardin*, 437 F.3d 463, 470 (5th Cir. 2006) (finding error where district court denied to appoint an expert “on a disputed factual issue regarding the primary issue to his sentence determination”).

**Rewrite Plea-bargains.** A conduct-based approach would effectively “rewrite the parties’ [plea] bargain[s]” and deprive defendants of their negotiated pleas.<sup>76</sup>

When a defendant enters into a plea deal, he gives up substantial rights including a vast array of trial and appellate rights.<sup>77</sup> In exchange for relinquishing these fundamental rights, a defendant must admit “the *elements* of a formal criminal charge.”<sup>78</sup> He need not admit more. Yet under the Commission’s proposal, “a later sentencing court could still treat the defendant as though he had pleaded to a [more serious charge], based on legally extraneous statements found in the old record.”<sup>79</sup> As the *Taylor* Court recognized many years ago, “if a guilty plea to a lesser [ ] 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 [the original offense].”<sup>80</sup>

For better or worse, our criminal justice system is “a system of pleas, not a system of trials.”<sup>81</sup> In 2012, the Supreme Court estimated that 97% of federal convictions and 94% of state convictions were resolved by plea.<sup>82</sup> And these rates appear to be

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<sup>76</sup> *Descamps*, 570 U.S. 271.

<sup>77</sup> Fed. R. Crim. P. 11(b)(1)(B)-(E), (N); *Class v. United States*, 138 S. Ct. 798, 803-06 (2018) (explaining the claims a defendant waives when pleading guilty, including all “technical and formal objections of which defendant could have availed himself by any other plea or motion” (internal marks and citation omitted)).

<sup>78</sup> *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (emphasis added).

<sup>79</sup> *Descamps*, 570 U.S. at 271.

<sup>80</sup> *Taylor*, 495 U.S. at 601-02; see also *Descamps*, 570 U.S. at 271.

<sup>81</sup> *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); see also *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (recognizing that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system”).

<sup>82</sup> *Frye*, 566 U.S. at 143.

rising.<sup>83</sup> Indeed, the system is reliant on pleas<sup>84</sup> and is structured to encourage them.<sup>85</sup>

The Supreme Court has repeatedly acknowledged the problems that would follow when “a trial court w[ill] have to determine what th[e] conduct was.”<sup>86</sup> If courts were directed to determine a defendant’s conduct and not merely the elements of his conviction, these problems would occur in every case.

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<sup>83</sup> See Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It?*, 111 NW. U. L. REV. 1429, 1432 (2017) (“In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%.”); see also USSC, *2017 Sourcebook of Federal Sentencing Statistics* S-25-28 (2017) (plea rates increased from 96.9% in FY 2013 to 97.2% in FY 2017. In FY 2017 numerous federal districts had plea rates higher than 98% and several districts had rates over 99%).

<sup>84</sup> See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“Properly administered, [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”); Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC (Sept. 15, 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> (“Taking to trial even a significant proportion of [the 11 million people arrested annually] would grind proceedings to a halt.”).

<sup>85</sup> See, e.g., §§3E1.1, 5K1.1; *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)) (“The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government ‘may encourage a guilty plea by offering substantial benefits in return for the plea.’”); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 881 (2009) (“[E]ven conservative estimates of the acceptance of responsibility discount at the federal level show a roughly 35% sentence reduction for that factor alone.”); see also National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 15 (2018), <https://www.nacdl.org/trialpenaltyreport/> (“The United States Sentencing Commission’s data on federal sentencing confirms the existence of a trial penalty. In 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence.”).

<sup>86</sup> *Taylor* 495 U.S. at 601.

## **2. The Additional Costs of a Conduct-Based Approach**

The reasons provided by the Supreme Court should be sufficient on their own to compel commitment to the categorical approach. But it is also worth considering the additional costs that would accompany a conduct-based approach: expanding the reach of an already over-inclusive, and severe, guideline; exacerbating unwarranted disparity, uncertainty and complexity; and expanding the guidelines' reliance on relevant conduct.

### **a. Unjustified Expansion: Reaching for More, When the Evidence Calls for Less**

The Commission proposes a conduct-based approach under which “the court shall consider the conduct that formed the basis of the conviction, *i.e.*, only the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.”<sup>87</sup> By looking to the means, the Commission's proposal would expand the reach of the career offender guideline beyond its current limitation to the elements of convictions. All of the evidence, however, indicates reform of the career offender guideline should be focused on narrowing its scope. As discussed above, Commission data show the career offender guideline is already over-inclusive.<sup>88</sup> Expanding its reach would increase unnecessary over-incarceration.

To the extent the proposed expansion is intended to cover anomalies—defendants that courts determine should be sentenced as career offenders, but for one reason or another are not—those anomalies already can be addressed with upward departures or variances.<sup>89</sup> It makes no sense to further expand the guideline with over 75% of individuals deemed to be career offenders already sentenced below the guideline.<sup>90</sup> In addition, §4A1.3(b)(3) limits downward departures from the career

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<sup>87</sup> 83 Fed. Reg., at 65409.

<sup>88</sup> *See supra* notes 3, 8-10 and accompanying text.

<sup>89</sup> *See* §4A1.3(b)(2).

<sup>90</sup> USSC, Individual Datafiles FY 2017 (77.5% sentenced below the guideline).

offender guideline to one criminal history category. No such limitation exists for upward departures.<sup>91</sup>

**b. Unwarranted Disparity: Exacerbated Not Alleviated**

The proposed expansion of the career offender guideline also risks increasing its already significant disparate impact. While approximately 2 out of 10 individuals sentenced in federal court are black, approximately 6 out of 10 individuals deemed to be career offenders are black.<sup>92</sup> That is reason enough not to further expand the reach of the career offender guideline. But the unwarranted disparity arising from the Commission's proposal does not end there.

Additional unwarranted disparity would result from the Commission's proposal to use *Shepard* documents in more than a "narrow range of cases"<sup>93</sup> and for more than a "limited function."<sup>94</sup> The Commission's proposal would direct the use of *Shepard* documents in every case, but the same *Shepard* documents would not be available in every case. The availability of these documents varies, not only district-to-district, but between counties within a single district. For example, Defenders have observed that document retention policies differ from county-to-county and state-to-state, such that in some places, it is unlikely that more than a docket sheet exists, especially for older convictions.<sup>95</sup> Defenders have also found that responsiveness to document requests can vary county-to-county.

Under the Commission's proposal, individual judges would make decisions under a preponderance of the evidence standard about whether there was "conduct that met one or more elements of the offense of conviction or that was an alternative means

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<sup>91</sup> See §4A1.3(b)(2).

<sup>92</sup> USSC, Individual Datafiles FY 2017. Among all FY 2017 individuals for whom the Commission received complete information, 21.6% were black, while 61.6% of those deemed career offenders were black.

<sup>93</sup> *Decamps*, 570 U.S. at 261 (citing *Taylor*, 495 U.S. at 602).

<sup>94</sup> *Id.* at 260.

<sup>95</sup> Because the guidelines' 15-year look back rule for prior felonies starts from the date the defendant was released, the date of the prior conviction can be significantly older than 15 years. See §4B1.2, comment. (n.3); §4A1.2(e).

of meeting any such element.”<sup>96</sup> It is easy to imagine different judges within the same district—and even the same judge in different cases—making different decisions about whether the same conduct, alleged in one document or another, qualified as a “crime of violence” or “controlled substance offense,” particularly when the availability and content of the documents differ. The events that transpired after the Ninth Circuit’s decision in *United States v. Aguila-Montes de Oca*, prove this point.<sup>97</sup> After *Aguila-Montes*, courts were allowed to look to documents “to discover what the defendant actually did.”<sup>98</sup> Overruling *Aguila-Montes*, the Supreme Court noted the conduct-based approach endorsed in that case resulted in “exactly the differential treatment we thought Congress, in enacting ACCA, took care to prevent.”<sup>99</sup> That is, “[i]n the two years since *Aguila-Montes*, the Ninth Circuit has treated some, but not other, convictions under [the same California statute] as ACCA predicates, based on minor variations in the cases’ plea documents.”<sup>100</sup> The Commission’s proposal would result in the same disparities.

### **c. New Uncertainty: Navigating a New Standard**

The Commission’s proposal would discard decades of precedent in favor of uncharted waters. The years of litigation under the categorical approach have brought us to a point where the significant issues have been settled. We know what to do with prior convictions based on guilty pleas,<sup>101</sup> we know what to do with convictions under statutes that are missing an element of the generic offense,<sup>102</sup> and we know what to do with convictions under statutes that list both elements and means.<sup>103</sup> Love it or hate it, judges, probation officers, prosecutors and defense attorneys are all familiar with the categorical approach.

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<sup>96</sup> 83 Fed. Reg., at 65409.

<sup>97</sup> See 655 F.3d 915 (9th Cir. 2011), *abrogated by Descamps*, 570 U.S. 254.

<sup>98</sup> *Descamps*, 570 at 268.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Shepard*, 544 U.S. 13.

<sup>102</sup> See *Descamps*, 570 U.S. 254.

<sup>103</sup> See *Mathis*, 136 S. Ct. 2243.

The Commission’s proposal rejects this precedent, specifying that the “‘categorical approach’ and ‘modified categorical approach’ adopted by the Supreme Court . . . *do not apply* in the determination of whether a conviction is a ‘crime of violence’ or a ‘controlled substance offense.’”<sup>104</sup> With this proposal, we would be starting over. Years of litigation, uncertainty and inconsistency would ensue. There would be the big picture challenges to the proposal’s constitutionality, and whether the Commission has the authority to promulgate this change that is inconsistent with Congress’s directive in § 994(h). But that is not all. Every word and phrase in the new definitions and commentary prescribing a “conduct-based inquiry” would be tested. And it would take years to sort out.

In addition, even once the parties and courts have sorted the parameters of the process, there would be greater uncertainty on a case-by-case basis about whether a prior conviction is a “crime of violence” or a “controlled substance offense.” Currently, the parties and courts know, for a significant number of prior convictions, whether they are, or are not, categorically, qualifying predicates. The Commission’s proposal for a “conduct-based” approach would require investigation into what happened in every individual case. Sometimes the *Shepard* documents would contain facts that were not necessary to the conviction, and investigation and litigation would be required to determine whether the defendant actually engaged in that conduct. In other cases, some or all of the documents would not exist. This uncertainty, from one case to the next, would negatively affect plea negotiations, while also consuming resources and time.

#### **d. Additional Complexity: Two Rules Instead of One**

Rather than simplifying, the Commission’s proposal would complicate sentencing. As discussed above, both the career offender guideline directed by Congress in § 994(h) and the ACCA, call on courts to enhance sentences on the basis of certain—and similar—categories of convictions.<sup>105</sup> Currently, to determine whether convictions fall into the specified categories, courts rely on an identical analytical framework for both provisions: the categorical approach.<sup>106</sup> The Commission’s proposal would disrupt this consistency and require that courts use two separate

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<sup>104</sup> 83 Fed. Reg., at 65409 (emphasis added).

<sup>105</sup> *See supra* notes 24-26 and accompanying text.

<sup>106</sup> *See supra* note 15.

analyses: the categorical approach for the ACCA and a conduct-based approach for the career offender guideline. In other words, and importantly for those who want to abandon the categorical approach, the Commission's proposal would not save courts or parties from the categorical approach. It would add a separate, untested, analysis.

The Commission recently concluded that a "single definition of the term 'crime of violence' in the guidelines and other federal recidivist provisions is necessary to address increasing complexity and to avoid unnecessary confusion and inefficient use of court resources."<sup>107</sup> The Commission's injection of a new and different standard for the guidelines is contrary to this conclusion, particularly since Congress recently re-committed itself in the First Step Act to enhancements for prior convictions determined as a matter of law under the categorical approach.<sup>108</sup>

We urge the Commission to heed its own advice regarding the hazards of complexity, and value the relative simplicity of what we have now: a single analysis that applies to both the career offender guideline and the ACCA.

#### **e. Relevant Conduct: A Bad Rule Made Worse**

The Commission's proposal also extends the guidelines' reliance on relevant conduct further than ever before.<sup>109</sup> Currently, relevant conduct is generally focused on actions, omissions and harms related to what "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."<sup>110</sup> These rules relate to the instant offense and affect a defendant's placement on the vertical axis of the sentencing grid. With the proposed amendment to the career offender guideline, courts would be required to consider relevant conduct from prior offenses

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<sup>107</sup> USSC, *Career Offender Report*, at 3.

<sup>108</sup> See First Step Act, Pub. L. No. 115-391, at §§ 401-02.

<sup>109</sup> Defenders have repeatedly requested the Commission consider a comprehensive review of the relevant conduct rules under §1B1.3. For a more complete discussion of the problems with and criticisms of relevant conduct, see Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 24-31 (May 17, 2013).

<sup>110</sup> §1B1.3.

to determine a defendant's placement on the horizontal axis of the grid as well.<sup>111</sup> The current scope of "relevant conduct" works enough mischief as it is, and has been subject to significant criticism.<sup>112</sup> It would be a mistake to expand it further.

The federal guidelines are the only guidelines in the United States that require increased sentences for uncharged, dismissed, or acquitted conduct.<sup>113</sup> "Instructing judges to consider 'real' conduct was a discretionary decision by one set of Commission members [from the first Commission] who seemed to believe the Guidelines could and should occupy the entire field."<sup>114</sup> Adopting a "real offense" model was not directed by Congress.<sup>115</sup> Indeed, it is "arguably contrary to the [Sentencing Reform Act's] most basic instructions," which directed the Commission to take into account the circumstances under which the "offense was committed."<sup>116</sup>

The Commission's relevant conduct rules have been subject to significant criticism. And for good reason. Among other problems, the rules lead to unwarranted

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<sup>111</sup> Classification as a career offender causes both (1) an increase in a defendant's offense level, and (2) automatic placement in Criminal History Category VI. §4B1.1.

<sup>112</sup> See, e.g., Meyers Letter *supra* note 109, at 24-31 (discussing criticism of relevant conduct rules).

<sup>113</sup> See Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1626 (2012) ("only the federal guidelines take this approach"). State guideline systems, before and after the Federal Sentencing Guidelines, have never required or allowed the use of uncharged or acquitted crimes in calculating the guideline range. See Phyllis J. Newton, Staff Director, U.S. Sent'g Comm'n, *Building Bridges Between the Federal and State Sentencing Commissions*, 8 FED. SENT'G REP. 68, 69 (Sept./Oct. 1995) ("Virtually all states, in contrast to the federal system, have adopted an offense of conviction system under which uncharged conduct generally remains outside the parameters of the guidelines.").

<sup>114</sup> Barkow, *supra* note 113, at 1628.

<sup>115</sup> *Id.* at 1626 ("Nor is there any evidence in the Sentencing Reform Act's legislative history that suggests Congress even intended the outcome.").

<sup>116</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1661 & n.157 (2012) ("The Commission was to take into account 'the circumstances under which the offense was committed' and 'the nature and degree of the harm caused by the offense.' [Sentencing Reform Act], Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), §994(c)(2)-(3), 98 Stat. 1987, 2020 (codified at 28 U.S.C. §994(c)(2)-(3) (2006)) (emphasis added).").

disparity,<sup>117</sup> are costly,<sup>118</sup> and provide prosecutors with “indecent power.”<sup>119</sup> They also lead to disrespect for the law because they are contrary to what ordinary citizens take for granted: that defendants will be punished based on a conviction.<sup>120</sup> The requirement that the guideline-recommended sentencing range be based even on acquitted conduct, poses particular concern.<sup>121</sup> The Commission’s proposal to

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<sup>117</sup> See USSC, *Fifteen Year Review*, at 50, 87 (relevant conduct rule is inconsistently applied because of ambiguity in the language of the rule, law enforcement’s role in establishing it, and untrustworthy evidence); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline §1B1.3*, Federal Judicial Center, Research Division, 10 FED. SENT’G REP. 16 (1997) (sample test administered by researchers for the Federal Judicial Center to probation officers resulted in widely divergent guideline ranges for three similar defendants).

<sup>118</sup> One study, for example, “concluded that one half of all sentences imposed in the districts studied had been increased, sometimes doubled or tripled, by uncharged conduct.” Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 289, 311-12 (1992).

<sup>119</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1425 (2008). The relevant conduct rules give prosecutors the twin benefits of (1) increased punishment through inflating guideline ranges on the basis of uncharged, dismissed and acquitted conduct, a lower standard of proof and inadmissible evidence; and (2) increased power to coerce guilty pleas, because they can obtain the same sentence even if no charge is filed or conviction obtained. See, e.g., Kate Stith & Jose Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 STAN. L. REV. 523, 550 (1993) (“Implementation of a conviction-offense system [rather than a ‘real offense’ system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders’ criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified.”).

<sup>120</sup> See, e.g., *United States v. Ibang*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006) (“[M]ost people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted.”), *vacated*, 271 Fed. App’x 298 (4th Cir. 2008).

<sup>121</sup> John Steer, former General Counsel and Vice-Chair of the Commission has called for the Commission to exclude acquitted conduct from the guidelines and permit its use only as a discretionary factor. See *An Interview with John R. Steer*, 32 CHAMPION 40, 42 (2008). See also *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (“Allowing judges to rely on acquitted or uncharged conduct to

extend this concept to a court’s consideration of a defendant’s prior conduct would exacerbate these problems, and should be rejected.

### 3. The Commission Exceeds its Authority

The Commission’s conduct-based approach is inconsistent with the plain language of Congress’s directive in 28 U.S.C. § 994, and adopting it would exceed the Commission’s authority.

Congress imposed upon the Commission several “specific requirements.”<sup>122</sup> Among those, Congress required that the Commission “shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for *categories* of defendants in which the defendant . . . has been *convicted* of a [qualifying] felony . . . and has previously been *convicted* of two or more prior [qualifying] felonies.”<sup>123</sup> The Commission “sought to implement this directive by promulgating the ‘Career Offender Guideline.’”<sup>124</sup>

Addressing this very congressional requirement in § 994(h), the Supreme Court recognized that while the Commission has “significant discretion in formulating guidelines,”<sup>125</sup> this discretion is not “unbounded.”<sup>126</sup> If a guideline is inconsistent with the plain language of a specific congressional directive, that guideline must “give way.”<sup>127</sup>

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impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.”); *Barkow, supra* note 113 at 1627 (“Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury.”); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235 (2009) (objecting to the use of acquitted conduct on both constitutional and policy grounds).

<sup>122</sup> *United States v. LaBonte*, 520 U.S. 751, 753 (1997) (“Congress imposed upon the Commission a variety of specific requirements” and § 994 is “[a]mong those requirements”).

<sup>123</sup> 28 U.S.C. § 994(h) (emphases added).

<sup>124</sup> *LaBonte*, 520 U.S. at 753.

<sup>125</sup> *Id.* at 757 (quoting *Mistretta v. United States*, 488 U.S. 361, 377 (1989)).

<sup>126</sup> *Id.* at 753.

<sup>127</sup> *Id.* at 757 (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)); see also *United States v. Nottingham*, 898 F.2d 390, 393 (3d Cir. 1990) (citing 28 U.S.C. § 994(a)) (“To the extent

Section 994(h) “is designed to cabin the Commission’s discretion in the promulgation of guidelines for career offenders.”<sup>128</sup> And in doing so, Congress unambiguously required that *categories* of defendants *convicted* of certain offenses be sentenced at or near the maximum. As discussed above, the Supreme Court has already held that when Congress refers to “conviction,” it “impos[es] the categorical approach.”<sup>129</sup> Directing courts to look beyond the elements of a conviction to conduct is inconsistent with the statute’s plain language.

Because a conduct-based approach is “at odds with § 994(h)’s plain language,” the Commission’s authority under § 994(a)-(f) cannot save the Commission’s proposal.<sup>130</sup> Any discretion the Commission may have under (a)-(f) “must bow to the specific directives of Congress.”<sup>131</sup> Section 994(h) is a “specific requirement,”<sup>132</sup> which includes that a defendant be “convicted.” The conduct-based approach the Commission proposes renders the “convicted” requirement a “virtual nullity.”<sup>133</sup> The Commission lacks the authority to eliminate this congressional requirement.

### **B. Parts B-D: Application Issues**

As discussed above, all available evidence shows that the career offender guideline is over-inclusive and fails to meet the Commission’s stated goal of “focusing . . . on the most dangerous offenders.”<sup>134</sup> Despite this evidence, the Commission proposes three amendments to address “application issues” with the career offender

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that the enabling legislation contains specific direction, the guidelines must comport with that direction”) *superseded on other grounds* by USSG §5G1.3 (1989); *United States v. Quesada*, 972 F.2d 281, 282 (9th Cir. 1992) (“Congress has given us the authority to invalidate a guideline section that is contrary to the Sentencing Reform Act.”).

<sup>128</sup> *LaBonte*, 520 U.S. at 761, n.5.

<sup>129</sup> *Shepard*, 544 U.S. at 19.

<sup>130</sup> *LaBonte*, 520 U.S. at 757. *See* 83 Fed. Reg., at 65411 (citing 28 U.S.C. § 994(a)-(f)).

<sup>131</sup> *LaBonte*, 520 U.S. at 757.

<sup>132</sup> *Id.* at 753.

<sup>133</sup> *Id.* at 760 (“Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity.”).

<sup>134</sup> 83 Fed. Reg., at 65411 (quoting USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016)); *see supra* notes 3, 8-10 and accompanying text.

guideline, each of which would expand the guideline's already over-inclusive reach. Defenders oppose this unwarranted expansion. The Commission's proposed amendments are out of step, not only with the Commission's own research and prior recommendations, but also with recent congressional action in the First Step Act to reduce mass incarceration and unduly harsh inflexible penalties.<sup>135</sup>

Before addressing each of the proposed amendments, we note that nothing in the Commission's recent report regarding recidivism following a violent offense shows that more offenses should be classified as "violent" for career offender purposes. Commission reports have often touted the correlation between criminal history and recidivism,<sup>136</sup> because risk prediction is the primary purpose of the criminal history rules.<sup>137</sup> Both this recent report and the Commission's previous report on career offenders found somewhat higher re-arrest rates among defendants with "prior" or "instant" violent offenses under the reports' definitions than among non-violent offenders.<sup>138</sup> But this does not show that prediction would be improved by classifying more prior offenses as "violent" predicates.<sup>139</sup> We know that the current career offender and armed career offender guidelines grossly over-predict recidivism risk for defendants who would not otherwise fall in CHC VI, and that the unjustly enhanced sentences under those rules fall disproportionately on black defendants.<sup>140</sup> Nothing in the Commission's reports shows that violent prior offenses in general—or the particular prior offenses that would be affected by the proposed amendments—should enhance sentences more than they already do under the current criminal history rules in Chapter 4, Part A. Indeed, the most recent report confirms that even career offenders and armed career offenders classified as

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<sup>135</sup> See First Step Act, Pub. L. No. 115-391.

<sup>136</sup> See, e.g., USSC, *Recidivism: Violent Offenses*, at 14.

<sup>137</sup> See USSC, *Fifteen Year Review*, at 13.

<sup>138</sup> See USSC, *Recidivism: Violent Offenses*, at 3; USSC, *Career Offender Report*, at 40-41.

<sup>139</sup> Such research requires a different methodology—with better control variables and concern with inter-correlations. The Commission has undertaken such research in the past. See, e.g., USSC, *A Comparison of Federal Sentencing Guidelines Criminal History Category and the U. S. Parole Commission's Salient Factor Score* (2005).

<sup>140</sup> See *supra* notes 5-10 and accompanying text.

“prior violent offenders” under the reports’ definitions have lower recidivism rates than defendants placed in CHC VI under the normal criminal history rules.<sup>141</sup>

### 1. Part B: Robbery

At the Department of Justice’s urging, the Commission proposes to amend §4B1.2 to define robbery as an offense “described in 18 U.S.C. § 1951(b)(1),” Hobbs Act robbery.<sup>142</sup> This amendment would expand the reach of the career offender guideline to encompass all forms of robbery-like offenses including those involving force to property or threatened immediate or future force to property. In light of what is known about the career offender guideline—that it is already over-inclusive and imposes a more severe sanction than required—we fail to understand why the Commission would reach out to sweep in offenses involving force against *property*. This proposed amendment would not focus the career offender guideline on “the most dangerous offenders.”<sup>143</sup> Defenders oppose it.

The “Hobbs Act is unmistakably broad,”<sup>144</sup> and “does not lend [itself] to restrictive interpretation.”<sup>145</sup> Important here, it prohibits among other things, takings “by means of actual or threatened force . . . immediate or future, to [a] person or property.” This stands in contrast to the “modern trend [which] is to consider robbery as an offense against the person.”<sup>146</sup> The vast majority of state robbery

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<sup>141</sup> See USSC, *Recidivism: Violent Offenses*, at 36, fig. 4.7.

<sup>142</sup> 83 Fed. Reg., at 65411-12 (citing 18 U.S.C. § 1951(b)(1), which defines robbery under the Hobbs Act). Alternatively, the Commission proposes to amend the commentary of §4B1.2 to define robbery, consistent with § 1951(b)(1), as: “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” The same objections set forth above apply to this alternative proposal.

<sup>143</sup> *Supra* note 134.

<sup>144</sup> *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016).

<sup>145</sup> *United States v. Culbert*, 435 U.S. 371, 373 (1978).

<sup>146</sup> 3 Wayne R. LaFare, *Substantive Criminal Law* § 20.3, n.3 (3d ed. Oct. 2018 update).

statutes require the taking of property from another by the use of force against a person or by the threat of immediate force against a person.<sup>147</sup>

The Commission's proposal is not necessary to ensure that defendants who engage in violent conduct and are convicted under the Hobbs Act receive severe sentences. Even without the career offender enhancement, individuals convicted of dangerous robberies would be subject to severe penalties. For example, under §2B3.1 (Robbery), a defendant's base offense level starts at 20.<sup>148</sup> If the robbery included bodily injury, the defendant would be subject to a 2- to 6-level upward enhancement.<sup>149</sup> And the defendant would be subject to further upward increases if a firearm or dangerous weapon was used, possessed, brandished, or discharged, or if a threat of death was made.<sup>150</sup> In addition, prior convictions would be accounted for in the regular criminal history calculation, which evidence shows is a better predictor of recidivism than the career offender designation.<sup>151</sup> If a court determines the advisory guideline range from these calculations would be too low, upward departures and variances would be available.<sup>152</sup> Addressing such cases in this manner makes far more sense than expanding the scope of the career offender guideline to sweep in less culpable, less serious offenses.

## 2. Part C: Inchoate Offenses

Currently, the commentary to §4B1.2 defines "crime of violence" and "controlled substance offense" to "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." The Commission proposes to remove this

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<sup>147</sup> See *United States v. O'Connor*, 874 F.3d 1147, 1155 (4th Cir. 2017) (citing *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380, nn.5 & 6 (5th Cir. 2006), *abrogated on other grounds by United States v Rodriguez*, 711 F.3d 541, 554-55 (5th Cir. 2013)) (recognizing "that a substantial majority of states have adopted a definition of robbery that includes either use of force or threats of imminent force against a person").

<sup>148</sup> §2B3.1(a).

<sup>149</sup> §2B3.1(b)(3)(A)-(E).

<sup>150</sup> §2B3.1(b)(2). Still more enhancements would apply if the defendant abducted or physically restrained a person (2-4 levels); if a firearm or controlled substance was taken (1 level); or if the loss exceeded \$20,000 (1-7 levels). §2B1.3(b)(4), (6), (7).

<sup>151</sup> See *supra* notes 8-10, 140-41 and accompanying text.

<sup>152</sup> §4A1.3; 18 U.S.C. § 3553(a).

language from the commentary and add to the text of §4B1.2 a significantly expanded set of inchoate offenses, including a new catch-all provision: “other [unnamed] . . . offenses arising from accomplice liability.”<sup>153</sup> The Commission also proposes additional guidance as outlined in three different options. Given the absence of any evidence that these lesser offenses warrant the severe sanctions of the career offender guideline, and the already overly broad reach of the guideline, Defenders oppose this proposal.

The Commission should exclude inchoate offenses from the career offender guideline. As we have previously explained, these offenses cover a broad range of conduct, much of which is non-violent.<sup>154</sup> Attempt offenses can be completed by mere reconnoitering, planning, or obtaining tools to commit a substantive offense;<sup>155</sup> conspiracies often require even less.<sup>156</sup> The Commission’s proposal to *add* to the list

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<sup>153</sup> The language the Commission proposes is as follows:

The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a ‘crime of violence’ or a ‘controlled substance offense.’

83 Fed. Reg., at 65414.

<sup>154</sup> Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 13-15 (Nov. 25, 2015).

<sup>155</sup> *Id.* at 13; *see also Short v. State*, 995 S.W.2d 948, 951-52 (Tex. Ct. App. 1999) (convicted of attempted delivery of a controlled substance to an inmate even though package received was actually rolled alfalfa hay and carrot tops); Model Penal Code § 5.01(2) (2017) (listing conduct that constitutes a “substantial step,” including reconnoitering, seeking to entice a victim, or soliciting an innocent agent).

<sup>156</sup> *See, e.g., United States v. Whitson*, 597 F.3d 1218, 1221, 1223 (11th Cir. 2010) (noting that South Carolina conspiracy requires an agreement with at least one other person to perform an unlawful act, but recognizing that there is “no violence or aggression in the act of agreement”); *United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992) (“Because the crime of conspiracy in New Mexico is complete upon the formation of the intent to commit a felony, and does not require that any action be taken on that intent, the elements of a conspiracy to commit a violent felony do not include the threatened use of physical force.”); *State v. Rozier*, 316 S.E.2d 893, 901 (N.C. Ct. App. 1984) (affirming conspiracy to traffic in

of inchoate offenses cannot be supported. A conviction for criminal solicitation is often complete upon mere communication.<sup>157</sup> And the Commission’s proposal to add an exceptionally broad catch-all—which would include *any* offense “arising from accomplice liability,” regardless of severity—is particularly troubling.

If the Commission persists in its proposal to treat these lesser offenses on par with more serious offenses subject to the severe sanctions of the career offender guideline, Option 3A, with a requirement that a conspiracy count “only if” an “overt act must be proved as an element,” is the least harmful of the proposed options.<sup>158</sup>

Options 1 and 2 should be rejected. Both options direct courts determining whether an offense is a “crime of violence” or a “controlled substance offense” to look “only to the underlying substantive offense” and “not consider the elements of the inchoate offense or offense arising from accomplice liability.”<sup>159</sup> This approach would treat defendants who have not been convicted of the object of the inchoate offense (*i.e.*,

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cocaine where the defendant merely had access to cocaine, was physically present during drug sales and relayed messages to co-defendant about cocaine transactions).

<sup>157</sup> See, e.g., *Lopez v. State*, 864 So.2d 1151, 1153 (Fla. Dist. Ct. App. 2003) (“No agreement is needed, and criminal solicitation is committed even though the person solicited would never have acquiesced to the scheme set forth by the defendant. Thus, the general nature of the crime of solicitation lends support to the conclusion that solicitation, by itself, does not involve the threat of violence even if the crime solicited is a violent crime.” (internal citations omitted)); *People v. Lubow*, 272 N.E.2d 331, 332 (N.Y. 1971) (“[The crime of solicitation] rest[s] solely on communication without need for any resulting action . . . . [N]othing need be done under the statute in furtherance of the communication (‘solicits, commands, importunes’) to constitute the offense. The communication itself with intent the other person engage in the unlawful conduct is enough. It needs no corroboration.”); see also Model Penal Code § 5.02 (2017) (defining “Solicitation” as commanding, encouraging, or requesting another person to engage in specific conduct that would constitute a crime, with the purpose of promoting or facilitating the crime’s commission. “It is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such a communication.”).

<sup>158</sup> 83 Fed. Reg., at 65414. At a bare minimum, in light of the Commission’s conclusions regarding drug trafficking only offenses, and new findings about non-violent offenses, the Commission should require an overt act for conspiracy to commit a “controlled substance offense,” as proposed in Option 3B. See USSC, *Career Offender Report*, at 44; USSC, *Recidivism: Violent Offenses*, at 14, fig. 2.9.

<sup>159</sup> 83 Fed. Reg., at 65414.

the underlying offense) as if they have been convicted of the underlying offense. In so doing, it raises all of the same issues discussed above regarding the Commission's proposal to abandon the categorical approach: it is inconsistent with the evidence regarding the over-inclusiveness of the current guideline, Supreme Court law, and Congress's directive in § 994(h) to use only offenses of which the defendant has been "convicted."<sup>160</sup>

The Supreme Court has long recognized that an inchoate offense and a substantive offense are distinct crimes with different elements.<sup>161</sup> Bypassing the determination of whether a specific inchoate conviction corresponds to the generic definition of that offense would improperly erase the distinction between inchoate offenses and completed offenses.<sup>162</sup> It would treat defendants convicted of inchoate offenses as if

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<sup>160</sup> See *supra* Part I.A.

<sup>161</sup> *Braverman v. United States*, 317 U.S. 49, 54 (1942) ("A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object."); *James v. United States*, 550 U.S. 192, 197 (2007) (recognizing that "[attempted burglary] is not 'burglary' because it does not meet the definition of burglary" and instead contains a separate element that "defendant fail in preparation or be intercepted or prevented in the execution of the underlying offense" (internal marks and citation omitted)), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). See also, e.g., *Berry v. State*, 996 So. 2d 782, 789 (Miss. 2008) ("Consequently, the elements of conspiracy and the elements of the underlying crime, possession of precursors, are not the same."); *State v. Leyba*, 600 P.2d 312, 313 (N.M. Ct. App. 1979) ("[B]ut conspiracy is an initiatory crime, and it is a separate common design or mutually implied understanding between two or more persons to accomplish a criminal act at some time subsequent to reaching the common design or mutual understanding to do so." (citation and marks omitted)); *State v. Lippard*, 25 S.E.2d 594, 596 (N.C. 1943) ("The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses.").

<sup>162</sup> And since inchoate offenses are often seen as lesser offenses than the completed offense, treating the two as equal would also deprive many defendants of their negotiated plea bargains. See *Taylor*, 495 U.S. at 601 ("if a guilty plea to a lesser [ ] 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 [the original offense]."); see also, e.g., N.Y. Penal Law § 110.05 and Practice Commentary (McKinney 2014) (classifying attempts of all offenses except several enumerated A-1 felonies as a class less than the completed offense because "the consequences of an attempt [are] generally less serious than those of the consummated crime, [and therefore] the attempt deserved a less severe penalty."); Me. Rev. Stat. Ann. tit. 17-A, § 152(1)(B)-(E) (2003) (reflecting that attempt crimes are one class lower than the corresponding substantive crime); Fla. Stat. Ann. § 777.04 (West 2008) (providing most

they had been convicted of a completed underlying offense. But these defendants were not convicted of the underlying offense, and in many cases were not even charged with it. Options 1 and 2 would rely on “labels”—whether an offense is called “attempt” or “conspiracy”—rather than determining whether the actual conviction corresponds to the generic definition of the inchoate offense. But as the Supreme Court has made clear, the “label a State assigns a crime . . . has no relevance.”<sup>163</sup> The determination of whether someone has been “convicted” of an offense requires an examination of the elements, “regardless of its exact definition or label.”<sup>164</sup> The Commission should reject Options 1 and 2.

### 3. Part D: Controlled Substance Offense

The Commission also proposes two expansions to the definition of “controlled substance offense.”<sup>165</sup> First, the Commission would amend the definition to include offenses involving an “offer to sell.” Second, the Commission would add a subsection to the existing definition to include “an offense described in 46 U.S.C. § 70503(a) or § 70506(b).” The Commission’s definition of “controlled substance offense” is already broader than what Congress required.<sup>166</sup> In addition, all the evidence shows that the career offender guideline directs more severe sentences than necessary to protect the public, particularly for defendants with only controlled substance convictions.<sup>167</sup> The last thing the Commission should do is expand the definition of “controlled substance offense.”

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criminal attempt, solicitation, and conspiracy offenses are ranked “one level below the ranking” of the completed offense); Haw. Rev. Stat. Ann. § 705-512 (West 1997) (“Criminal solicitation is an offense one class or grade, as the case may be, less than the offense solicited”).

<sup>163</sup> *Mathis*, 136 S. Ct. at 2251 (citing *Taylor*, 495 U.S. at 590-92).

<sup>164</sup> *Taylor*, 495 U.S. at 599. *See also id.*, at 588 (“Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled ‘robbery’ or ‘burglary’ by the laws of the State of conviction.”).

<sup>165</sup> 83 Fed. Reg., at 65415.

<sup>166</sup> *Compare*, 28 U.S.C. § 994(h)(1)(B), (2)(B) (enumerating qualifying drug felonies), *with* §4B1.2(b) (defining “controlled substance offense”); *see also* Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 52-57 (2010).

<sup>167</sup> *See supra* notes 8-10 and accompanying text.

Expanding the definition of “controlled substance offense” to include offers to sell would prove particularly misguided. In some jurisdictions, a person can be convicted of offering to sell a controlled substance even though no actual transfer of the controlled substance takes place.<sup>168</sup> A person need not actually possess a controlled substance or even have the ability to transfer the substance in the future.<sup>169</sup> Such convictions should not subject a defendant to the severe sanction of the career offender guideline.

If the Commission’s concern is that there are specific cases where a controlled substance offense does not count under the categorical approach because an indivisible statute can be violated by an “offer to sell,”<sup>170</sup> the best solution is for the sentencing court to depart or vary upward if it concludes the conduct at issue was sufficiently serious. The solution is not to sweep countless less culpable defendants into to a guideline that judges already reject as too severe over 75% of the time.<sup>171</sup>

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<sup>168</sup> See *Stewart v. State*, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986) (en banc) (“However, when delivery is by offer to sell no transfer need take place. A defendant need not even have any controlled substance. . . . The offense is complete when, by words or deed, a person knowingly or intentionally offers to sell what he states is a controlled substance.”).

<sup>169</sup> See *id.* See also *State v. Mosley*, 380 N.E.2d 731, 734 (Ohio Ct. App. 1977) (affirming defendant’s conviction for offering to sell heroin where the defendant sold a mixture of baking soda, coffee, and sugar because “[t]he defendant made an offer to sell heroin, thereby violating the law”); *State v. Lorsung*, 658 N.W.2d 215, 216 (Minn. Ct. App. 2003) (affirming offer to sell conviction where defendant accepted the money, left, and never returned with the drugs); *State v. Strong*, 875 P.2d 166, 167 (Ariz. Ct. App. 1993) (“[The statute] requires proof that the defendant ‘knowingly’ offered to sell the drug. There is thus no reason to read into the statute the additional requirement of proof of intent to sell.”); *State v. Brown*, 301 A.2d 547, 553 (Conn. 1972) (“[T]here is no question that the allegation of sale offense in the information does not include the elements of a possession violation. . . . [T]here is no requirement that one be in possession of goods or have control over them in order to sell them.”), *overruled on other grounds by State v. Hart*, 605 A.2d 1366 (Conn. 1992).

<sup>170</sup> See, e.g., *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017).

<sup>171</sup> USSC, Individual Datafiles FY 2017. This number has steadily increased over the past decade. In FY 2008 approximately 55% of those designated as career offenders were sentenced below the guideline. In FY 2013, 69.2% were sentenced below the career offender range. USSC, Individual Datafiles FY 2008 & 2013.

## II. Proposed Amendment: §1B1.10

### A. Part A: *Koons v. United States*

The Commission proposes amending §1B1.10 “in light of the Supreme Court decision” in *Koons v. United States*, 138 S. Ct. 1783 (June 4, 2018).<sup>172</sup> Defenders oppose the proposed amendment for two reasons. First, the proposed amendment is premised on an incorrect interpretation of *Koons*. Read correctly, for the narrow holding it offers, *Koons* requires no change to §1B1.10. Second, the Commission adopted the current rule, that continues to provide appropriate and still-relevant guidance to courts, for good reason and with support from Defenders and the Department of Justice, among others.<sup>173</sup> The rule helps “ensure that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance.”<sup>174</sup>

#### 1. *Koons* Provides No Basis to Amend §1B1.10

The Commission identifies the Supreme Court’s decision in *Koons* as the impetus for the proposed changes to §1B1.10. The holding in *Koons*, however, is narrower than the Commission represents, and does not require any change to the policy statement.

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<sup>172</sup> 83 Fed. Reg., at 65401.

<sup>173</sup> See Letter from Jonathan J. Wroblewski, U.S. Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 4 (Mar. 6, 2014) (supporting the proposed amendment later adopted by the Commission and stating: “the correct policy – for proportionality reasons and to properly account for substantial assistance – is to permit a reduction from the applicable guideline range without regard to any mandatory minimum”); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 2-4 (Mar. 18, 2014) (supporting the proposed amendment later adopted by the Commission); Public Comment on Proposed Amendments (Mar. 2014), <https://www.ussc.gov/policymaking/public-comment/public-comment-march-26-2014>; Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., (Mar. 13, 2014); USSC Public Meeting (Apr. 10, 2014) (including Commissioners discussion of amendment before vote), video available at <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-10-2014>.

<sup>174</sup> USSG App. C, Amend. 780, Reason for Amendment (Nov. 1, 2014).

The Commission appears to read *Koons* as holding that *all* “defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance . . . , are ineligible for sentence reductions under section 3582(c)(2).”<sup>175</sup> *Koons*, however, only addressed a *subset* of those defendants: specifically those who were sentenced by courts that explicitly relied on the mandatory minimum, and not the advisory guideline range, when imposing a sentence below the mandatory minimum following a substantial assistance motion under 18 U.S.C. § 3553(e).<sup>176</sup> “[W]hat happened here,” the Court explained, is that the sentencing “court discarded the advisory ranges in favor of the mandatory minimum sentences” and then “departed downward from the mandatory minimum because of petitioners’ substantial assistance.”<sup>177</sup> And “[i]n no case did the court consider the original drug Guidelines ranges that it had earlier discarded.”<sup>178</sup> From these facts, the Court concluded that “petitioners’ sentences were ‘based on’ their mandatory minimums and on their substantial assistance to the government, not on sentencing ranges that the Commission later lowered,”<sup>179</sup> and they therefore were “ineligible for § 3582(c)(2) sentence reductions.”<sup>180</sup>

What happened in *Koons* is not what happens in every case. In other cases, courts do look to the guidelines to help determine the appropriate sentence when a defendant has provided substantial assistance. During argument in *Koons*, while

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<sup>175</sup> 83 Fed. Reg., at 65402.

<sup>176</sup> The government repeatedly emphasized that in the cases before the Court in *Koons*, the original sentencing courts relied on the mandatory minimum, not the guidelines. *See, e.g.*, Brief of Appellee, *Koons v. United States*, 138 S. Ct. 1783 (2018) (No. 17-5716), 2018 WL 1050341, at \*8 (“the district court granted a substantial-assistance departure, which it calculated as a reduction from the statutory minimum”); Transcript of Oral Argument, *Koons*, 138 S. Ct. 1783, 2018 WL 1509019, at \*43 (“In this case, [defendants] have no argument, and they haven’t really made one, that their sentences were based on the guidelines as a matter of historical fact.”).

<sup>177</sup> *Koons*, 138 S. Ct. at 1787.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1787.

<sup>180</sup> *Id.*

making “clear that we’re talking about a case that’s not this one,”<sup>181</sup> the government “acknowledge[d] . . . as we acknowledge[d] in our brief, there are district courts that do this . . . . And I also would acknowledge that in those cases, the government often . . . suggest[s] that the court do it that way.”<sup>182</sup> For example, in *In re Sealed Case*, a decision the Commission considered when amending §1B1.10 in 2014, the sentencing court “announced that it would ‘do somewhat of a reduction, not only from’ the mandatory minimum, but also *a further reduction* from ‘what he would have gotten without the mandatory minimums.’”<sup>183</sup> Looking to the advisory guideline range is exactly what courts should do when imposing a sentence below the mandatory minimum following a substantial assistance motion under 18 U.S.C. § 3553(e). Section 3553(e) specifically instructs that a sentence below the mandatory minimum “shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission.” A recent Defender survey confirms that sentencing courts across the country regularly use guideline ranges as anchors or targets in crafting sentences in such circumstances.<sup>184</sup>

The narrow holding in *Koons* did not address cases where sentencing courts look to the guideline ranges to determine the appropriate sentence. The Court explicitly declined to “resolve the meaning of ‘sentencing range’” under 18 U.S.C. § 3582(c)(2).<sup>185</sup> The Court also took “no view” on whether 18 U.S.C. § 3553(e) “prohibits consideration of the advisory Guidelines ranges in determining how far to

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<sup>181</sup> Transcript of Oral Argument, *Koons*, 138 S. Ct. 1783, 2018 WL 1509019, at \*43.

<sup>182</sup> *Id.* at \*29 (responding to Justice Ginsburg’s point that “district court judges do take into account the guidelines when they . . . determine how much time to include for substantial assistance”).

<sup>183</sup> *In re Sealed Case*, 722 F.3d 361, 366 (D.C. Cir. 2013) (citation omitted).

<sup>184</sup> See Brief of National Ass’n of Federal Defenders as Amicus Curiae in Support of Petitioners, *Koons*, 138 S. Ct. 1783, 2018 WL 620251, at \*18-24 (reporting results of national survey of Federal Defender offices, including that in 78% of 81 responding districts, “judges expressly based sentences in whole or in part on the applicable guideline range”).

<sup>185</sup> *Koons*, 138 S. Ct. at 1788 n.1 (“We need not resolve the meaning of ‘sentencing range’ today.”).

depart downward.”<sup>186</sup> Nothing in the *Koons* holding requires or suggests the amendments the Commission proposes.<sup>187</sup>

## 2. The Current Rule Prevents Unwarranted Disparity and Unjust Results

The current rule in §1B1.10 regarding cases with mandatory minimums and substantial assistance continues to provide useful and appropriate guidance. Both Defenders and the Department of Justice supported the rule when it was proposed in 2014.<sup>188</sup> And the Commission rightly adopted it because it prevents unwarranted disparity and unjust results. As the Commission explained when it adopted the rule: “The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated . . . . Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.”<sup>189</sup>

The current rule also helps avoid unwarranted disparity that would arise if only those defendants with original guideline ranges above the mandatory minimums were eligible for retroactive reductions. Without the current rule and commentary, many defendants with less serious offenses and less serious criminal histories

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<sup>186</sup> *Id.* at 1790 n.3.

<sup>187</sup> Even Option 1 of the proposed amendment, which does not change the text of subpart (c), proposes adding to the commentary an incorrect representation of the holding in *Koons*. The proposed commentary cites *Koons* as support for the following statement: “Accordingly, a defendant is not sentenced ‘based on a guideline range’ if, pursuant to §5G1.1(b), the guideline range that would otherwise have applied was superseded and the statutorily required minimum sentence became the defendant’s guideline sentence.” Because the Court, consistent with the government’s description of what happened, found that the defendants in *Koons* were sentenced based on the mandatory minimum, not based on a guideline range, the Court never addressed the issue the Commission suggests it did.

<sup>188</sup> *See* Letters, *supra* note 173.

<sup>189</sup> USSG App. C, Amend. 780, Reason for Amendment (Nov. 1, 2014) (quoting USSG App. C, Amend. 759, Reason for Amendment (Nov. 1, 2011)). *See also* USSC Public Meeting (Apr. 10, 2014) (discussion by Chief Judge Ricardo H. Hinojosa, then Vice Chair and former Chair, U.S. Sentencing Comm’n, regarding the proposed amendment, beginning at 21:54), video available at <https://www.usc.gov/policymaking/meetings-hearings/public-meeting-april-10-2014>.

would remain incarcerated longer than defendants with more serious offenses and criminal histories.

Take, for example, Aaron and Brian, both first time offenders, sentenced under the current guidelines for the same drug quantity, 50 grams of “Ice,” and facing the same 120-month mandatory minimum sentence under 21 U.S.C. § 841. In both cases the government filed § 3553(e) motions, and in both cases the court anchored the §3553(e) reduction to the guideline ranges, and imposed sentences of 60 months. Brian’s guideline range, however, was higher than Aaron’s because he had a higher offense level based on a 2-level enhancement for possessing a gun. Brian’s offense level was 32, with a guideline range of 121-151 months. Aaron’s offense level was 30, with a guideline range of 97-121 months. The current commentary ensures that both Aaron and Brian are eligible for any future amendments to the drug quantity table, not just Brian, who received the sentencing enhancement for a gun, pushing his guideline range above the mandatory minimum. Aaron, who received no weapon enhancement, should be similarly eligible for a retroactive reduction. The current rule best avoids unwarranted disparity and helps ensure fair sentences for defendants who provide substantial assistance.

### **B. Part B: Circuit Conflict**

The Commission proposes to amend the §1B1.10 commentary to specify that when a court is considering a motion for a reduced sentence under 18 U.S.C. § 3582, and the original sentence was less than the applicable guideline range at that time “pursuant to one or more departures or variances in addition to a substantial assistance departure,” the court may reduce the sentence “comparably less than the amended range” under §1B1.10(b)(2)(B) based on *either* (Option 1) “only the substantial assistance departure”; *or* (Option 2) “all the departures and variances that the defendant received.”<sup>190</sup> Defenders urge the Commission to adopt Option 2.

Option 2 is the superior approach: it is simple, provides fair sentences to cooperators, and poses no danger to the community. First, Option 2 minimizes complexity. It “provides a straightforward method for determining a reduced sentence without forcing courts to attempt to deconstruct the original sentence by

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<sup>190</sup> 83 Fed. Reg., at 65406.

determining the specific values of each departure or variance.”<sup>191</sup> Courts do not always “specify to what extent the reduction was attributable to each” of the departures and variances relied upon at sentencing.<sup>192</sup> As a result, if courts considering § 3582 motions had to separate the effect of the substantial assistance motion from other departures or variances, they would “be forced to speculate on the reasons for the initial below-guideline sentence.”<sup>193</sup> Such speculation is imprecise, inefficient, and often unfair. For this reason, in response to the Commission’s Issue for Comment, the Commission also should refrain from specifically including or excluding some departures or variances from Option 2.<sup>194</sup>

Second, Option 2 provides fair sentences for cooperators. It would ensure that cooperators “who have additional mitigating circumstances strong enough to merit . . . downward departures [or variances of a size] equal to or greater than the amendment effects,” are eligible for sentence reductions under § 3582(c)(2).<sup>195</sup> “[W]hy would the Commission intend that defendants with more mitigating factors be denied the continuing benefit of their cooperation?”<sup>196</sup> The alternative approach in Option 1 would render “the benefit to cooperators intended by USSG §1B1.10(b)(2) . . . obscure or illusory when a cooperator originally received the

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<sup>191</sup> *United States v. D.M.*, 869 F.3d 1133, 1141 (9th Cir. 2017).

<sup>192</sup> *United States v. Taylor*, 815 F.3d 248, 249 (6th Cir. 2016) (recognizing that the district court granted both a government motion for substantial assistance and the defendant’s motion for a downward variance, “but did not specify to what extent the reduction was attributable to each one”); *see also United States v. Wright*, 562 Fed. App’x 885, 886 (11th Cir. 2014) (observing that defendant’s sentence was below his advisory guideline range “based on both a U.S.S.G. § 5K1.1 substantial assistance departure and an 18 U.S.C. § 3553(a) variance, although the sentencing court did not indicate to what extent its sentence accounted for each of these grounds”).

<sup>193</sup> *D.M.* 869 F.3d at 1141-42; *see also Taylor* at 252 (Merritt, J., dissenting) (“The mathematical percentage estimated for ‘substantial assistance’ almost five years ago at the original sentencing is not a scientific fact, just a guess or speculation.”).

<sup>194</sup> *See* 83 Fed. Reg., at 65407 (seeking comment on if the Commission adopts Option 2, whether it should limit the departures and variances that may be considered).

<sup>195</sup> *D.M.*, 869 F.3d at 1142.

<sup>196</sup> *Id.*

benefit of multiple downward adjustments.”<sup>197</sup> Option 1, thus, is inconsistent with the Commission’s rationale for the 2011 amendment to §1B1.10: “The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants” and “[a]pplying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.”<sup>198</sup>

Third, Option 2 is not subject to abuse and does not jeopardize public safety. “[T]here is no risk of defendants somehow taking undue advantage of this [approach] because, at most, it makes a defendant eligible for a reduced sentence, and the district court must still determine whether the individual defendant warrants the reduction sought.”<sup>199</sup> Option 2 simply means that those with departures and/or variances in addition to a substantial assistance motion are *eligible* for a comparable reduction from the newly amended guideline range. It does not—and cannot—require a court to reduce a sentence below the court’s determination of what is sufficient to serve the purposes of sentencing including protection of the public.<sup>200</sup>

That said, an even simpler and fairer solution than Option 2 exists. Defenders encourage the Commission to allow courts to consider comparable reductions in all cases where the original sentence was below the advisory guideline range at the time, regardless of whether the government filed a motion for substantial assistance. If the Commission is concerned about how a court might account for certain variances when determining the appropriate reduction, such as those based on policy disagreements with the guideline that was lowered, the Commission could provide specific guidance. For example, Defenders have previously recommended that “the Commission ‘bring back the concept of the former policy statement’ of

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<sup>197</sup> *Id.* at 1141.

<sup>198</sup> USSG App. C, Amend. 759, Reason for Amendment (Nov. 1, 2011); *see also D.M.*, 869 F.3d at 1140 (recognizing the Commission’s reasons for the 2011 amendment “stress that cooperators are to be eligible for below-guideline sentences”).

<sup>199</sup> *D.M.*, 869 F.3d at 1142.

<sup>200</sup> *See* 18 U.S.C. § 3582(c) (requiring a court consider the factors set forth in 18 U.S.C. § 3553(a)).

instructing courts to consider the sentence it would have imposed had the amendment been in effect, including ‘whether they already did exactly what the amendment does, that is, reduced the sentence based on the guideline’s policy flaws and to the same extent reflected in the amended guideline range.’”<sup>201</sup> Defenders continue to support this approach, and urge the Commission to consider it.

### **III. Miscellaneous**

#### **A. The FDA Reauthorization Act of 2017**

In response to legislation adding a new criminal offense to subsection (b)(8) of 21 U.S.C. § 333, penalizing the knowing manufacture, sale, dispensing, or holding of counterfeit drugs, the Commission proposes amending Appendix A to reference this new offense to §2N2.1 (Violation of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product).<sup>202</sup>

Defenders urge the Commission to wait and see what cases are prosecuted under this new provision before deciding how best to address them in the guidelines. With evidence about what the cases look like, and how the parties and courts assess them, the Commission will be in a better position to make this decision. That said, if the Commission opts to proceed now, Defenders do not object to the Commission’s proposal to refer the offense to §2N2.1. While we believe a base offense level of 6 may be too high across the board for this guideline, and would support a base offense level of 4, under no circumstances should the base offense level for the new offense be higher than 6. In addition, there is no need to add a specific offense characteristic, particularly in light of the existing cross-references in §2N2.1(c) to §2B1.1 or any other offense guideline.

#### **B. The FAA Reauthorization Act of 2018**

The FAA Reauthorization Act of 2018 created new criminal offenses at 18 U.S.C. §§ 39B and 40A, and added a new subsection to 18 U.S.C. § 1752 for the operation of unmanned aircrafts (drones). The Commission proposes referencing each of these

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<sup>201</sup> Meyers Letter, *supra* note 173 (quoting Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 6 (June 6, 2011)).

<sup>202</sup> See 83 Fed. Reg., at 65416.

new offenses to several different guidelines.<sup>203</sup> Because these offenses involving drones are new, Defenders recommend the Commission wait for more information and evidence before referencing them to the guidelines. The related regulations for recreational drone use have yet to be implemented,<sup>204</sup> and there are no cases,<sup>205</sup> nor empirical evidence by which to make informed decisions about the proper penalties for these offenses.

### **C. Allow States and Victims to Fight Online Sex Trafficking Act of 2017**

The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 created two new criminal offenses codified at 18 U.S.C. § 2421A.<sup>206</sup> The Commission proposes referencing the new offenses to §2G1.1 and §2G1.3.<sup>207</sup> No cases have been prosecuted under § 2421A,<sup>208</sup> and little is known about the issues that will arise when they are prosecuted. Defenders urge the Commission to wait for more information before deciding how best to address these offenses in the guidelines.

If, however, the Commission opts to proceed now, the Commission should consider setting lower base offense levels for these offenses to better reflect the relative

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<sup>203</sup> See *id.* at 65416-17.

<sup>204</sup> See Federal Aviation Administration, *FAA Reauthorization Bill Establishes New Conditions for Recreational Use of Drones* (The FAA currently advises recreational drone pilots to continue following regulations that were in effect prior to the passing of the Act), <https://www.faa.gov/news/updates/?newsId=91844>.

<sup>205</sup> A Westlaw search for federal cases involving the unsafe operation of drones yielded no results, nor did a survey to the federal defender and CJA panel communities. Data collected by the Federal Judicial Center reflect no cases prosecuted under 18 U.S.C. § 39B since January 3, 2018, the date of enactment. Fed. Judicial Ctr. Integrated Database, Criminal, 1996-present, Filings Title/Section 1 Starts with 18:39B, Proceeding Date is Greater than 01/03/2018, <https://www.fjc.gov/research/idb/interactive/IDB-criminal-since-1996>.

<sup>206</sup> See Pub. L. No. 115-164, 132 Stat. 1253 (2018).

<sup>207</sup> 83 Fed. Reg., at 65417-18.

<sup>208</sup> Fed. Judicial Ctr. Integrated Database, Criminal, 1996-present, Filings Title/Section 1 Starts with 18:2421A, Proceeding Date is Greater than 04/11/2018, <https://www.fjc.gov/research/idb/interactive/IDB-criminal-since-1996>.

culpability of the third-party facilitators covered in the new offenses compared to those who directly engage in trafficking.

We oppose the addition of new specific offense characteristics to both §2G1.1 and §2G1.3.<sup>209</sup> No evidence shows that the base offense levels for these guidelines combined with existing specific offense characteristics and chapter three adjustments are insufficient to address these offenses. If, however, the Commission decides to add the specific offense characteristics, their application should be limited to when the defendant was actually convicted of the aggravated form of the offense under § 2421A(b)(2). We strongly oppose application of the enhancement based on conduct, regardless of conviction. As we explained above and in prior comment, “sentencing based on relevant conduct presents numerous problems. It provides prosecutors with ‘indecent power,’ and contributes to unwarranted disparity, undue severity, and disrespect for the law.”<sup>210</sup> Last year, when the Commission considered a new specific offense characteristic under §2B1.1, it similarly sought input on whether the enhancement should be limited to when the defendant was convicted of the aggravated offense, and wisely chose to limit its application to “those defendants convicted under the relevant statutes and subject” to the enhanced penalties.<sup>211</sup> We ask the Commission to do the same here.

We support a new application note directing courts not to apply the computer enhancement at §2G1.3(b)(3)(B) if the offense of conviction is § 2421A. If, however, the Commission pursues a conduct-based, rather than conviction-based specific offense characteristic, allowing for a significant enhancement regardless of whether the defendant was convicted under § 2421A, the Commission should expand the application note to direct courts not to apply the computer enhancement if either the offense of conviction is § 2421A or the enhancement at §2G1.3(b)(4)(B) applies.

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<sup>209</sup> The Commission proposes adding an enhancement to both §2G1.1 and §2G1.3 if “[the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2).” 83 Fed. Reg., at 65417-18.

<sup>210</sup> See Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 4-5 (Oct. 10, 2017) (quoting Stith, *supra* note 119); see also *supra* Part I.A.2.e.

<sup>211</sup> See USSG, App. C., Amend. 806, Reason for Amendment (Nov. 1, 2018); 82 Fed. Reg. 40651, 40653 (Aug. 25, 2017); Meyers Letter, *supra* note 210, at 4-5.

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Finally, in response to the Commission’s Issues for Comment, Defenders encourage the Commission to exclude offenses under § 2421A from §4B1.5 and §5D1.2.<sup>212</sup> Like “transmitting information about a minor”—another Chapter 117 offense already excluded from these provisions—offenses under §2421A are not offenses “perpetrated against a minor,” and do not otherwise involve sexual contact with a victim. Section 2421A punishes facilitation offenses, including owning, managing or operating an interactive computer service that promotes prostitution. Neither the base offense nor the aggravated violation require that a defendant have *any* contact with persons promoted.

#### **IV. Conclusion**

As always, we appreciate the opportunity to submit comments on the Commission’s proposed amendments. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,  
/s/ Michael Caruso  
Michael Caruso  
Federal Public Defender  
Chair, Federal Defender Sentencing  
Guidelines Committee

cc: David Rybicki, Commissioner *Ex Officio*  
Patricia K. Cushwa, Commissioner *Ex Officio*  
Kenneth Cohen, Staff Director  
Kathleen Cooper Grilli, General Counsel

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<sup>212</sup> See 83 Fed. Reg., at 65416.