

# Article

## TIME FOR A DIVORCE: UNCOUPLING DRUG OFFENSES FROM VIOLENT OFFENSES IN FEDERAL SENTENCING LAW, POLICY, AND PRACTICE

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## I. Introduction

There is a growing sentiment that the United States imprisons far too many people for far too long, especially for non-violent drug crimes. This sentiment is leading to unique collaborations between the political left and right aimed at reducing the “mass incarceration” caused by the war on drugs and its affiliated policies.<sup>1</sup> Remarkably, when it comes to drugs, the pendulum of crime policy is swinging from the long dominant “tough on crime” extreme towards a more compassionate and reasoned understanding of drug crimes and the impact of imprisonment on defendants and their families and communities.

However, one issue lost in the reform discussion is how throughout federal sentencing law and practice, drug offenses are pervasively linked to violent offenses to lengthen prison sentences. Throughout federal criminal statutes, sentencing guidelines and policies, drug crimes and violent crimes are not only treated equally, but also interchangeably to increase a defendant’s prison sentence.<sup>2</sup> This interchangeable equivalence is ingrained in federal criminal statutes and sentencing guidelines providing some of the lengthiest terms of imprisonment.<sup>3</sup>

These statutes, guidelines, and policies were intended to remove serious offenders primarily responsible for the drug related violence from the community for extended periods of time. The equivalency and interchangeability of violent offenses with non-violent drug offenses, however, has resulted in a growing gap between intent and results.<sup>4</sup> It has contributed significantly to the country’s mass incarceration problem and its growing elderly prison population (whose healthcare and other needs are co-opting an increasing percentage of our criminal justice resources), and has aggravated the racial disparities in our prison population.<sup>5</sup>

If we are truly serious about reducing our over-reliance on imprisonment and confronting the disparities tied to the “war on drugs” and federal drug policies, then an action-item that must be on the agenda is decoupling violent conduct from non-violent drug conduct for sentencing purposes. This article discusses one such policy—the career offender guideline—as an example of the wayward approach of equating drug offenses with violent offenses. It also discusses a recent effort and recommendation by the United States Sentencing Commission (the “Sentencing Commission”) to mitigate the consequences of equating drugs with violence under

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<sup>1</sup> See generally Inimai M. Chettiar, *A National Agenda to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUSTICE (Apr. 27, 2015), <https://www.brennancenter.org/analysis/national-agenda-reduce-mass-incarceration> (discussing methods of reducing mass incarceration).

<sup>2</sup> See, e.g., 18 U.S.C. § 924(e) (2012) (known as the Armed Career Criminal statute, which imposes a 15-year mandatory minimum sentence when a defendant convicted of possessing a firearm as a prohibited person has two prior convictions “for a violent felony or serious drug offense, or both. . .”).

<sup>3</sup> *Id.*

<sup>4</sup> Christopher Ingraham, *Here’s How Much Americans Hate Mandatory Minimum Sentences*, WASH. POST (Oct. 1, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/01/heres-how-much-americans-hate-mandatory-minimum-sentences/>.

<sup>5</sup> *Id.*

the career offender guideline—a first step that likely will go nowhere because of Congress.

## II. The Career Offender Guideline

The career offender guideline is Section 4B1.1 of the United States Sentencing Guidelines (“U.S.S.G.”).<sup>6</sup> The section holds that a defendant is a career offender, and therefore subject to the accompanying enhanced penalties, if:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
- (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
- (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.<sup>7</sup>

Offenders who qualify are exposed to the enhanced penalties provided in the section.<sup>8</sup> The enhanced penalties come in the form of drastically altered guidelines coordinates that subject a defendant to guidelines ranges at or near the maximum terms of imprisonment allowed by the statute of conviction.<sup>9</sup> First, the offender’s base offense level is set at the greater of: (a) the level applicable to the offense of conviction; or the more likely, (b) the level set by the table within the career offender guideline.<sup>10</sup> The table establishes offense levels high enough to meet Congress’s mandate that career offenders receive prison sentences “at or near the maximum term authorized.”<sup>11</sup> The second alteration places all qualifying career offenders, no matter their actual criminal history point total, in criminal history category VI – the guidelines’ highest category.<sup>12</sup>

Qualifying as a career offender changes the entire landscape of a defendant’s prison exposure. It can transform a sentencing exposure that normally would be a few years into decades of imprisonment, and even life im-

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<sup>6</sup> U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm’n 2015).

<sup>7</sup> U.S. Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm’n 2015).

<sup>8</sup> See 28 U.S.C. § 994(h) (2006) (directing the Sentencing Commission to specify prison terms “at or near the maximum the term” for qualifying career offenders).

<sup>9</sup> *Id.* For the unfamiliar, the Sentencing Guidelines specify a base offense level for every federal offense, and that pre-set offense level increases or decreases based on enumerated contextual factors of a particular case. The base offense level with the adjustments produces a final offense level that ranges from one to forty-three. Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant’s criminal record and status at the time of the instant conviction. A defendant’s total number of criminal history points determines into which of the six criminal history categories he/she falls. Using the guidelines’ sentencing table, the final offense level is cross-referenced with the defendant’s criminal history category to yield a defendant’s presumptive sentencing range.

<sup>10</sup> 28 U.S.C. § 994(h) (2012).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Sentencing Guidelines Manual § 4B1.1(b) (U.S. Sentencing Comm’n 2015).

prisonment.<sup>13</sup> As a real world example, I once had a client, Mr. Derrick Allen, who was charged with distributing 18 grams of heroin for \$1000.<sup>14</sup> Mr. Allen had three prior convictions for distributing small amounts of drugs: a) nine bags of crack worth \$20 each; b) six bags of cocaine, 21 heroin gel caps, and 17 morphine pills—valued altogether at \$425; and c) three small bags of marijuana and 24 bags of cocaine—valued altogether at \$174.<sup>15</sup> He had no history of violence or using weapons.<sup>16</sup> Everyone recognized that Mr. Allen was a drug addict who sold small amounts of drugs to fund his addiction. Nonetheless, because of his three qualifying non-violent drug convictions, Mr. Allen’s presumptive post-trial guidelines range went from 33 to 41 months imprisonment (non-career offender range based on offense level 14 at criminal history category V) to a career offender range of 151 to 181 months imprisonment (offense level 29 at criminal history category VI).<sup>17</sup> Due to the career offender guideline, Mr. Allen’s four convictions (the instant offense and the three priors) for distributing a total of \$1779 in drugs, without violence or a weapon, increased Mr. Allen’s presumptive guidelines range by 400%.<sup>18</sup>

### III. History of the Career Offender Guideline<sup>19</sup>

Mr. Allen’s case shows the problem of focus here: how the equating of non-violent drug offenses with violent offenses to increase imprisonment has led to the over-punishment and over-incarceration of non-violent drug offenders. It was not supposed to be this way. Sticking with the career offender guideline, a review of the provision’s history shows that Congress’s intent was not to create a means to incarcerate non-violent drug offenders and addicts such as Mr. Allen for decades of their lives.<sup>20</sup>

In passing the Sentencing Reform Act (“SRA”) in 1984, Congress directed the Sentencing Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants.”<sup>21</sup> To Congress, the defendants in these categories were those who: (1) were at least eighteen years old; (2) had been convicted of a felony that was either a “crime of violence” or an offense described in certain provisions of the Controlled Substances Act and/or Con-

<sup>13</sup> *Id.*

<sup>14</sup> United States v. Derrick Allen, No. 1:14CR00198, (D. Md. 2015).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

<sup>18</sup> Somewhat realizing the absurdity of a career offender sentence for Mr. Allen, the government agreed to a plea agreement where the government sought a sentence of 108 to 132 months. Thankfully, the Honorable James K. Bredar credited Mr. Allen’s non-violent history and obvious drug addiction, and imposed a sentence of 66 months.

<sup>19</sup> For the history of Career Offender guidelines this article relies greatly on what I believe is the most comprehensive deconstruction of the guideline: Amy Baron-Evans & Jennifer Coffin, Unraveling and ‘Deconstructing’ the Career Offender Guideline, (Apr. 25, 2010), [https://www.fd.org/pdf\\_lib/WS2011/Deconstructing\\_Offender\\_Guideline.pdf](https://www.fd.org/pdf_lib/WS2011/Deconstructing_Offender_Guideline.pdf).

<sup>20</sup> See *id.* at 2 (finding the United States Sentencing Commission “significantly deviated” from Congress’ original directive concerning the career offender guideline).

<sup>21</sup> 28 U.S.C. § 994(h) (1988).

trolled Substance Import Act; and (3) had previously been convicted of two or more prior felonies, each of which was a crime of violence or an offense described in the Controlled Substances Act and/or Controlled Substance Import Act.<sup>22</sup>

For drug offenders, Congress's goal was not to punish with near statutory maximum sentences all "repeat drug traffickers, but rather a specific type of repeat offender who posed the most danger to society and was responsible for distributing large amounts of illegal drugs."<sup>23</sup> Congress's target was repeat drug offenders:

- for whom drug trafficking is "extremely lucrative";
- who distribute drugs to "an unusual degree" through "continuing patterns of criminal activity";
- who have "substantial ties outside of the United States from whence most dangerous drugs are imported into the country"; and
- who have the resources and contacts to "to escape to other countries with relative ease in order to avoid prosecution."<sup>24</sup>

In other words, Congress wanted the career offender guideline to reach and punish kingpins and major drug traffickers, who by the nature of their continuous criminal conduct, are at or near the top of the drug trafficking chain, and who benefit from the money, resources, and foreign contacts not available to lower level drug offenders.

The career offender guideline was part of the Sentencing Guidelines that debuted on November 1, 1987.<sup>25</sup> The inaugural career offender guideline was similar to the current version in that it applied to offenders with predicate convictions for violent or controlled substance offenses.<sup>26</sup> However, the reach of "controlled substance offense" is much more expansive today than what it was in 1987.<sup>27</sup>

From the start, the Sentencing Commission interpreted Congress's directive (Section 994(h)) in regards to drug offenses far beyond what Congress intended.<sup>28</sup> Rather than limiting the reach of the career offender guideline to kingpins and the like, the Sentencing Commission has continually extended the provision to reach federal and state controlled substance offenses

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<sup>22</sup> *Id.*

<sup>23</sup> S. REP. NO. 98-225, at 175 (1983).

<sup>24</sup> *Id.* at 20, 212.

<sup>25</sup> See U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING pt. C, Analysis of Career Offender at 3 (2012), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_C12\\_Career\\_Offenders.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C12_Career_Offenders.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 3–4 (reviewing the history of the definition of "controlled substance offense"). The definition of "crime of violence" has also greatly expanded since 1987, but will not be examined for the purposes of this article.

<sup>28</sup> See Baron-Evans & Coffin, *supra* note 19, at 12–15 (summarizing the history of amendments to §4B1.1 that expanded the universe of federal and state drug offenses that qualified as career offender predicates).

that prohibit “the manufacture, import, export, distribution” (or possession with the intent to do any of these things) of drugs and are punishable by imprisonment for a term exceeding one year.<sup>29</sup> This unexplainable expansion has brought nearly every federal and state drug offense other than simple possession within the ambit of the career offender guideline, and as a result, exposes addicts, low level street dealers, and others responsible for mere drops in the ocean of drug trafficking to the harsh sentences suggested by the career offender guideline.

The Sentencing Commission’s expansion of the career offender guideline to reach state drug offenses, in particular, is a direct contravention of congressional intent. Section 994(h) directed the Sentencing Commission to craft the career offender guideline to reach offenders who had previous convictions for drug offenses described in three pieces of federal legislation: the Controlled Substances Act, the Controlled Substances Import and Export Act, and the Drug Trafficking Vessel Interdiction Act of 2008.<sup>30</sup> Neither Section 994(h) nor its legislative history directs the Sentencing Commission to designate *state* drug offenses as career offender predicates.<sup>31</sup> If Congress intended for state drug offenses to serve as career offender predicates, it certainly knew how to do so.<sup>32</sup>

The absence of language relating to state drug convictions in Section 994(h) should be seen as an intentional choice by Congress. At least one circuit has done so. In *United States v. Knox*,<sup>33</sup> the Seventh Circuit aptly explained how the Sentencing Commission went far beyond Congress’s call when the Commission promulgated the career offender guideline. The specific question before the circuit court was whether Section 994(h) reached a drug conspiracy conviction charged under 21 U.S.C. Section 846.<sup>34</sup> The court started its analysis by noting that Section 994(h) reflected Congress’s intent for the career offender guideline to reach a select and defined set of drug offenses.<sup>35</sup> The court then deconstructed Section 994(h) to show how the Sentencing Commission’s career offender guideline includes drug offenses not enumerated in the statute.<sup>36</sup> Next, the court noted that while the Sentencing Commission had the authority to include drug offenses not identified in Section 994(h), “nothing in the text requires the Commission to do so,” and therefore the Commission’s decision to include additional drug offenses “reflect[s] an exercise of discretion.”<sup>37</sup> However, the court stressed, “[s]uch policy decisions made by the Commission in developing

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<sup>29</sup> U.S. Sentencing Guidelines Manual § 4B1.2(b) (U.S. Sentencing Comm’n 2015).

<sup>30</sup> 28 U.S.C. § 994(h)(1)(B) (2012).

<sup>31</sup> See also S. Rep. No. 98-225 (1983).

<sup>32</sup> See, e.g., 21 U.S.C. §§ 841(a), (b) (2012) (providing for increased penalties for prior convictions for a “felony drug offense”).

<sup>33</sup> 573 F.3d 441 (7th Cir. 2009).

<sup>34</sup> *Id.* at 448.

<sup>35</sup> *Id.* (“[T]he precision with which § 994(h) includes certain drug offenses but excludes others indicates that the omission of § 846 was no oversight.”).

<sup>36</sup> *Id.* at 448–449; see also *id.* at 449 (“Relying on the general guideline promulgation authority under 28 § 994(a)–(f), the Sentencing Commission has gone beyond the specific offenses listed in § 994(h) . . .”).

<sup>37</sup> *Id.* at 449.

the Guidelines are not binding on sentencing courts.”<sup>38</sup> As the *Knox* court recognized, the Sentencing Commission has steadily added state and other drug offenses not listed in Section 994(h) to expand the career offender guideline’s definition of “controlled substance offenses” well-beyond what Congress wanted.<sup>39</sup>

Early on, the Sentencing Commission relied solely on Section 994(h) as its authority for the expansion.<sup>40</sup> This justification met its end in the 1990s, when some circuits began vacating career offender sentences on the ground that the Commission had exceeded the plain statutory language of Section 994(h).<sup>41</sup> In response, the Sentencing Commission changed course and amended Section 4B1.1 to switch the Commission’s reliance from Section 994(h) to the general grant of authority provided by 28 U.S.C. Section 994(a)-(f), (o), and (p), to justify the expansion of the career offender guideline’s definition of “controlled substance offense.”<sup>42</sup> Missing from this shift was the required explanation and empirical evidence justifying the Sentencing Commission’s policy decision to expand the reach of Section 4B1.1 beyond the drug offenses included in Section 994(h)’s plain language.<sup>43</sup> To this day, the Sentencing Commission has remained silent as to the “data” or “comments” justifying its expansion of the career offender guideline to reach nearly every drug offense.

In sum, the career offender guideline is contrary to the words and intent of Congress. The goal of Congress was to bring the full weight of federal sentencing to bear on repeat offenders at the top of the drug distribution chain.<sup>44</sup> The goal was *not* to expose drug addicts, low-level drug traffickers, and street dealers to near maximum statutory penalties. Yet, without sufficient explanation, that is what the Sentencing Commission has done

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<sup>38</sup> *Id.* at 449-450 (citing *Kimbrough v. United States*, 552 U.S. 85, 101–02 (2007)).

<sup>39</sup> See also Sarah F. Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1172–73 (2010) (noting that courts applied the career offender provision in 2,321 drug-related cases in 2008, compared to 616 drug-related cases in 1996).

<sup>40</sup> See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM’N 1990) (“28 U.S.C. § 994(h) mandates that the Commission assure that certain ‘career’ offenders, as defined by the statute, receive a sentence of imprisonment ‘at or near the maximum term authorized.’ Section 4B1.1 implements this mandate.”).

<sup>41</sup> See, e.g., *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Ballazerius*, 24 F.3d 698 (5th Cir. 1994) (Both cases were superseded by the Commission amending the Guidelines in 1994 (amendment 528) that altered the source of the Commission’s authority for the career offender guideline); See *United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997) (“The amendment to the sentencing guidelines speaks directly to this point and effectively eliminates the concerns of the *Bel-lazerius* court.”).

<sup>42</sup> U.S. Sentencing Guidelines Manual § 4B1.1 1 cmt. background (U.S. Sentencing Comm’n 2014).

<sup>43</sup> See 28 U.S.C. § 994(o) (2012) (authorizing the Commission to revise the guidelines “in consideration of comments and data” the Commission received).

<sup>44</sup> See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM’N 2014) (explaining the goal of the career offender guidelines is to “focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate.”). Indeed, as recently stated by the current chair of the Sentencing Commission, the career offender guideline is part of a regime that “ensure[s] that the most dangerous or serious offenders will continue to receive appropriately severe sentences.” Chief Judge Patti B. Saris, *A Generational Shift for Drug Sentences*, 52 AM. CRIM. LAW REV. 1, 21 (2015), [http://www.uscc.gov/sites/default/files/pdf/news/speeches-and-articles/article\\_saris\\_112014.PDF](http://www.uscc.gov/sites/default/files/pdf/news/speeches-and-articles/article_saris_112014.PDF).

by repeatedly expanding the reach of the career offender guideline to nearly every state and federal drug offense.

#### IV. Impact of the Career Offender Guideline

For the past ten years, career offenders have consistently accounted for between 3% and 3.6% of all federal prison inmates each year.<sup>45</sup> Because of their lengthy sentences, career offenders now account for more than 11% of the total federal prison population, or 20,329 federal career offender inmates for fiscal year 2014.<sup>46</sup> One sign of progress is that the percentage of career offenders receiving a sentence within their career offender guideline range has fallen from 43.5% in fiscal year 2005 to 27.5% in fiscal year 2014.<sup>47</sup> However, while career offenders are increasingly receiving sentences below their presumptive career offender guideline ranges, they are still receiving lengthy sentences. For fiscal year 2014, the average career offender sentence was 147 months imprisonment, or slightly more than 12 years.<sup>48</sup> For that fiscal year, slightly over half (50.9%) of career offenders received a prison sentence between 10 and 20 years, 13.8% received sentences of 20 years or more, 25% received sentences between five and ten years imprisonment, and only 10.3% received a sentence of less than five years.<sup>49</sup>

In accordance with its design, the career offender guideline has a profound impact on the offense levels and criminal history category placements of qualifying defendants. Take for example the 2,269 defendants sentenced as career offenders in fiscal year 2014.<sup>50</sup> For nearly half (46.3%), the career offender guideline caused an increase in both the final offense level and criminal history category.<sup>51</sup> An additional 32.6% of these offenders saw an increase in their offense level, but not their criminal history category.<sup>52</sup> Another 12.4% saw an increase in their criminal history category, but not their offense level.<sup>53</sup> In total, for fiscal year 2014, “the career offender designation affected the final guideline range for the majority (91.3%) of offenders sentenced under [the career offender guideline].”<sup>54</sup>

##### A. The Logical and Moral Failure of the Career Offender Guideline

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<sup>45</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 18, fig. 1 (2016), <http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements>.

<sup>46</sup> *Id.* at 24.

<sup>47</sup> *Id.* at 22.

<sup>48</sup> *Id.* at 18, Key Findings.

<sup>49</sup> *Id.* at 24.

<sup>50</sup> *Id.* at 18.

<sup>51</sup> *Id.* at 21.

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

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

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



The career offender guideline's over-expansive definition of "controlled substance offense" is not the provision's only fault. As the title and subject of this article suggests, the career offender guideline is a logical and moral failure because of its predicate equivalency of drug offenses and violent offenses.

The career offender guideline puts qualifying drug offenses on the same footing as qualifying violent offenses. If a prior drug conviction meets the definition provided by Section 4B1.2(b) of the guidelines, it holds the same predicate weight and consequences as a conviction for armed robbery, rape, arson, or murder.<sup>55</sup> This is true even if the prior drug offense did not involve violence or a firearm or other weapon.<sup>56</sup> Indeed, a conviction for selling \$100 of cocaine is as equally a qualifying predicate as killing another person for \$100 of cocaine.

Once a defendant qualifies as a career offender, he/she is exposed to a predetermined punishment range, regardless of whether his/her qualifying predicates are for drug offenses, violent offenses, or a mixture of both.<sup>57</sup> The result is a sentencing mechanism that allows absurdist consequences that are unjustifiable logically and morally. Two defendants who share an instant offense that triggers the career offender guideline are subject to the same range of punishment even if one defendant's predicate convictions are for violent crimes, and the other defendant only has non-violent drug offense predicates.<sup>58</sup> For instance, a defendant with two priors for selling small amounts of drugs is subject to the same offense level, criminal history category, and therefore presumed sentencing range, as a defendant with two priors for rape, murder, or arson.

Because these absurdist outcomes are not only possible, but probable, the career offender guideline must be seen as a policy failure. There is no plausible justification for a sentencing policy that subjects repeat low-level drug traffickers to the same sentencing exposure as repeat violent offenders.

These absurdist outcomes are assisted by the career offender guideline tethering a career offender's offense level to the statutory maximum of the instant offense. This is a problem because many federal drug offenses carry statutory maximums that exceed those for violent offenses. For instance, a drug offender convicted for violating 21 U.S.C. Section 841(b)(1) faces a statutory maximum of life imprisonment, compared to a statutory

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<sup>55</sup> However, after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (discussed later), there are even less crimes that qualify as violent felonies triggering the enhanced penalties provided by the Armed Career Criminal Act, the career offender guideline, and similar enhanced penalty statutes and guideline provisions.

<sup>56</sup> U.S. Sentencing Guidelines Manual § 4B1.1(b) (U.S. Sentencing Comm'n 2014).

<sup>57</sup> The instant crime or offense provides the only variation in sentencing exposure under Section 4B1.1(b). The longer the statutory maximum penalty for the instant crime of violence or drug offense, the higher the assigned career offender offense level. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (U.S. SENTENCING COMM'N 2014). However, consistent with the remainder of the guideline, there is no difference in the designated offense level based on the instant offense being either a crime or violence or a drug crime.

<sup>58</sup> U.S. Sentencing Guidelines Manual § 4B1.1(b) (U.S. Sentencing Comm'n 2014).

maximum of twenty years for a robbery offender convicted under 18 U.S.C. Section 1951 or an arson offender convicted for violating 18 U.S.C. Section 844(i). Under the career offender guideline, the drug offender's offense level is 37, while the robbery and arson offenders share a level 32.<sup>59</sup> This translates into the drug offender having a presumptive guideline range (before any deductions) of 360 months to life, while the range for the arson and robbery offenders is 210 to 262 months imprisonment.

B. The Missing Kingpins: The Misapplication of the Career Offender Guidelines.

Congress trusted the Sentencing Commission to structure the career offender guideline in a manner flexible enough to distinguish between drug offenders.<sup>60</sup> As explained by a leading Commission lawyer in 1987:

Reasonably construing [Congress's decision to empower the Commission to draft the career offender guideline] in its present context and in light of the total legislative history, it is sensible to conclude that Congress did not intend a purely mechanical application which would be unduly harsh in some instances and inconsistent with the overall instructions to the Sentencing Commission. Counsel further doubts that Congress would desire the Commission to adopt a strict, literalistic reading which exacerbates prison impact. Most members of the legislative body would probably appreciate a less extreme, more flexible approach, so long as it clearly achieved the fundamental objective of severely punishing career criminals.<sup>61</sup>

Unfortunately, a “purely mechanical application” that “exacerbates prison impact” is a fitting description of the career offender guideline as it currently exists. The career offender guideline applies whether the defendant is a low-level street dealer or major trafficker responsible for distributing tons of illegal narcotics. All that matters is whether the instant and past convictions meet the expansive definition of “controlled substance offense.” Section 4B1.1's failure to distinguish drug offenders has resulted in an unwarranted and prejudicial uniformity—i.e. all qualifying drug offenders, regardless of conduct or culpability, are exposed to the same near-maximum penalties. It

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

<sup>60</sup> See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 2014). ([T]he Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate....”).

<sup>61</sup> Memorandum from John Steer to the U.S. SENTENCING COMM'N, (March 26, 1987), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988\\_Career\\_Offender.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf).

is a problem the Sentencing Commission's staff recognized and warned about in 1988:

In its current form, the Career Offender guideline is potentially both under-inclusive and over-inclusive. . . . As amended, the guideline focuses exclusively on the count of conviction, rather than the conduct involved, both as to the instant offense and the prior offenses. . . . In much the same way, the guideline is also potentially over-inclusive. It makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions. For example, two defendants convicted of the same federal drug felony . . . , each with two prior drug offenses, would be subject to the same career offender sanction, even if one defendant was a drug "kingpin" with serious prior offenses, while the other defendant was a low-level street dealer whose two prior convictions for distributing small amounts of drugs resulted in actual sentences of probation.<sup>62</sup>

It should come as no surprise that the Sentencing Commission's steady expansion of "controlled substance offense" has led to a dramatic increase in the number of defendants qualifying as career offenders. For fiscal years 1996 through 2011, the annual number of career offenders more than doubled from 909 career offenders to 2,157 career offenders.<sup>63</sup> The number reached 2,269 career offenders for fiscal year 2014.<sup>64</sup> While the Sentencing Commission has also expanded the definition of "crime of violence" for career offender purposes, recent statistics show that the incessant increase in the number of career offenders is largely due to the expanded definition of "controlled substance offense." From 2008 through 2012, 11,516 defendants were sentenced as career offenders.<sup>65</sup> Of these, a drug trafficking offense was the primary offense for 8,503 offenders, or 73.8% of the defend-

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<sup>62</sup>Memorandum from Gary J. Peters to the U.S. SENTENCING COMM'N (March 25, 1988), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988\\_Career\\_Offender.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf).

<sup>63</sup>U.S. SENTENCING COMM'N, *supra* note 25, at 9.

<sup>64</sup>U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY14.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf) (2015).

<sup>65</sup>Sentencing data (demographic, departures/variances, sentencing by guideline provision) held by the U.S.S.C. is available through the interactive "sourcebook" on the commission's website: <http://isb.ussc.gov/Login>. This data was compiled using the "Offenders Receiving Career Offender/Armed Career Criminal Adjustments in Each Primary Offense Category" available under the "All Tables and Figure" portion of the interactive sourcebook.

ants.<sup>66</sup> Firearm and robbery offenses were a distant second and third, constituting 10.9% and 7.7% of the defendants, respectively.<sup>67</sup>

This raises the question of who are the drug offenders sentenced as career offenders—are they the kingpins and major drug suppliers Congress sought to reach, or low-level/street level dealers and addicts? Statistics show that the overwhelming majority is the latter. For instance, in 2012, more than half (52.1%) of the 2,232 defendants sentenced as career offenders saw increases in both their final offense level and criminal history category.<sup>68</sup> For these offenders, the average increase was *seven offense levels* (from 24 to 31) and *two criminal history categories* (from IV to VI).<sup>69</sup> In contrast, for *only 5%* of the career offenders sentenced in 2012 did the career offender guideline have no impact on an offender's offense level or criminal history category (because their pre-career offender numbers were already at career offender levels).<sup>70</sup>

Finally, the career offender guideline has also failed to punish the class of recidivist drug offenders it was designed to reach. An analysis by the Sentencing Commission determined that the “recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI.”<sup>71</sup> The Sentencing Commission found that offenders in criminal history category VI had a recidivism rate two years after release of 55%.<sup>72</sup> For the subset of offenders who were career offenders because of violent crime predicates, the rate was 52%.<sup>73</sup> In comparison, career offenders with drug crime predicates had a much lower recidivism rate of 27%, which “more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual*.”<sup>74</sup> As a result, the Sentencing Commission concluded that the “career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.”<sup>75</sup> Simply put, the over-inclusion of qualifying drug offenses has resulted in harsh, unnecessarily long prison sentences that have little correlation to the recidivism risk posed by many drug offenders sentenced as career offenders.

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<sup>66</sup> *Id.*

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

<sup>68</sup> U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf) (2013).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2.

<sup>71</sup> U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, 134 (2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (emphasis in original).

<sup>75</sup> *Id.* (emphasis in original).

### C. Career Offender Guideline & Racial Sentencing Disparity

A key motivation for the promulgation of the sentencing guidelines was the growing sentencing disparity between minority and white defendants for similar offenses. Unfortunately, 15 years after enactment, the Sentencing Commission found that the “increasingly severe treatment of other crimes, particularly drug offenses and repeat offenses, has widened the gap among different offender groups,” and the “sentencing guidelines and mandatory minimum statutes, have a greater impact on Black offenders than did the factors taken into account by judges in the discretionary system . . . .”<sup>76</sup> In other words, elements of the guidelines are exacerbating the racial sentencing divide, not narrowing it. The career offender guideline and its expansive inclusion of drug offenses, the Sentencing Commission determined, is a key contributor to this growing disparity:

In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline. Most of the offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline . . . . Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air markets, which are most often found in impoverished minority neighborhoods. . . , which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers. . . .”<sup>77</sup>

These findings were made before the Supreme Court rendered the sentencing guidelines advisory in *United States v. Booker*.<sup>78</sup> Despite this monumental decision, the racial disparity among career offenders has not only persisted post-*Booker*, it has widened. The percentage of black career offenders increased from 58.8% of all career offenders pre-*Booker* to 64.9% as of September 2011.<sup>79</sup> In comparison, the percentage of white career offenders decreased from 24.7% of all career offenders pre-*Booker* to 19.4% as of September 2011.<sup>80</sup> This racial disparity narrowed slightly in fiscal

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<sup>76</sup> U.S. SENTENCING COMM’N, *supra*, note 71, at 135.

<sup>77</sup> *Id.* at 133–34.

<sup>78</sup> 543 U.S. 220 (2005).

<sup>79</sup> U.S. SENTENCING COMM’N, *supra* note 25, at 10.

<sup>80</sup> *Id.*

year 2014: 59.7% of career offenders were black, 21.6% were white, and 16% were Latino.<sup>81</sup> According to the Sentencing Commission the racial disparity represents an “‘institutionalized unfairness’ . . . built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges.”<sup>82</sup>

#### V. Lack of Empirical Evidence Linking Drugs and Violence

From nearly all perspectives—design, logic, moral, and application—the career offender guideline is a failure. Its continued existence and use is therefore justified only if there is a demonstrable link between drugs offenses and violent offenses warranting their continued interchangeable equivalency under Section 4B1.1.

That drugs and violence go hand-in-hand is a largely unchallenged and readily accepted presumption that pervades the public consciousness and crime policy. Yet, as exposed by Utah law professor Shima Baradaran, there is a near complete lack of scholarship and study supporting the presumed link.<sup>83</sup> In addition to exposing the lack of empirical support for the presumed link between drugs and violence, Professor Baradaran has demonstrated how the little empirical evidence that is available shows that the link is unclear at best. She is not alone in her conclusion.<sup>84</sup>

Perhaps the dearth of reliable scholarship is due to the lack of agreement as to what “link” actually means. In other words, what does it mean to say that drugs and violence are “linked”? You ask ten different people, you will likely get ten varied responses. But generally, when people say drugs and crime are linked, they are referring to one or a combination of the following three relationships (or models) as established by the often cited work of Paul Goldstein:

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<sup>81</sup>*Quick Facts: Career Offenders*, U.S. SENTENCING COMM’N, [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY14.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf) (2015).

<sup>82</sup> U.S. SENTENCING COMM’N, *supra*, note 71, at 135.

<sup>83</sup> Shima Baradaran, *Drugs and Violence*, 88 S. CAL. REV. 227, 233–34 (2015).

<sup>84</sup> *See id.* (citing Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 294 (1998) (“In general, little evidence suggests that illicit drugs are uniquely associated with the occurrence of violent crime.”); Eric J. Workowski, *Criminal Violence and Drug Use: An Exploratory Study Among Substance Abusers in Residential Treatment*, 37 J. OFFENDER REHABILITATION 109, 118 (2003) (“These findings reveal a weak relationship between substance abuse and violence among this addict population and, clearly, not all addicts are violent. In fact, most of this population is not.”); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 756 (2000) (stating that the final report of a task force established to study the drug-violence nexus “concluded that drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting the drug laws”); Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, HEALTH AFFAIRS, Winter 1993, at 65, 75 (finding that despite the accumulating evidence on the validity of the drugs-violence relationship, persistent difficulty in establishing causal linkages remains); Michelle Torok et al., *Conduct Disorder as a Risk Factor for Violent Victimization and Offending Among Regular Illicit Drug Users*, 41 J. DRUG ISSUES 25, 25–26 (2011) (“Despite the available evidence, little is actually known about the causal mechanisms associating substance use and violence.”).

- 1) A person commits a violent act as a result of using/ingesting drugs (the psychopharmacological model);
- 2) A drug user engages in “economically-oriented” violent crime (e.g. robbery) to support his/her drug use (the economic compulsive model);
- 3) Violence is intrinsically involved with the distribution and sale of illegal drugs (the systemic model).<sup>85</sup>

Each model provides a separate and distinct context for the interplay between drugs and violence. These contexts reflect variations among the models as to the victims of the violence, the motivation for the violence, what drugs are involved, and the role drugs played in the violence. For instance, under the psychopharmacological model the “violence may involve drug use by either offender or victim. In other words, drug use may contribute to a person behaving violently, or it may alter a person’s behavior in such a manner as to bring about that person’s violent victimization.”<sup>86</sup> In comparison, under the systemic model the “[v]ictims of systemic violence are usually those involved in drug use or trafficking.”<sup>87</sup>

Goldstein’s tripartite scheme remains the leading and most commonly cited framework for the link between drugs and violence.<sup>88</sup> This is understandable – Goldstein’s models provide clean and clear lines between varying violent conduct and drug activity. However, even Goldstein admitted that there was insufficient empirical evidence to support his models, and that it was impossible to assess the causal relationship for key parts of his scheme.<sup>89</sup> Indeed, Goldstein recognized that more data was needed because “[n]o evidence currently exists as to the proportions of violence engaged in by drug users and traffickers that may be attributed to each of the three posited models.”<sup>90</sup>

Despite the lack of data, Goldstein’s three models served as the foundation of a lost in history effort by the federal government in the mid-1990s to measure the link between drugs and violence.<sup>91</sup> The effort was a 28-member task force assigned to “report to the United States Sentencing Commission specific findings, conclusions, and recommendations concerning the relationship (if any) between drugs and violence.”<sup>92</sup> The task force’s

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<sup>85</sup> Paul Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. OF DRUG ISSUES (1985), <http://www.drugpolicy.org/docUploads/nexus.pdf>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, 40 LAW & SOC. INQUIRY 746, 770–71 (“Paul Goldstein’s (1985) tripartite classification scheme remains the most commonly cited framework for understanding the possible connections [between drugs and violence.]”).

<sup>89</sup> Paul Goldstein, *supra* note 86 (“The incidence of psychopharmacological violence is impossible to assess at the present time, both because many instances go unreported and because when cases are reported the psychopharmacological state of the offender is seldom recorded in official records.”).

<sup>90</sup> *Id.*

<sup>91</sup> Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship Symposium on Drug Crimes*, 63 ALB. L. REV. 749, 755 (2000).

<sup>92</sup> *Id.* at 749.

membership included high-ranking attorneys from the Justice Department's criminal division, law professors, medical school professors, nursing school professors, economists, professors of criminology, social scientists, high-ranking lawyers from the Office of National Drug Control Policy, a federal district court judge, the staff director of the Sentencing Commission, legal advisors from the U.S. Department of Health & Human Services, and a number of congressional aides.<sup>93</sup> Ex-officio members included a former director of the Office of National Drug Control Policy, the Senator Edward Kennedy, a commissioner of the Sentencing Commission, New Jersey Governor Christine Todd Whitman, U.S. Representative Bobby Scott, and U.S. Attorney General Janet Reno.<sup>94</sup> The task force's extensive effort included reviewing prominent research on the issue, funding four original studies, and having experts present research to the task force.<sup>95</sup>

In the end, after two years of trying, the task force failed to reach any unanimous conclusions.<sup>96</sup> On June 27, 1996, the task force released its "unreconciled" final report.<sup>97</sup> The report was "unreconciled" because it contained a politically troublesome conclusion supported by the task force's academic members, but not by its government and political members. The conclusion causing the divide: "drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting drug laws."<sup>98</sup> In a stinging criticism of drug laws "built on the premise that long-term imprisonment of drug offenders would abate violent crime," the report further concluded that there was "no evidence that such policies decreased either drug use or violence . . . [and] the retention of such policies, premised on the belief that drugs cause violence, could hinder the adoption of other, more appropriate, remedies."<sup>99</sup>

The final report did not go so far as to say that there was no relationship between drugs and violence. However, the report made clear that "whether any link existed at all depended on which of the [Goldstein] three types of drug-violence relationships was being examined and the quality of the research available."<sup>100</sup> In other words, without more research, the only thing that was clear was that the existence and strength of any link varied among the Goldstein models, as well as among drug types, across time, and across different drug markets.<sup>101</sup>

Not much has changed since the task force issued its final report twenty years ago. The "tough on crime" perspective that promotes imprisonment still dominates and has led to a drastic increase in the number of federal statutes imposing mandatory minimum sentences (particularly for

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<sup>93</sup> *Id.* at 749, n. 1.

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

<sup>95</sup> *Id.* at 754.

<sup>96</sup> The task force was impaired by predictable political forces given the topic, as well as more mundane but critical disagreements such as how to define "violence." *Id.* at 751–52, 754–55.

<sup>97</sup> *Id.* at 749.

<sup>98</sup> *Id.* at 756.

<sup>99</sup> *Id.* at 757–58.

<sup>100</sup> *Id.* at 749 n.1.

<sup>101</sup> *Id.* at 756–57.



drug offenses) and an exploding prison population.<sup>102</sup> In the intervening two decades, research into the link between drugs and violence has not improved, has not firmly validated the link, and has not advanced the discussion much.<sup>103</sup>

#### VI. *Johnson v. United States*: The Unintended Consequence Drug Offenders Will Suffer

In *Johnson v. United States*,<sup>104</sup> an 8-1 opinion by the late-Justice Scalia, the Supreme Court held that the residual clause of the Armed Career Criminal Act (“ACCA”) was too vague to survive constitutional due process review. In doing so, the Supreme Court struck a boundless definition of what constituted a violent offense that had been used for many years to impose 15-year mandatory minimum sentences.<sup>105</sup> *Johnson* has unleashed a torrent of litigation that is redefining (and significantly limiting) what constitutes a violent offense not only for the ACCA, but also for the career offender guideline and other enhanced penalty provisions containing residual clause clones.<sup>106</sup> This litigation is leading to reduced sentences for a significant number of ACCA and other defendants collectively by hundreds of years.<sup>107</sup>

While *Johnson* has provided a windfall of relief for defendants whose prior convictions are no longer deemed violent under law, the decision brought no relief for ACCA, career offender, or other enhanced penalty defendants who received or face elongated sentences because of non-violent drug convictions. Indeed, a tragic unintended consequence of *Johnson* may

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<sup>102</sup> At year-end 1985 there were 502,507 adult prisoners in federal and state correctional institutions combined. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Prisoners in 1996 (1997), <http://www.bjs.gov/content/pub/pdf/p96.pdf>. By year-end 1996, the combined prison population was up to 1,182,169 adult prisoners. *Id.* At year-end 2014, there were 1,561,500 adult prisoners in federal and state correctional institutions combined. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2014 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>. Among those years, the federal prison population increased from 40,223 inmates in 1985, to 105,544 inmates in 1996, to 210,567 inmates in 2014.

<sup>103</sup> Baradaran, *supra* note 83, at 276–81 (discussing more recent studies and concluding, “Overall, the drug violence link is at the very least over-exaggerated and lacks reliable empirical support.”).

<sup>104</sup> 135 S. Ct. 2551 (2015).

<sup>105</sup> The residual clause held that a prior crime qualified as a violent offense under the statute if the crime “otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Id.* at 2555.

<sup>106</sup> See *United States v. Gardner*, 823 F.3d 793, 804 (4th Cir. 2016) (indicating defendant’s prior conviction for North Carolina common law robbery cannot qualify as a ACCA violent felony after *Johnson*); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (holding that armed robbery conviction under Massachusetts statute does not qualify as a ACCA violent felony post-*Johnson*); *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016) (joining the 3rd and 10th Circuits in holding that in light of *Johnson*, the identical residual clause in career offender guideline is unconstitutionally vague); *United States v. Bell*, 158 F. Supp. 3d 906 (N.D. Cal. 2016) (indicating that post-*Johnson* the felony offenses of assault on a federal officer and robbery of government property were not crimes of violence triggering enhanced penalties provided by 18 U.S.C. § 924(c)).

<sup>107</sup> As of the end of June 2016, more than 500 *Johnson*-based petitions had been filed in one month in the Fourth Circuit and 350 petitions were pending in the Eighth Circuit. See Ann E. Marimow, *One of Scalia’s final opinions will shorten some federal prison sentences*, WASH. POST (June 24, 2016), [https://www.washingtonpost.com/local/public-safety/small-words-big-consequences-for-possibly-thousands-of-federal-prisoners/2016/06/23/0d3d7934-3199-11e6-95c0-2a6873031302\\_story.html](https://www.washingtonpost.com/local/public-safety/small-words-big-consequences-for-possibly-thousands-of-federal-prisoners/2016/06/23/0d3d7934-3199-11e6-95c0-2a6873031302_story.html).

be an *increase* in the number of drug defendants sentenced under the ACCA and career offender guideline. That is because as *Johnson* each day limits the world of defendants susceptible to enhanced penalties for “violent” offenses, prosecutors will likely fill the gap with defendants whose drug offenses and prior convictions offer no *Johnson*-like constitutional bar. Finding comfort in the unproven, yet readily accepted and preached belief that violence is a natural extension of illegal drug activity, it is easy to see how prosecutorial forces will realign themselves in this post-*Johnson* world. Their strategy will shift to bringing in federal court more defendants whose drug convictions make them unquestionably qualified for the enhanced penalties provided by the ACCA, the career offender guideline, and similar enhanced penalty statutes and guideline provisions. The result will be a dramatic increase in the number of non-violent drug offenders sentenced to unreasonably long and overly punitive prison sentences, while the number of repeat “violent” offenders suffering the same fate will nose-dive.

*Johnson* is a landmark decision that is changing the face and practice of federal sentencing. But the decision also highlights the continuing lack of sentencing proportionality and balance suffered by non-violent drug offenders who receive enhanced sentences. While the reach of enhanced penalties for “violent” offenses shrinks, their reach for drug offenses has only known growth. This circumstance is not just a distortion, but a perverted misuse of Congress’s authorization and intent for these enhanced penalty provisions. Without a focused effort now to decouple non-violent drug offenses from violent offenses in these statutes and provisions, the “mass incarceration” that nearly everyone finds troublesome will only worsen and swell.

## VII. U.S.S.C.’s First Step at Decoupling the Career Offender Guideline

On July 28, 2016, the Sentencing Commission submitted a report to Congress concerning its multi-year study of “statutory and guideline definitions relating to the nature of a defendant’s prior conviction...and the impact of such definitions on the relevant statutory and guideline provisions,” with a particular focus on the career offender guideline.<sup>108</sup> The study included “a detailed analysis of career offenders’ prior criminal history and recidivism after release from federal prison.”<sup>109</sup>

As the study progressed, the data caused the Sentencing Commission to have “concerns that the career offender directive fails to meaningfully distinguish among career offenders with different type of criminal records and has resulted in overly severe penalties for some offenders.”<sup>110</sup> In particular, the data showed that Section 4B1.1’s formulaic approach failed to adequately account for and differentiate how a defendant qualified under the

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<sup>108</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, 1, 6 (2016), <http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements>.

<sup>109</sup> *Id.* at 2.

<sup>110</sup> *Id.*

provision, most notably drug convictions as compared to violent convictions. These concerns were fueled by four findings during the study:

- 1) Career offenders are primarily convicted of drug trafficking offenses – nearly three-quarters (74.1%) of career offenders in fiscal year 2014 were convicted of a drug trafficking offense and would have been sentenced pursuant to §2D1.1 (offenses involving drugs and narco-terrorism).
- 2) Career offenders are sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months).
- 3) As a result of these lengthy sentences, career offenders now account for more than 11 percent of the total Bureau of Prisons population.
- 4) Even though they continue to receive lengthy sentences, career offenders are increasingly receiving sentences below the guideline range, often at the request of the government. During the past ten years, the proportion of career offenders sentenced within the applicable guideline range has decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014, while government sponsored departures have steadily increased from 33.9 percent to 45.6 percent.<sup>111</sup>

These findings, and the concerns they caused, led the Sentencing Commission to more closely examine the relationship between an offender's career offender status and the nature of his/her instant offense and prior convictions. To achieve this, the Commission categorized the study's subjects into three distinct categories based on their prior and instant offenses: drug trafficking offenses only, violent offenses only, and mixed.<sup>112</sup> By the end, the "Commission found clear and notable differences" concerning the reach, impact and efficacy of Section 4B1.1 among the three categories of career offenders.<sup>113</sup>

The first "clear and notable" difference is that "career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future."<sup>114</sup> The Sentencing Commission found that close to half of the violent only offenders (42.1%) and mixed offenders (44.5%) were already in criminal history category VI prior to ap-

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2, 26.

plication of the career offender guideline, compared with just 23.3% of drug trafficking only offenders.<sup>115</sup> Another comparative gap was found when the Commission looked at recidivism rates among the three categories of career offenders.<sup>116</sup> Just over half (54.4%) of drug trafficking only career offenders were arrested for a new crime or an alleged violation of supervised release within eight years of their release from prison, compared to recidivism rates of 69.4% for mixed career offenders and 69.0% for violent only career offenders.<sup>117</sup>

The second “clear and notable difference” the Commission discovered is that the career offender guideline has “the greatest impact on federal drug trafficking offenders” because of the high statutory maximums provided by federal drug offense statutes, particularly 21 U.S.C. Section 841.<sup>118</sup> Generally, “federal drug trafficking offenders often face much higher statutory maximum penalties than those offenders convicted of a violent federal offense.”<sup>119</sup> For instance, for fiscal year 2014, 31.7% of drug trafficking only offenders had an instant offense carrying a life imprisonment maximum punishment, compared to just 10.5% of violent only offenders.<sup>120</sup> This disparity translates into a related disparity in the criminal history and offense level impact of Section 4B1.1. “More than half (57.5%) of offenders in the drug trafficking only category had both an increased final offense level and [criminal history category] as a result of the application of the career offender guideline, as compared to approximately 40 percent for each of the other two categories.”<sup>121</sup>

These “clear and notable differences” led the Sentencing Commission to conclude its study by recommending amendments to Section 994(h) (and thereby Section 4B1.1) designed to “differentiate between career offenders with different types of criminal records,” and focus the career guideline on offenders who have committed at least one “crime of violence.”<sup>122</sup> The amendments are needed, according to the Commission, because of “clear and notable differences between drug trafficking only career offenders and those career offenders who have committed a violent offense,” and also because “drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.”<sup>123</sup>

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<sup>115</sup> *Id.* at 30. “[O]ffenders in the drug trafficking only category were distributed to a greater extent across CHC III through VI.” *Id.* The Commission’s analysis consisted of a 20% random sampling of the 2,269 offenders sentenced under §4B1.1 in fiscal year 2014. *Id.* at 30 fig. 10.

<sup>116</sup> *See id.* at 38–42. The Commission analyzed the records of 1,988 career offenders who re-entered the community in calendar years 2004 through 2006. *See id.* at 38.

<sup>117</sup> *Id.* at 40–41.

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 31.

<sup>120</sup> *Id.* at 32 (fig. 11).

<sup>121</sup> *Id.* at 33.

<sup>122</sup> *Id.* at 3. The Commission also found that “[e]ven though they continue to receive lengthy sentences, career offenders are increasingly receiving sentences below the guideline range, often at the request of the government.” *Id.* at 2.

<sup>123</sup> *Id.* at 27.

Just looking at recent history, it is doubtful that Congress will act on the Sentencing Commission's recommendations. In 2011, the Commission strongly urged Congress to reduce the mandatory minimum penalties for drug offenses and expand the safety valve provided by 18 U.S.C. Section 3553(f) to reach more drug offenders.<sup>124</sup> The Commission argued that the reforms were needed because "certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute" which has "led to inconsistencies in application of certain mandatory minimum penalties" and racial disparities in sentencing.<sup>125</sup> The Commission echoed these recommendations in 2015 in support of the Sentencing Reform Act then pending in Congress.<sup>126</sup> Despite these recommendations, which were based on the Commission's extensive study of the issues, Congress has failed to implement any of the recommended reforms.<sup>127</sup> There is no reason to believe that the Sentencing Commission's recommendation to amend Section 994(h) will not suffer the same fate of inactivity.

### VIII. Conclusion

The career offender guideline provides a vivid example of the problem with equating drug offenses with violent offenses for sentencing purposes. The problem starts with the lack of objective and empirical evidence demonstrating a link between drugs and violence, and continues through to the racial disparity in sentencing caused by sentencing policies based on the perceived link. Interchanging drugs with violence for sentencing leads to not only morally deficient sentencing practices and outcomes, but illogical and ineffective ones as well. It is time to de-couple drugs and violence for sentencing if we truly are going to address the mass incarceration problem that is fueling the divide between many citizens and law enforcement (and the courts), crippling our inner city communities, consuming an increasing amount of our country's resources, and bestowing on this country the dubious honor of having the world's largest prison population.

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<sup>124</sup> U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1, 355 (2011), <http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

<sup>125</sup> *Id.* at 345, 347.

<sup>126</sup> U.S. Sentencing Comm'n, Statement on Bipartisan Sentencing Reform Legislation: House Judiciary Committee votes to Approve the Sentencing Reform Act (H.R. 3713) (Nov. 18, 2015), <http://www.ussc.gov/about/news/press-releases/november-18-2015>.

<sup>127</sup> Take for example the Smarter Sentencing Act first introduced in 2013, which would (among other things) significantly reduce the mandatory minimums imposed by 21 § U.S.C. 841. Despite the bipartisan origin of bill, and the wide bi-partisan list of sponsors, the bill has yet to receive a floor vote in the Senate. The legislation's companion bill in the House of Representatives has faced a similar fate.