CASE NO. 20-5755

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LAZELLE MAXWELL,
Defendant-Appellant.

Brief of the Federal Public and Community Defenders for the Judicial Districts of the Sixth Circuit and the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Reversal

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IDENTITY AND INTEREST OF AMICI

The Sixth Circuit Federal and Community Public Defenders represent the eight federal defender offices in the Western District of Kentucky, Eastern District of Michigan, Western District of Michigan, Northern District of Ohio, Southern District of Ohio, Eastern District of Tennessee, Middle District of Tennessee, and Western District of Tennessee. Following the enactment of section 404 of the First Step Act of 2018, Pub L. No. 115-391, 132 Stat. 5194, and pursuant to standing orders in each district, they have represented hundreds of clients who potentially benefit from the retroactive application of the Fair Sentencing Act of 2010.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar

association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amici write to address in more detail the history and impact of the career offender guideline as it has been applied in this Circuit and within the framework of federal sentencing as it has evolved in recent years. For Federal Defender Amici's clients and for those defendants in the Eastern District of Kentucky, where there is no federal defender office, a favorable ruling would ensure uniform treatment across the Circuit of those who were deemed career offenders before the passage of the Fair Sentencing Act.

Counsel for Lazelle Maxwell consents to the filing of this brief.[1]

[1] No part of this brief was authored by counsel for Mr. Maxwell, and no party or other person provided money to fund its preparation or submission. Fed. R. App. P. 29(c)(5).

Introduction

The career offender guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). One of the most extreme punishments under federal law, the career offender guideline has been applied the most broadly. Career offenders comprise just 3% of sentenced defendants but over 11% of the federal prison population. The career offender guideline's failure to advance the purposes of sentencing has long been recognized, as has its unwarranted disparate effect on Black defendants.

Even though the career offender guideline, like all guidelines, was rendered advisory in *United States v. Booker*, 543 U.S. 220 (2005), its controlling hold was particularly hard to shake. More than four years passed before this Circuit gave district courts the green light to disagree with that guideline's manifest over-inclusive severity and racially disparate impact. While some district courts more freely exercised their discretion to vary downward from the career offender guideline, all were operating in the blind about the sentencing practices of other courts across the country and the empirical effectiveness of the guideline. Without readily available national sentencing data on these points, all courts

lacked important information for assessing whether a career offender sentence advances the need to protect the public and whether it avoids unwarranted disparity.[2]

In 2012, the Sentencing Commission published extensive data regarding sentencing outcomes in post-*Booker* career offender cases, as part of a massive six-part report spanning over 1,000 pages.[3] That report found that after *Booker*, the influence of the career offender guideline on sentences had decreased significantly, especially in the post-*Gall*/*Kimbrough* era.[4] Then in 2014, the Commission started focusing in earnest on "making its data and research more readily accessible in more easily understood ways to Congress, the courts, the public, and the press," expanding its online *Quick Facts* series first introduced in 2013.[5]

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[2] The Commission did not report guideline application data for career offenders in its annual *Sourcebook of Federal Sentencing Statistics*.

[3] U.S. Sent'g Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, Pt. C (2012) ("Booker Report").

[4] *Id.* Pt. C, at 12 (showing that the rate of within-range sentences nationwide had decreased from 59% during the PROTECT Act period before *Booker* to an average 36.1% during the five-year period between when *Gall* and *Kimbrough* were decided in 2007 and 2011).

[5] U.S. Sent'g Comm'n, *Annual Report – Fiscal Year 2014*, at A-4.

To that end, in March 2014, it published an easy to read, two-page report on career offenders, which revealed in plain terms that the career offender guideline's force was waning across the country.[6] Finally, in 2016, the Commission published a full report focused solely on the career offender guideline, which showed that in drug cases in particular, the guideline overstates the risk of reoffending and that judges impose sentences well below the recommended range in most cases.[7] But for people sentenced under the career offender guideline during the height of its grip, these data came too late.

When a person previously sentenced as a career offender moves for a sentence reduction under the First Step Act, careful review of the career offender guideline is critical because that guideline is so harsh, has such a racially disparate impact, and is so rarely followed by sentencing courts today. This Court should ensure that, when district courts exercise discretion to grant or deny a First Step Act motion, they examine whether

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[6] U.S. Sent'g Comm'n, *Quick Facts – Career Offenders FY2012*, at 2 (2014) (reporting rate of within-range sentences in fiscal year 2012 had decreased to 30.2%).

[7] U.S. Sent'g Comm'n, *Report to Congress: Career Offender Sentencing Enhancements* 43-44 (2016) ("Career Offender Report").

old career offender sentences are justified in light of prevailing norms, and that they do not create unwarranted disparity.

A. The Career Offender Guideline Is Problematic.

The career offender guideline is among the most problematic guidelines in the federal system. In 2004, the Sentencing Commission identified the career offender guideline as a source of significant, unwarranted adverse impact on Black defendants.[8] In 2016, the Commission recommended that Congress amend its directive to the Commission to address the guideline's most extreme problems.[9] At the same time, the Commission showed with national sentencing data that the guideline frequently fails to serve sentencing purposes, leading courts to sentence below its recommended ranges in the majority of cases.

For those sentenced as career offenders before the Fair Sentencing Act, the career offender guideline was either mandatory or retained a quasi-mandatory grip on sentences. Because the career offender guideline

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[8] U.S. Sent'g Comm'n, *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").

[9] *Career Offender Report*, at 43-44.

is too severe, does not advance the purposes of sentencing, and has a racially disparate impact, it is vital that when district courts exercise their discretion in First Step Act cases, they examine whether old career offender sentences are actually justified under prevailing norms, rather than leaving them intact without special scrutiny. Most important is a requirement that district courts consider national sentencing data when considering whether to reduce a sentence. These data show that today district courts sentence most drug offenders who are deemed career offenders below the career offender range, often to a sentence at or near the ordinary drug range. If, after this special scrutiny, a court still decides to leave intact an old career offender sentence, it should be required to explain how it avoids unwarranted disparity.

1. The impact of the career offender guideline was even more severe before the Fair Sentencing Act of 2010.

The career offender guideline prescribes harsh sentence ranges. Congress mandated that the Commission "specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" convicted for at least a third time of a "crime of violence" or

"an offense described in" particular federal drug trafficking statutes.[10] The Commission implemented the directive by tying the offense level to the statutory maximum for the offense of conviction and automatically placing the defendant in Criminal History Category (CHC) VI.[11]

Several other features make the career offender guideline particularly harsh, and especially so for those sentenced in the years before the Fair Sentencing Act was enacted in 2010. Those categorized as career offenders cannot benefit from mitigating-role reductions, which ordinarily alleviate some of the outsized influence of drug quantity on sentencing.[12] In addition, a district court's authority to grant "departures" for overstated criminal history or likelihood of reoffending, which allow judges to adjust downward the CHC, is restricted for career offenders. Ordinarily, if a district court believes CHC V overstates the person's criminal history, it can depart downward to any of the four lower categories, as it deems appropriate. But that departure authority is

[10] 28 U.S.C. § 994(h).

[11] U.S.S.G. § 4B1.1(a)-(b).

[12] U.S.S.G. §§ 3B1.2, 2D1.1(a)(5); U.S.S.G. § 4B1.1(b).

limited for career offenders—and only career offenders—to just one criminal history category.[13]

Moreover, not only was the career offender guideline mandatory for over seventeen years, but it was still treated as mandatory long after *United States v. Booker*, 543 U.S. 220 (2005), and even after *Gall v. United States*, 552 U.S. 38 (2007), *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009). Several circuits, including this one, prohibited district courts from varying from the career offender range based on a policy disagreement, viewing the guideline as having a congressional imprimatur of special weight and authority. *See United States v. Funk*, 543 F.3d 552, 530 (6th Cir.) (reversing as substantively unreasonable district court's decision to vary from the career offender range and impose sentence within otherwise applicable drug guideline), *pet. rh'g granted, vacated by*, *United States v. Funk*, No. 05-3708, 2008 U.S. App. LEXIS 27700 (6th Cir. Dec. 18, 2008), *vol. dismissed*, *United States v. Funk*, 560 F.3d 619 (6th Cir. 2009). This Court did not correct this erroneous understanding of the district court's

[13] U.S.S.G. § 4A1.3(b)(3)(A).

power until August 2009, when in *United States v. Michael*, 576 F.3d 323, 327 (6th Cir. 2009), it held that a district court may disagree with the career offender guideline because it implicitly incorporated the 100:1 powder-to-crack ratio, just as it may disagree with that ratio as expressly set forth in the drug guideline at U.S.S.G. § 2D1.1(c).

Michael provided the clear statement that had previously been missing in this Circuit. Its recognition of district courts' authority matters a great deal still, given the guideline's continuing drastic effect on a defendant's guideline range, either by automatically increasing the offense level, the criminal history category to VI, or both. The median low-end guideline range for career offenders in fiscal year 2019 was 188 months, 2.7 times the non-career offender median of 70 months.[14] This impact persists for the 76.8% designated as career offenders because of a drug conviction.[15] Even though district courts are now free to vary from

[14] U.S. Sent'g Comm'n, Individual Datafiles FY2019 (drawing from the eight major offense types found among career offenders: murder, sexual abuse, assault, robbery, arson, drug trafficking, firearms, racketeering/extortion), *available at* https://www.ussc.gov/research/data files/commission-datafiles.

[15] U.S. Sent'g Comm'n, Individual Datafiles FY2019.

the career offender guideline, the sentences imposed reflect that the guideline continues to "influence . . . the sentence that the court will impose" by "anchoring" the sentence to the higher guideline range. *Peugh v. United States*, 569 U.S. 530, 545, 549 (2013).

Still, the freedom of district courts to fully exercise their true authority to account for the known problems with the career offender guideline has proven crucial. In the fifteen years the Guidelines have been advisory, the career offender guideline has been the subject of special scrutiny. Sentencing judges, recognizing that the severe recommended ranges are frequently (if not ordinarily) greater than necessary to serve sentencing purposes,[16] choose to impose sentences within the career offender range at a continually decreasing rate. By fiscal year 2019, district judges imposed sentences within the guideline

[16] *E.g.*, *United States v. Newhouse*, 919 F. Supp. 2d 955, 967-81 (N.D. Iowa 2013) (chronicling the history and development of the career offender guideline and identifying its failure to serve sentencing purposes in numerous respects).

range for just 22.6% of those deemed career offenders,[17] down from 44% in 2008, and down from 59% in the years before *Booker*.[18]

But this now-flourishing freedom has not benefitted people like Mr. Maxwell who were sentenced before the Fair Sentencing Act. Until the First Step Act of 2018, relief has not been available for those sentenced as career offenders before 2010. Nor have they been able to benefit from the recent reductions in the guideline range for the underlying offense, *United States v. Webb,* 760 F.3d 513 (6th Cir. 2014), or the ameliorating changes to the definition of "crime of violence" in 2016, which included the removal of burglary offenses as predicates and the elimination of the residual clause. U.S.S.G. App. C, amend. 798 (Aug. 1, 2016). Until now, there was no mechanism for them to seek renewed consideration, under contemporary norms, of the harsh sentencing ranges produced by the career offender guideline.

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[17] U.S. Sent'g Comm'n, *Quick Facts – Career Offenders FY2019*, at 2 (2020).

[18] *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders FY2012*, at 2 (2014) (noting decrease since 2008); *Booker Report*, Pt. C, at 12.

2. The severity of the career offender guideline does not advance the purposes of sentencing.

Due to the extreme impact of the career offender guideline on sentence length—especially in the years prior to the Fair Sentencing Act—those deemed career offenders still comprise over 11 percent of the federal prison population, even though they are only about 3 percent of defendants sentenced each year.[19] That severity is not necessary to protect the public or advance any other purpose of sentencing.

Research by the Sentencing Commission has now documented that the offenses singled out by the career offender guideline—both drug-related and violent—do a poor job of identifying which defendants are at the greatest risk of recidivism.[20] Defendants classified as career offenders are automatically placed in CHC VI. But those classified as career offenders and armed career criminals actually have lower rates of recidivism than defendants in CHC IV, V, and VI.[21] The overly harsh

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[19] *Career Offender Report*, at 18.

[20] U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* 19 figs. 7A, 7B (2016) ("Recidivism Report"); U.S. Sent'g Comm'n, *Recidivism Among Federal Violent Offenders* 14 fig. 2.9, 36 fig. 4.7 (2019) ("Recidivism: Violent Offenses").

[21] *Recidivism Report*, at 19 figs. 7A, 7B.

assessment of these "career" offenders is even worse for those deemed career offenders based on drug offenses: their recidivism rate (50%) closely approximates defendants in CHC II (49.4%).[22]

Moreover, many career offenders not only are automatically assigned to the highest criminal history category, as Mr. Maxwell was, but also receive an offense-level enhancement tied to the statutory maximum.[23] Because the offense level prior to this enhancement is already designed to reflect the seriousness of the instant offense,[24] this increase can be justified only for the purpose of incapacitation. Yet, the Commission has found "no apparent relationship" between offense levels and recidivism risk.[25]

The problem is even worse for defendants who qualify as career

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[22] *Recidivism: Violent Offenses*, at 14 fig. 2.9, 36 fig. 4.7.

[23] U.S. Sent'g Comm'n, *Quick Facts: Career Offenders FY 2019*, at 1 (2020).

[24] Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 49-50 (2003).

[25] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guideline*s 13 (2004).

offenders based solely on drug offenses. In the same report, the Commission recommended that Congress amend 28 U.S.C. § 994(h) so that these drug offenders no longer qualify as a career offender.[26] According to the Commission, excluding them from the coverage of the career offender guideline would help ensure that federal sentences better account for the severity of a person's prior records, protect the public, and avoid undue severity for certain less culpable people.[27]

Finally, and most recently, the Commission issued a report showing that the early release of drug offenders does not result in increased recidivism. In July, the Commission reported that drug offenders released years early as a result of the retroactive "Drugs Minus Two" amendment (Amendment 782) have not recidivated at a higher rate than those who served their full sentence, including for crack offenders in

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[26] *Career Offender Report*, at 43-44, 45.

[27] *Id.* at 3, 43-44. Although the Commission did not make the same recommendation for defendants who qualify as career offenders based on crimes of violence—which would render the career offender category a null set—the Commission's data support excluding these defendants as well. As noted above, the recidivism rate for career offenders and armed career criminals categorized on the basis of violent offenses also falls well below those for other CHC VI defendants. *See Recidivism: Violent Offenses* at 14 fig.2.9, 36 fig.4.7.

Criminal History Category VI and for those whose sentence was more than 10 years.[28] And like all offenders ultimately released, early or not, the most common and most serious post-release recidivating event was a court or supervision violation. [29]

Simply put, the extreme severity of the career offender guideline is not justified to protect the public. Its application does not track recidivism rates, the guideline does not serve a public safety purpose, and no other justification has ever been offered for it by Congress or the Commission.

3. The career offender guideline has an unwarranted adverse impact on Black defendants.

In the late 1980s, a wide and enduring gap opened between the sentences of Black defendants like Mr. Maxwell and those of other races.[30] Some of that gap resulted from new statutes and guidelines, including the career offender guideline, "that have a disproportionate impact on"

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[28] U.S. Sent'g Comm'n, *Retroactivity & Recidivism: The Drugs Minus Two Amendment* 11, 18, 21 & App. C fig. E-5 (July 2020), *available at* https://www.ussc.gov/research/research-reports/retroactivity-recidivism-drugs-minus-two-amendment.

[29] *Id.* at 25 fig. 14 & App. C, tbl. C-1.

[30] *Fifteen Year Review*, at 115.

Black defendants but "serve no clear sentencing purpose."[31] As the Sentencing Commission itself has recognized, "if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group."[32] In its *Fifteen Year Review*, the Commission identified the career offender guideline—along with the since-discarded 100-to-1 quantity ratio between powder and crack cocaine—as a source of significant and unwarranted adverse impact on Black defendants.[33]

The disproportionate impact of the career offender guideline on Black defendants arises partly from disparate state and local policing practices. In Nashville, Tennessee, for example, Black drivers "are more than twice as likely as White [drivers] to be stopped by the police" in a traffic stop.[34] "[B]lack drivers were searched at 3.4 times the rate of white

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[31] *Id.* at 131.

[32] *Id.* at 114.

[33] *Id.* at 131-34.

[34] Gideon's Army, *Driving While Black: A Report on Racial Profiling in Metro Nashville Police Department Traffic Stops*, at 9-11 (Oct. 25, 2016),

drivers" even though the success rate against white drivers was 15%, whereas it was only 10% against black drivers.[35] Similarly, an empirical study of police practices in Cleveland showed that Black drivers received one and a half times (1.53) their proportional share of traffic tickets, while whites received slightly less than two-thirds (0.60) of their share."[36]

The racial disparity in the application of the career offender guideline endured even after the reduction of the 100-to-1 disparity between powder and crack cocaine.[37] In fiscal year 2019, 61.4% of the individuals classified as career offenders were Black—nearly three times their share of the overall federal defendant population.[38] Because the

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available at https://drivingwhileblacknashville.wordpress.com (last visited Nov. 2, 2020).

[35] *Id.*

[36] Ronnie A. Dunn, *Racial Profiling: A Persistent Civil Rights Challenge Even in the Twenty-First Century*, 66 Case Western. Res. L. Rev. 957, 973 (2016); *see also* Mary N. Beall, *Gutting the Fourth Amendment: Judicial Complicity in Racial Profiling and the Real-Life Implications*, 36 Law & Ineq. 145, 149 n.27 (Winter 2018) (citing study making similar findings regarding suburban Detroit).

[37] Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010).

[38] U.S. Sent'g Comm'n, Individual Datafiles FY2019. Among all FY2019 individuals for whom the Commission received complete information,

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.[39]

4. A career offender sentence creates rather than avoids unwarranted disparity in the ordinary case.

In its 2016 Career Offender Report, the Commission provided greater detail about sentencing outcomes in career offender cases. For those in the study cohort convicted of drug offenses with no violent prior offenses, courts imposed sentences within the career offender range in just 22.5 percent of cases, with the average reduction being 32.7 percent below the guideline minimum.[40] Significantly, the average sentence imposed for "drug trafficking only" offenders (134 months) was nearly identical to the average guideline minimum under the otherwise applicable drug guideline of 131 months.[41] Simply put, the greater the

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20.7% were Black, while 61.4% of those deemed career offenders were Black.

[39] Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 Just. Q. 231, 247-48 (2013).

[40] *Career Offender Report*, at 34 & fig.13, 35 & fig.15.

[41] *Id.* at 35 & fig.14.

impact of the career offender designation, the more likely it was that the district court imposed a below-range sentence.[42]

For offenders with both drug and violent convictions (the largest category of offenders, and the category into which Mr. Maxwell falls),[43] the rate of within-range sentences was still less than one-quarter (23.5 percent), with judges sentencing below the range in 75.8 percent of cases.[44] And the average below-range sentence still reflected a nearly one-third reduction, at 29.6 percent below the career offender guideline minimum.[45] The average sentence imposed for these "mixed offenders" was 145 months, just seven months above the average ordinary drug guideline minimum of 138 months.[46]

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[42] *Id.* at 36 & fig.16.

[43] *Id.* at 27, 28 & fig.8 (describing the "mixed category" as "encompassing all . . . career offenders who have either a drug trafficking or violent instant offense of conviction and any combination of violent and/or drug trafficking prior offenses").

[44] *Id.* at 35 fig.15.

[45] *Id.* at 34 fig.13.

[46] *Id.* at 35 & fig.14. Even those in the small category of offenders convicted of only violent offenses were sentenced within the range only half the time, with the average extent of a non-government-sponsored

And the trend continues. In fiscal year 2019, career offenders as a whole were sentenced within the career offender guideline range in just 22.6 percent of cases, and that includes those whose status depended entirely on crimes of violence.[47] The national average sentence for all career offenders was 152 months.[48] Whether on the defendant's request, the government's request, or the court's own initiative, these below-range sentences prove, both individually and collectively, that the career offender guideline is greater than necessary in the mine-run career offender case.

The upshot is that today a sentence within the career offender range is *unlike* most of the sentences similarly situated offenders receive today. When it comes to the career offender guideline, a within-range sentence is an outlier.

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reduction for those sentenced below it similarly being thirty percent below the guideline minimum. *Id.* at 35 fig.15, 37 fig.17.

[47] U.S. Sent'g Comm'n, *Quick Facts – Career Offenders FY2019*, at 2 (2020).

[48] *Id.*

B. Courts Must Take Special Care When Considering the Need to Avoid Unwarranted Disparity for Those Deemed Career Offenders and Eligible for First Step Act Relief.

Because the vast majority of defendants eligible for retroactive application of the Fair Sentencing Act were sentenced before 2010,[49] most in the Sixth Circuit were sentenced when the power of a district court to impose a sentence below the career offender range was far more limited. These people and their sentencing judges also did not have the benefit of the current understanding of the inefficacy of these lengthy sentences. Today, when assessing whether to grant a reduction under the First Step Act, district courts must engage in a "close" and "thorough renewed consideration of the 3553(a) factors." *United States v. Boulding,* 960 F.3d 774, 784 (6th Cir. 2020). As part of this assessment, district courts must "take account of sentencing practices in other courts" and any warranted disparity created by the guideline itself. *Kimbrough v. United States,* 552 U.S. 85, 108 (2007).

As shown above, some of the most crucial new information about the career offender guideline has to do with the sentencing practices of

[49] *See* U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* tbl. 2 (Oct. 2020).

other courts, the racial disparity it creates, and the true outlier status of a sentence within the career offender range. While this Court has previously suggested that guideline ranges produced by a properly functioning guideline—say, one based on empirical data and national experience and serving sentencing purposes in the mine-run case—should operate as the guide for assessing the need to avoid unwarranted disparity, *see United States v. Swafford*, 639 F.3d 265, 270 (6th Cir. 2011), the career offender guideline is not such a guideline. Recent precedent supports the conclusion that the ordinary drug range today is the more appropriate starting point for assessing the need to avoid unwarranted disparity for drug offenders deemed career offenders.

Beginning in 2012, this Court made clear that the Commission's national sentencing data should serve as "a starting point for district judges in their efforts to avoid unwarranted sentence disparities" under 18 U.S.C. § 3553(a)(6). *United States v. Stock*, 685 F.3d 621, 629 n.6 (6th Cir. 2012) (internal quotation marks omitted). In *Stock*, the Court *sua sponte* requested and received from the Commission specific sentencing data about offenders convicted of similar offenses with similar records, which it treated as meaningful when discussing the district court's

prospective task of considering the need to avoid unwarranted disparity on remand after reversal due to an erroneously calculated guideline range. *Id.* at 629-30 & n.6. The Court observed that the sentence imposed "is an outlier when compared to other sentences for failure-to-register violations, even when that comparison is limited to other criminal-history-category-VI offenders." *Id.* at 629.

Following this logic, this Court, when considering the need to avoid sentencing disparities in an assault case, described Commission data showing the average sentences for federal defendants in Criminal History Category I and sentenced for assault, and it used this data along with sentencing outcomes in individual cases as "comparators." *United States v. Boucher*, 937 F.3d 702, 713 (6th Cir. 2019). "Despite these comparators," the Court said, "the district court failed to address the risk of disparity" that the sentence imposed in that case, which was far below these comparators, would seem to create. *Id.* at 714. It therefore vacated the sentence and remanded for "a more careful discussion about the relationship between [the defendant's] sentence and the danger of unjustified disparities." *Id.* The Court's concern there was the "acute" "risk of disparity" in what was an "unremarkable" assault case. *Id.*; *see*

also United States v. Perez-Rodriguez, 960 F.3d 748, 757 (6th Cir. 2020) (vacating above-guideline sentence as substantively unreasonable partly because the Commission's national data indicated offense was merely an "average" case, and "the court selected the sentence without properly considering sentencing disparities").

Although *Boucher* and *Perez-Rodriguez* both involved outside-the-range sentences, they emphasize the critical importance of the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This goal is just as important when courts consider the appropriateness of a sentence reduction in a First Step Act case for a defendant deemed a career offender. It just so happens that in the context of the career offender guideline, a sentence *within* the career offender range is usually the outlier sentence. Thus, when a sentence within the career offender range is left intact without a careful consideration of the relevant comparator, it could easily create an unwarranted disparity with sentences of similarly-situated offenders. Under *Boucher*, *Perez-Rodriguez*, and *Stock*, the starting point for considering unwarranted disparity in a run-of-the-mill career offender case is the national data

showing both that a below-range sentence typically suffices and that most judges sentence below the range by approximately one-third on average.

With this more properly oriented starting point, a sentencing judge deciding whether to reduce the sentence of a career offender under section 404 of the First Step Act should be required to explain why the ordinary drug range is insufficient; by the same token, the judge should be required to justify the extent of the difference between the ordinary drug range and the career offender range. *Boucher*, 937 F.3d at 714. Then, when this Court reviews the sentence and asks "where within the constellation of similar cases the sentencing outcome in the present case falls," it must consider the fact that a career offender sentence is usually substantially longer than the sentence actually imposed in the large majority of similar cases. *United States v. Krueger*, 815 F. App'x 847, 851 (6th Cir. 2020) (citing *Boucher*, 937 F.3d at 707-09)).

Today, in light of the retroactive reduction to Mr. Maxwell's offense level under § 2D1.1, a chasm has opened between his applicable drug range (now 188 to 235 months) and the 360-month career-offender minimum. Even if he is still a "career offender" as a matter of the

technically applicable guideline range (despite his persuasive arguments to the contrary) and treated as the majority of similarly situated career offenders are today, he would receive a significantly below-range sentence. The fact that he would not even be a career offender today makes his argument in favor of a further sentence reduction even stronger.

* * *

Before 2010, courts treated the career-offender guideline as mandatory or quasi-mandatory, and so a career offender's sentence was firmly "anchored" to the range produced by that problematic guideline, resulting in very long sentences without proper justification. Today, a person seeking relief under the First Step Act gets just "one bite at the apple" at resentencing to correct a flawed sentence. *United States v. Maxwell*, 800 F. App'x 373, 376 (6th Cir. 2020) ("The First Step Act gives defendants only one bite at the apple."). Because the movant gets just that one chance, that opportunity must be meaningful. And it will be meaningful only if the district court with the authority to resentence considers the fact that, in light of developments over the last decade, a sentence within the career-offender range is the true outlier. Amici urge

this Court to ensure that, when exercising their discretion in First Step Act cases, district courts engage in special scrutiny of prevailing norms to determine whether old career-offender sentences are actually justified.

CONCLUSION

For the above reasons, and for the reasons persuasively set forth by Mr. Maxwell, Amici respectfully urge the Court to vacate the district court's order and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Amicus Brief has been served upon the parties through operation of the Court of Appeals Electronic Filing System.

Dated this 6th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B)(i), Federal Rules of Appellate Procedure, as it contains 5,234 words, excluding the table of contents, table of citations, and the certificates of counsel. Certification is based on the word count of the word-processing system used in preparing the brief, Microsoft Word 2013.

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