

# National Association of Assistant United States Attorneys

*Safeguarding Justice for All Americans*

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November 12, 2015

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The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Chief Judge Saris:

The National Association of Assistant United States Attorneys (NAAUSA) submits the following comments in response to the proposed amendment to the Sentencing Guidelines dated August 12, 2015, regarding the definition of "crime of violence" and related issues.

The National Association of Assistant United States Attorneys represents the interests of 5,400 Assistant United States Attorneys employed by the Department of Justice and responsible for the prosecution of federal crimes and the handling of civil litigation throughout the United States. United States Attorneys and Assistant United States Attorneys are the gatekeepers of our system of justice. Their primary responsibility is to protect the innocent and convict the guilty.

Mindful of these responsibilities, we agree with the Commission that in light of *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551 (2015), the Sentencing Guidelines should be amended to address the void created by removal of the residual clause. However, we believe that the approach suggested in the October 30, 2015 letter submitted to the Commission by the Department of Justice (the DOJ Letter) is the preferred one, as we explain below, and NAAUSA endorses the amendments as proposed by the Department of Justice (DOJ).

NAAUSA agrees with DOJ that there are three critical issues requiring the Commission's attention in this amendment:

1. A new definition of “crime of violence” that adopts the definitions contained in federal criminal statutes to the extent possible;
2. The retention of the current definition of a felony as “an offense punishable by a term of imprisonment exceeding one year” without regard to definitional differences among the states; and
3. A “conduct-based” review of the underlying conviction where there is no clear answer after comparison of the underlying state count of conviction with the Guidelines’ “crime of violence” definition.

First, NAAUSA endorses the amendment of §4B1.2(a) as proposed by the DOJ Letter to expand the list of enumerated crimes to include reference to the specific federal statutes listed at page 2, and to add to that list the generic definitions for the 12 crimes defined at pages 7-8 of the DOJ Letter. We agree with DOJ that the strong federal interest in ensuring that every violent crime conviction be counted in determining whether to apply the career offender guideline mandates expansion of the enumerated crimes list to be as broad as practicable.

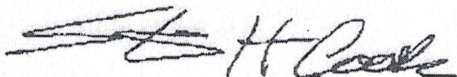
We also urge the Commission to include the suggested Commentary making clear that the cross-references to federal criminal statutes include those convictions in every respect “*except* for an interstate-commerce or other element that is the basis for federal legislative jurisdiction.” DOJ Letter page 8. We endorse the specifics laid out in the DOJ proposals at pages 5-11, and in particular we recommend that the definition of burglary include burglary of any building or structure and not just a dwelling, for the reasons explained in the DOJ Letter at 9.

Second, NAAUSA strongly urges the Commission not to include the language contained in the August 12<sup>th</sup> proposed changes to Application Note 1 (at page 6) that would limit consideration of prior state convictions to only those that were “classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted.” As argued by DOJ at page 15, this new requirement to look beyond the term of maximum imprisonment will introduce confusion and inconsistency in the application of these Guidelines, and will require additional prosecutorial and judicial resources to litigate an issue that should be straightforward, based on the maximum penalty specified in the state statute. As DOJ states, the “goals of sentencing are best served by applying through the guidelines the uniform and long-established definition of a felony, that is, a crime punishable by death or by more than one year in prison.” We urge the rejection of this proposed change.

Finally, NAAUSA strongly endorses the approach suggested by DOJ to adopt a "conduct-based" backup to the categorical approach, as explained at pages 11-14, to include the language proposed at page 14. DOJ has included a detailed analysis that points to the frustrations our members have encountered repeatedly on this issue, where the state law definitions do not line up with the USSG ones, resulting in the rejection of a conviction for conduct that can be plainly proved to have been violent in nature. This giant loophole has inured to the benefit of countless violent criminals whose criminal history cannot be considered by the judge to fashion an appropriate sentence without looking behind the statutory definition of the count of conviction. The thoughtfully written language proposed at page 14 of the DOJ Letter addresses this gap effectively and we endorse its adoption.

In summary, while NAAUSA does not always agree 100% with positions taken by the Department of Justice -- and in fact we are on record disagreeing with some of the Department's positions on the need for "sentencing reform" in the broader context -- we do agree with the considered approach suggested by the Department of Justice here, and we urge the Commission to adopt that approach in whole. We appreciate your consideration of these comments in finalizing your proposed amendments to the Guidelines.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Steve Cook". The signature is stylized with a large, sweeping initial "S" and a cursive "C".

Steve Cook  
President