U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

October 30, 2015

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,

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendment to §4B1.2 of the federal sentencing guidelines and issues for comment published in the Federal Register on August 17, 2015.[1] We look forward to continuing our work with the Commission on this and other possible amendments to the sentencing guidelines during the remainder of the amendment year.

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I. Overview

The Department supports the Commission's proposal to amend §4B1.2 of the sentencing guidelines in response to the Supreme Court's decision in *Johnson v. United States*.[2] We agree with the Commission's proposal to delete the residual clause from the definition of "crime of violence" in §4B1.2. We also agree that the elements clause of the definition should be retained, the list of enumerated offenses expanded, and the enumerated offenses defined within the guideline and commentary. The Department believes that where appropriate, federal definitions should be used for the enumerated offenses in order to better promote uniformity across the guidelines and U.S. Code. Generic definitions, in turn, should be provided in the commentary for those enumerated offenses for which there is no clear federal counterpart. In an effort to achieve equal justice across the country, minimize sentencing disparities across jurisdictional

[1] U.S. Sentencing Comm'n, *Notice of Proposed Amendments to the Sentencing Guidelines and Commentary*, 80 Fed. Reg. 49314 (Aug. 17, 2015).
[2] *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015).

lines for defendants with the same or similar prior criminal history, and best achieve the public safety and sentencing goals mandated to the Commission by Congress, the Department urges the Commission to adopt a conduct-based backup to the categorical approach to determine which offenses meet the enumerated list or elements test. This would entail employing traditional sentencing fact-finding in those cases where the categorical approach is insufficient to determine whether a crime of violence took place, for example, where the state statute defining the crime includes but is broader than the definition of the crime stated in the federal code or generic definition. It would eliminate the inconsistent and occasionally perverse results created by exclusive application of the categorical approach and would be consistent with the kind of fact-finding sentencing courts engage in virtually every case and that is required by 18 U.S.C. § 3553(a). Finally, the Department recommends that the Commission not adopt the proposed requirement that an otherwise qualifying crime of violence must be classified as a felony or "comparable classification" under state law.[3]

The Department recommends that the text of §4B1.2(a) be amended as follows:

(a) The term "crime of violence" means any offense under federal, ~~or~~ state, or territorial law, by whatever designation and wherever committed, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder (as described in 18 U.S.C. § 1111(a)), voluntary manslaughter (as described in 18 U.S.C. § 1112(a)), assault (as described in 18 U.S.C. § 113(a)), aggravated sexual abuse and sexual abuse (as described in 18 U.S.C. §§ 2241, 2242), abusive sexual contact (as described in 18 U.S.C. § 2244(a)(1) and (a)(2)), child abuse, kidnapping, robbery (as described in 18 U.S.C. § 1951(b)(1)), carjacking (as described in 18 U.S.C. § 2119), firearms use, burglary ~~of a dwelling~~, arson, ~~or~~ extortion (as described in 18 U.S.C. § 1951(b)(2), but not extortion under color of official right or fear of economic loss), communication of threats, coercion, domestic violence, hostage taking, stalking, human trafficking, or using weapons of mass destruction (as described in 18 U.S.C. § 2332a), involves use of explosives, or attempt to commit, conspiracy to commit, solicitation to commit, or aiding and abetting any of the above offenses. ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another.~~

We set forth suggested changes to the commentary, including definitions for the enumerated crimes, below.

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[3] The Department does not support retroactive application of the amendment. We appreciate that this issue is not presently before the Commission and will address it further at the appropriate time, if necessary.

II. First Principles

Congress, the Sentencing Commission, and all 50 States have identified recidivism as an important sentencing factor for achieving the goals of sentencing. *See, e.g., Parke v. Raley*, 506 U.S. 20, 26 (1992) (recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States); U.S. Dept. of Justice, Office of Justice Programs, *Statutes Requiring the Use of Criminal History Record Information* 17-41 (June 1991) (50-state survey); USSG §§4A1.1, 4A1.2 (Nov. 2014) (requiring sentencing courts to consider defendant's prior record in every case). As Justice Breyer wrote in *Almendarez-Torres v. United States*, "recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[4] *See also* 28 U.S.C. § 994(h) (instructing the Commission to write guidelines that increase sentences for serious recidivists); 18 U.S.C. § 924(e) (Armed Career Criminal Act of 1984) (imposing significantly higher sentence for felon-in-possession violation by serious recidivists); 21 U.S.C. § 841(b)(1)(A)-(D) (same for drug distribution). This is true because research has clearly established that offending repeatedly is a reliable indicator of offender dangerousness and repeated offending is a sign of greater criminal culpability. State and federal legislators and state and federal sentencing commissions have uniformly found that increasing sentences for repeat offenders serves the retributive, deterrent, and incapacitative purposes of sentencing.

But to be parsimonious with prison sentences, as we should, and to assure to the extent achievable that only the dangerous receive long sentences, it is critical to differentiate among criminal histories; to identify those offenders with histories that indicate dangerousness. This is precisely why defining "crime of violence" is so critical. We share the policy goals of the Commission, set out in the immigration, firearms, career offender, and other guidelines, to identify the dangerous offenders with reference to prior crimes of violence and reserve long prison terms for those offenders. And we share the goals of the Chairman and Ranking Members of both the House and Senate Judiciary Committees, who have introduced legislation in the last month to better target long sentences to dangerous offenders using criminal history as a key determining factor. But to achieve this policy, the Commission must define "crime of violence" in a way that can be implemented consistently, readily, across 50 State criminal codes, by hundreds of courts and thousands of probation officers, prosecutors, and defense attorneys. This should be the goal of the Commission in considering this proposed guideline amendment.

We recognize that the severity levels associated with the career offender guideline, the Armed Career Criminal Act, and other provisions tied to violent criminal history are not all optimally set. The sentencing legislation recently introduced in Congress would reduce mandatory penalties for several of these provisions, and we support this goal. Moreover, we are open to further changes to severity levels for other recidivist provisions. However, we urge the

[4] *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

Commission in amending the definition of "crime of violence" to focus solely on developing a workable policy that will identify dangerous offenders consistently and avoid unwarranted disparities. The Commission should simultaneously and in parallel analyze severity levels that are tied to the definition and specify which ought to be reformed. To the extent that only Congress can do so for some of these provisions, the Commission should send Congress a legislative proposal to enact those reforms. But the Commission should not develop a sub-optimal definition of crime of violence – one that is under- (or over-) inclusive or results in haphazard or difficult application, unequal justice, or inadequate sentences for dangerous offenders – simply in order to compensate for sub-optimal severity levels that may now be in place but that can be changed either by the Commission or by Congress.

Last year, at the Commission's roundtable on the definition of "crime of violence," several judges noted that the more the definition of crime of violence is tied to the quirks of criminal code drafting among the 50 States, the less it will be of practical value and use – as one judge put it, "it will remain tied to the theoretical" – and the more it will result in sentencing outcomes that are inconsistent and do not meet public safety and equal justice goals. These judges suggested that sentencing courts be empowered to identify those offenders who genuinely have a violent criminal history and where an enhanced criminal sentence is warranted. Our position reflects those judges' views.

III. Standardization

In response to the Commission's ninth and tenth issues for comment, the Department supports a standardized definition of "crime of violence" throughout the guidelines. We believe that standardization will reduce litigation and foster more consistent decision-making and more equal and just outcomes. We urge the Commission to adopt a single definition of "crime of violence" in the guidelines.

However, we think the Commission should proceed with caution as it considers recommendations to Congress regarding a standardized definition of "crime of violence" between the guidelines and federal statutory law. There is a significant constitutional difference between the requirements surrounding statutes that increase a statutory minimum or maximum penalty and sentencing factors in the guidelines. In addition, the various statutory recidivist enhancements serve different purposes and the definition of the triggering predicates may need to be tailored for those differences. Moreover, whatever action the Commission takes this amendment year, it will not solve all the problems with crime of violence litigation.[5] We think realistically, this litigation will remain a vexing and unstable area of law for some time. For this

[5] We are concerned that the newly introduced sentencing bills in both the House and Senate create yet new definitions of violent offenses and drug trafficking offenses, and that the legislation will create yet further complex litigation based on the categorical approach.

reason, we believe the Commission should promulgate a guideline amendment this year and then monitor the litigation and legislative developments over the coming months before recommending changes to Congress regarding statutory definitions of "crime of violence" and similar terms.

IV. Residual Clause

We fully support the Commission's proposal to eliminate the residual clause of the current definition of "crime of violence" in §4B1.2.[6] The Department believes that the elimination of the residual clause, retention of the current elements clause, and expansion of the list and definitions of enumerated offenses will provide for greater clarity and consistency in the application of the guidelines. The relevant portion of §4B1.2(a), with the residual clause italicized, currently states:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*

Judicial attempts to formulate a consistent and workable approach to the residual clause contained in the Armed Career Criminal Act and §4B1.2(a) have been numerous and frustrating. Because of this constant judicial reinterpretation, the "ever-shifting sands of the residual clause"[7] fosters uncertainty and confusion amongst probation officers and judges as to its proper interpretation and application, ultimately resulting in inconsistent sentencing.

In addition to such difficulties, the Department is also cognizant of the potential for judicial nullification of the clause in light of the Supreme Court's recent decision in *Johnson v. United States,* which invalidated the ACCA's residual clause for vagueness.[8] Courts have taken

[6] This is the government's response to the Commission's first issue for comment.
[7] As described by Judge Carnes in *United States v. Chitwood*, 676 F.3d 971, 978 (11th Cir. 2012).
[8] *Johnson v. United States*, 135 S. Ct. at 2563.

different approaches on the specific application of the *Johnson* decision to the guidelines.[9] Some courts have explicitly signaled that the removal of the residual clause will bring the guidelines in line with current precedent. For example, the Seventh Circuit opined that "the U.S. Sentencing Commission has begun the process of amending the career offender guideline to delete the residual clause, bringing the Guidelines into alignment with *Johnson*."[10] In light of these considerations, for reasons of both policy and judicial prudence, the Department agrees with the Commission that the residual clause of §4B1.2(a)(2) should be deleted.

V. Enumerated Offenses

The Department agrees with the Commission that the list of enumerated crimes and definitions should be expanded.[11] However, while we agree that the Commission should define generic crimes within the guideline, the Department believes the enumerated crimes should be defined, where appropriate, by reference to existing federal statutes and that generic definitions should be provided for those offenses for which there is no natural federal counterpart. The use of federal definitions will increase consistency across the guidelines and U.S. Code and provide more predictability for defendants and better guidance for probation officers and judges. This method is also advisable because it relies to the extent possible on definitions established by Congress.

a. Offenses and Definitions

There are various models of this approach in state and federal law, including 18 U.S.C. § 3559, which provides statutory cross-references for offenses where available and creates generic definitions for the remaining offenses. We think the Commission should use this approach to identify the enumerated crimes and definitions to be used in the guidelines. However, we believe the Commission should develop a more tailored list of enumerated offenses that identify the most dangerous offenders. The Commission should be guided in developing the

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[9] *Compare United States v. Matchett*, No. 14-10396, 2015 WL 5515439 at *6 (11th Cir. Sept. 21, 2015) (holding that the *Johnson* decision does not render the guidelines' residual clause similarly unconstitutional), *pet'n for rehearing en banc filed* (Oct. 13, 2015); *with United States v. Darden*, No. 14-5537, 605 F. App'x 545, 546 (6th Cir. July 6, 2015) ("In *Johnson v. United States*, the Supreme Court held that the identically worded residual clause of the Armed Career Criminal Act is void for vagueness. We have previously interpreted both residual clauses identically, and [defendant] deserves the same relief as Johnson: the vacating of his sentence." (internal citations omitted)); *United States v. Goodwin*, No. 13-1466, 2015 WL 5167789 at *3 (10th Cir. Sept. 4, 2015) (unpublished) ("[T]he language of §4B1.2(a)(2)'s residual clause is essentially identical to the language of the ACCA's residual clause, which the Supreme Court declared void for vagueness in *Johnson*. Therefore, the district court's reliance on §4B1.2(a)(2)'s residual clause in enhancing [defendant]'s sentence was error and also seemingly clearly or obviously so.").

[10] *United States v. Rollins*, No. 13-1731, 2015 WL 5117087 at *1 (7th Cir. Sept. 1, 2015).

[11] In response to the Commission's fifth issue for comment, the Department believes the definition of crime of violence must include both an elements clause and an enumerated clause. Removing the enumerated clause would likely exclude a large number of violent crimes that do not have an element of physical force but are nonetheless violent. Moreover, relying solely on an elements clause will require additional litigation regarding the interpretation of state statutes. The identification of violent crime will be accomplished much more directly by enumerating offenses.

list by recidivism research that shows whether or not an offense is a good indicator of the likelihood for reoffending. Enumerating these additional offenses and definitions will capture many crimes that would otherwise fall under the now-deleted residual clause – offenses that are clearly of a violent nature – and help ensure that a policy gap is not created by the absence of the residual clause. More importantly, it will capture the offenders that the Commission's own research shows are likely to reoffend.

We believe the list of enumerated crimes should include: murder, voluntary manslaughter, assault, aggravated sexual abuse and sexual abuse, abusive sexual contact, child abuse, kidnapping, robbery, carjacking, firearms use, burglary, arson, extortion, communication of threats, coercion, domestic violence, hostage taking, stalking, human trafficking, use of weapons of mass destruction, use of explosives, or attempt to commit, conspiracy to commit, solicitation to commit, or aiding and abetting any of the above offenses.

We believe the Commission should cross-reference federal definitions of these crimes where possible – and we set forth those cross-references above. For those crimes for which there is no cross-referenced federal definition, the Commission should provide the following generic definitions:

> *Assault* – "assault" is defined by reference to 18 U.S.C. § 113(a), and may be committed recklessly, knowingly, or intentionally.[12]
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> *Arson* – the term "arson" means maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive.
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> *Burglary* – the term "burglary" means an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.
>
> *Child Abuse* – the term "child abuse" means the intentional infliction of physical injury or the commission of any sexual act against a child under fourteen by any person eighteen years of age or older.
>
> *Communication of Threats* – the term "communication of threats" means the transmission of any communications containing any threat of use of violence to: (1) demand or request for a ransom or reward for the release of any kidnapped person; (2) threaten to kidnap or injure the person of another; or (3) threaten to injure the property or reputation of another.
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> *Coercion* – the term "coercion" means causing the performance or non-performance of any act by another person which such other person has a legal right to do or to abstain from doing, by the use of actual or threatened force, violence, or fear thereof, including

[12] 18 U.S.C. § 113(a) includes assault with intent to commit murder, assault with intent to commit any felony and various other more specific means of committing assault.

the use, or an express or implicit threat of use, of violence to cause harm to the person, reputation, or property of any person.

Domestic Violence – the term "domestic violence" means committing any act with the intent to kill or injure a spouse, intimate partner, or dating partner.

Firearms Use – the term "firearms use" means conduct described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise possessed, carried, or used as a weapon and the crime of violence or drug trafficking crime during and in relation to which the firearm was possessed, carried, or used was subject to prosecution in a court of the United States or a court of a State, or both. The term "firearms use" also includes unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun).[13]

Hostage Taking – the term "hostage taking" means the seizure or detention with threats to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained.

Human Trafficking – the term "human trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of a commercial sex act or subjection to involuntary servitude, peonage, debt bondage, or slavery.

Kidnapping – the term "kidnapping" means seizing, confining, inveigling, decoying, kidnapping, abducting, or carrying away and holding for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof.[14]

Stalking – the term "stalking" means intentionally placing a person in reasonable fear of death or serious bodily injury.

b. Commentary

We think the Commission should include commentary that makes clear that when it cross-references to a federal statute using the term "as described in" or otherwise, it means to include convictions under state and foreign law that are equivalent to the federal provision in every respect *except* for an interstate-commerce or other element that is the basis for federal legislative jurisdiction. *See, Torres v. Lynch* ___ U.S. ___ (*cert. granted* June 29, 2015). The Commission could borrow language from, for example, 18 U.S.C. § 3142 to include state or local offenses "that would have been an offense described [in the referenced section] if a circumstance giving rise to Federal jurisdiction had existed[.]"[15] We also believe the

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[13] The reference to 26 U.S.C. § 5845(a) is part of the Commission's current definition of "crime of violence." *See* USSG §4B1.2, cmt. 1.

[14] This language is taken from 18 U.S.C. § 1201.

[15] 18 U.S.C. § 3142(e)(2).

Commission should include commentary that specifies that conspiring to commit a crime of violence is itself a crime of violence regardless of whether the conspiracy statute of conviction requires proof of an overt act. The Supreme Court has long recognized that formation of a conspiracy necessarily threatens the accomplishment of the conspiracy's object. *See, e.g., United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003) ("The conspiracy poses a 'threat to the public' over and above the threat of the commission of the relevant substantive crime . . .").

c. Responses to Issues for Comment Regarding Enumerated Offenses

Issue for Comment 2 – Recklessness. Issue for Comment 2 inquires whether the definition of crime of violence should include offenses committed recklessly. In the government's view, this question may be answered through the definitions provided for enumerated offenses. Those offenses, such as murder and assault, which are traditionally sanctioned based on reckless conduct, should be defined accordingly. In those instances, the traditional definition of recklessness is of a mental state closely akin to culpable knowledge, and thus such treatment is appropriate. *See* Model Penal Code § 2.02(2)(c), *cited in Global-Tech Appliances, Inc., v. SEB S.A.,* 131 S. Ct. 2060, 2071 (2011) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

Issue for Comments 3, 4(F), and 4(G) – Crimes Against Property. Issue for Comment 3 asks "[h]ow, if at all, should the guidelines definition of 'crime of violence' apply to property offenses?" The government suggests that this question should be answered selectively, through the definition of enumerated offenses. We do not advocate that any crime involving property qualify. Rather, there are specific crimes against property, such as arson and burglary, that routinely present a manifest danger to human safety and life, and those should appropriately be included in the crime of violence definition in the guidelines.

With respect to burglary (addressed in Issue for Comment 4(F)), the government proposes that the Commission define burglary as including the burglary of any building or structure, not just a dwelling. That is consistent with *Taylor v. United States*, which, in determining the definition of "burglary" in ACCA, found that the broader definition is "the generic sense in which the term is now used in the criminal codes of most States."[16] There is no reason that the offense of burglary should be treated inconsistently in federal law.

The Commission also noted (Issue for Comment 4(G)) that "[m]any states define 'arson' to include burning of personal property." The government proposes that, for purposes of efficiency and consistency, the guidelines incorporate the definition from 18 U.S.C. § 3559(c)(2)(B) (which specifies a "building, inhabited structure, vehicle, vessel, or real property").

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[16] *Taylor v. United States*, 495 U.S. 575, 598 (1990).

Issue for Comment 4(A) – Murder. With respect to murder, the government proposes that, as in 18 U.S.C. § 3559, the crime be defined by reference to 18 U.S.C. § 1111. Section 1111 includes some aspects of the common law felony-murder rule, providing that the commission of a killing in the course of certain specified felonies supplants the necessity of proving malice aforethought.[17] In answer to Issue for Comment 4(A), we believe it is appropriate, for purposes of both proper sentencing and efficiency, to define murder by reference to section 1111 and thereby include certain felony murders.

Issue for Comment 4(B) - Kidnapping. Issue for Comment 4(B) concerns the proposed definition of "kidnapping." The proposed definition in the amendment contains an extensive set of factors, which would be difficult to apply, particularly if the Commission retains an exclusive categorical approach to application of the crime of violence definition. It may prove close to impossible to align the kidnapping statutes of the 50 States with this complex proposed definition. The government proposes instead that the Commission define kidnapping using the language from the federal kidnapping statute at 18 U.S.C. § 1201.

Issue for Comment 4(C) – Assault. Issue for Comment 4(C) concerns the proposed definition of "aggravated assault," and inquires whether the definition should include as an aggravating factor that the victim has a special status, such as law enforcement, elderly, or minor. In the government's view, the definition of crime of violence should include any assault, not just an aggravated assault, making this question moot. The government proposes that "assault" be defined by reference to 18 U.S.C. § 113(a), which lists a number of types of assaults, all of them violent.

Issue for Comment 4(D) – Forcible Sex Offenses. Issue for Comment 4(D) concerns the proposed definition of "forcible sex offense," including whether statutory rape should be included. The government answers that question in the affirmative, and therefore proposes an enumerated offense of "child abuse" which includes a generic definition of statutory rape (*i.e.*, a sexual act by a person 18 years of age or older with a child under the age of 14). That definition is somewhat broader than the definition which appears in 18 U.S.C. § 2241(c), which we also propose to incorporate, along with other forms of "aggravated sexual abuse" described in § 2241.

Issue for Comment 4(E) – Robbery. The proposed amendment defines "robbery" as "the misappropriation of property under circumstances involving immediate danger to the person of another." *See* Issue for Comment 4(E). The government believes that this definition is somewhat vague and would likely prove problematic in inevitable litigation over the application of the definition to myriad robbery statutes. The government proposes instead that the guidelines incorporate the definition of robbery stated in 18 U.S.C. § 1951(b)(1) ("The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the

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[17] *See United States v. Thomas,* 34 F.3d 44, 48-49 (2d Cir. 1994).

person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.").

Issue for Comment 4(H) – Extortion. Issue for Comment 4(H) notes that "[e]xtortion has been defined in case law as including non-violent threats, such as a threat to reveal embarrassing personal information," and as including "fear." The government agrees with the amendment proposal that extortion be defined as causing a fear of physical injury, not reputational injury. For purposes of consistency and efficiency, rather than draft a new definition, the government proposes that the Commission define extortion by reference to 18 U.S.C. § 1951(b)(2) ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear"), excluding extortion under color of official right and fear of economic loss.

Issue for Comment 6 – Inchoate Crimes. Issue for Comment 6 asks whether the definitions of "crime of violence" and "controlled substance offense" should include attempts, conspiracies, and aiding and abetting, as the commentary presently states. The government believes that it should, and also suggests that "solicitation" be added, consistent with 18 U.S.C. § 3559(c)(2)(F)(i) ("attempt, conspiracy, or solicitation to commit any of the above offenses"). In addition, the government believes the Commission should include commentary that specifies that conspiring to commit a crime of violence is itself a crime of violence regardless of whether the conspiracy statute of conviction requires proof of an overt act.

VI. A Conduct-Based Backup to the Categorical Approach

a. The Categorical Approach Applied Strictly Results in Inconsistent Sentencing and a Flawed Policy and Should be Augmented With a Conduct-Based Backup

The Department urges the Commission to adopt within the guidelines a conduct-based backup to the categorical approach for the evaluation of offenses and whether they are crimes of violence. The categorical approach has long been criticized as a cumbersome, imprecise, and litigation-intensive mechanism for evaluating past crimes, which fails to capture varying state statutory definitions and the practical realities of the criminal justice system.

The categorical approach, which considers only the elements of a prior offense and not the defendant's actual conduct, was never expressly adopted by the Commission as a method for identifying crimes of violence in a defendant's criminal history. Rather, the Supreme Court, in *Taylor v. United States,*[18] adopted the categorical approach in construing the language of the Armed Career Criminal Act, and later explained that the approach is justified in application of ACCA in order to avoid the Sixth Amendment issue that may arise if a court, without a jury verdict, determined facts regarding a prior offense that (as in ACCA) increased a statutory

[18] *Taylor v. United States*, 495 U.S. at 600.

maximum sentence.[19] Although the categorical approach was thus developed for application of a statutory recidivism provision, with attendant constitutional considerations in mind, courts uniformly decided that the same approach should be employed in the application of guideline provisions calling for identification of a prior crime of violence.

However, the strict and exclusive use of the categorical approach, eschewing the actual facts of a defendant's prior conduct in all cases, is antithetical to the theory and implementation of the guidelines, which call for sentencing judges to apply the guidelines' enumerated aggravating and mitigating factors to defendants' actual conduct and not focus solely on the number or elements of counts of conviction. Pursuant to *Booker*, courts are permitted to determine pertinent sentencing facts by a preponderance of the evidence.[20] There is no sensible reason that determination of a defendant's criminal history should be handled any differently than the determination of any other relevant fact about the defendant's conduct, and every reason not to solely apply a categorical approach which inevitably leads to disparate conclusions divorced from defendants' actual histories.

The shortfalls of the categorical approach are many. First, and most importantly, the categorical approach results in strikingly different sentences based on the same crimes, depending on the diverse practices of each state and jurisdiction in charging and adjudicating criminal cases and in crafting criminal laws. For example, convictions under many of the burglary statutes in the Ninth Circuit are not counted as "crimes of violence," because they are broader than the generic federal definition of burglary, whereas convictions under the comparable Texas statute are counted as crimes of violence.[21] The ensuing sentencing disparities lead to the conclusion that the categorical approach to the guidelines directly contravenes the guidelines' core purpose of ensuring uniform federal sentencing for equivalent crimes and it undermines the goals of parsimony in meting out prison sentences.

Similarly, there are numerous practical difficulties arising from the realities of the prosecutorial system that also lead to inconsistent sentencing under the categorical approach. The system in Pennsylvania provides an excellent example. Federal courts have held that some of the six subsections of the state robbery statute, 18 Pa. C.S. § 3701, are categorically crimes of violence, and have held that others may or may not be crimes of violence.[22] Subsection (a)(1)(iii), for instance, may or may not qualify as a crime of violence depending on the nature of

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[19] *Shepard v. United States*, 544 U.S. 13, 24-26 (2005) (plurality opinion).
[20] *United States v. Campbell*, 491 F.3d 1306, 1314 n. 11 (11th Cir. 2007) (citing *Rita v. United States*, 551 U.S. 338, 353-54 (2007)).
[21] *Compare United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (second-degree burglary under Oregon statute is not "crime of violence" under ACCA because state statute includes other structures as "buildings" that are not included in generic federal definition); *United States v. Beltran*, No. 10-10265, 467 F. App'x 669 at *1 (9th Cir. Jan. 30, 2012) (conviction under Nevada burglary statute does not count as crime of violence under §2L1.2(b)(1)(A) because "unlawful or unprivileged" entry is not necessary element); *with United States v. Garcia-Mendez*, 420 F.3d 454, 455 (5th Cir. 2005) (Texas statute of burglary of "habitation" equivalent to §2L1.2 guideline version of burglary of a dwelling, and therefore conviction counts as crime of violence).
[22] *United States v. Thompson*, No. 12-418-5, 2014 WL 6819973 at *4 (E.D. Pa. Dec. 4, 2014).

the felony a defendant committed or threatened in the course of committing a theft.[23] However, as a standard practice, district attorneys in the state often list every subsection of the statute, often making it impossible to ascertain under which subsection a defendant was convicted. In many cases, as a result, a prior offense, which was unquestionably a gunpoint robbery, cannot be established as such using *Shepard* records. Likewise, sometimes *Shepard* records cannot be found because of the passage of time, and in other instances local prosecutors have pled down to a lesser non-qualifying charge. In all of these cases, although it may be known without dispute that the act in question was manifestly violent, the offense may escape such designation due to the fact that the imprecise categorical approach fails to appropriately capture the nuances inherent in the criminal justice system. In sum, if the purpose of sentencing enhancements is to identify the most violent criminals and protect the rest of society from them, then the categorical approach, strictly and exclusively applied, is not an efficient or effective means to achieve that end. And while it may be necessary in the statutory context, it is not under the guidelines and traditional fact-finding by sentencing courts.

By contrast to the categorical approach, the adoption of a conduct-based backup to the categorical approach would far better achieve the goals of identifying dangerous offenders and avoiding unwarranted sentencing disparities. Rather than replacing the categorical approach entirely, this conduct-based backup would apply fact-finding to those cases where the categorical approach is insufficient to determine that the defendant did or did not commit an enumerated offense. Under this method, a court may efficiently identify as a crime of violence any offense for which a defendant was convicted whose elements satisfy the Commission's definition of a crime of violence. The court may then further inquire into the facts only in those matters in which the crime of conviction is not categorically a crime of violence, but reliable evidence establishes that the defendant in fact engaged in conduct that amounts to a crime of violence as defined by the Commission. Sentencing courts should be permitted to consider any reliable evidence, including court and law enforcement records and witness testimony, in the same manner that it may consider any such evidence in making any other factual determination under the guidelines. *See* USSG §6A1.3(a) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."). Such an approach would maintain the implementation of the categorical approach in the majority of cases, while also minimizing the troubling issue of vast sentencing disparities based on the jurisdiction in which the defendant was convicted.

This conduct-based backup has many merits. It will support the essential purpose of the guidelines, which is to ensure that the sentence imposed is based upon the defendant's individual history, personal characteristics, and prior conduct. Our brothers and sisters in the defense bar in nearly every case ask courts to consider a defendant's individual characteristics, based on facts

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[23] *Id.*

presented to the sentencing court. This is precisely what we are asking to happen as a matter of policy respecting prior criminal conduct. Such an approach will create simple and more predictable sentencing enhancements for prior convictions which unequivocally involved the use of force against, and causation of injury to, innocent persons.

b. Standard of Proof

Under these proposals, in cases where circumstances require sentencing courts to go beyond the categorical approach, a preponderance of the evidence standard would apply to assessments of defendants' prior criminal conduct. Pursuant to *Booker*, district courts may consider any facts proven to the judge by a preponderance of evidence, as long as the sentence imposed does not exceed the maximum permitted by the verdict.[24] We see no reason to vary from this standard for these particular sentencing decisions.

c. Proposed Language.

The Department suggests that the Commission include a comment along these lines:

> A person has been convicted of one of the offenses enumerated in Section xxx (the "enumerated offenses") if he was convicted of an offense punishable by a term of imprisonment exceeding one year on the basis of conduct fitting a description provided in Section xxx. In determining whether a person has incurred such a conviction, the court should first examine the elements of the offense of conviction, including the version of an offense involving alternative means or alternative elements that was the basis for the conviction, as set forth in judicial records such as a charging document, jury instructions, a plea colloquy, or a judgment. If those elements include and are no broader than the conduct described in an enumerated offense, the court should conclude that the person was convicted of an enumerated offense. If this approach does not suffice to establish whether the person was convicted of an enumerated offense, the court should then consider any reliable evidence, as set forth in §6A1.3(a), in determining by a preponderance of the evidence whether the conduct leading to the prior conviction met the definition of an enumerated offense as set forth in Section xxx. Similarly, if the elements of the offense of conviction, as set forth in judicial records such as a charging document, jury instructions, a plea colloquy, or a judgment, do not establish that a person has been convicted of an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, the court should then consider any reliable evidence, as set forth in §6A1.3(a), in determining by a preponderance of the evidence whether the conduct in which the person engaged which led to the prior conviction involved such use, attempted use, or threatened use of physical force.

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[24] *United States v. Campbell*, 491 F.3d at 1314 n. 11 (citing *Rita v. United States*, 551 U.S. 338, 353-54 (2007)).

VII. Additional Requirement That Offense Be Classified as Felony Under State Law

The Department is opposed[25] to the additional requirement that an otherwise qualifying crime of violence offense must be classified as a felony under state law, or under a comparable classification. We believe that this addition will lead to further disparate treatment of defendants based on the particular states in which they were convicted, and the unique state laws on which their convictions were based. We see no reason why a defendant convicted of an otherwise-qualifying three-year felony in one state should receive a different sentence from a defendant convicted of the same crime in a different state based solely on whether the state calls the crime a misdemeanor, felony, or wobbler. In addition, such a provision would require judges to engage in additional analysis of state law in order to determine whether a defendant was convicted under a "comparable classification." It is our view that this proposal will lead to greater inconsistency in sentencing, and runs counter to the guidelines' central purpose of promoting uniformity in sentencing.[26] 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 think it is critically important that the Commission get the "crime of violence" definition right. We have repeatedly stated – as has the Commission – that parsimony in the use of imprisonment must be our guide in developing federal sentencing policy. But recidivist violent offenders who destroy lives and neighborhoods should be incapacitated in a manner that offers consistent and effective treatment nationwide. To prevent violent crime from escalating and do so parsimoniously and economically, one essential step is to target our prison resources towards the dangerous offenders. Doing that successfully will avoid public frustration over crime – and the inevitable reaction of more broadly punitive laws – as well as victimization of innocent people.

But if the rules for classifying prior convictions as crimes of violence are unpredictable or capricious in their application or both, our system of justice will not effectively address the worst offenders. Unfortunately, the current system for classifying crimes of violence is both unpredictable and capricious. An offender with an assault conviction involving very serious bodily injury can escape consequences because the assault statute at issue encompasses offensive touching and is non-divisible. A defendant with a kidnapping conviction involving unambiguously serious conduct can avoid enhancement because the kidnapping statute encompasses kidnapping by deception and is not divisible. A defendant with a conviction for

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[25] This also serves as our response to the seventh and eighth issues for comment.
[26] *United States v. Booker*, 543 U.S. 220, 253 (2005).

burglary of a home can evade appropriate penalties merely because the burglary statute covers burglary of boats and rail cars, as under Virginia state law.

These flaws in the crime of violence classification are fundamental impediments to administering a more effective and less punitive sentencing system. When courts struggle to classify basic crimes that have been on the books for hundreds of years – like assault, kidnapping, and arson – our system has a serious problem. And when that problem hampers the ability of courts to assess common offenses like burglary in the most populous states in the country, like California, we have not done our job.

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other commissioners to refine the sentencing guidelines and to develop a more effective, efficient, and fair sentencing policy.

Sincerely,

Jonathan J. Wroblewski
Director, Office of Policy and Legislation

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel