

August 15, 2010

Mr. Michael Courlander  
Public Affairs Officer  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500 South Lobby  
Washington, DC 20002-8002

Dear Sir;

I am writing concerning the Notice of Proposed Priorities and Request for Public Comment (BAC2210-40) specifically, sentencing issues which potentially will be amended in the cycle ending May 1, 2011.

In accordance to Rule 5.2 of the Rules of Practice and Procedures, the United States Sentencing Commission is responsible for analyzing sentencing issues by seeking comment on possible "priority issues" for amendment.

I am interested in and support the continuation of your multi-year study of the statutory and guideline definitions of "crimes of violence." In addition, the examination of relevant circuit conflicts regarding whether any offense is categorically a "crime of violence" for the purpose of triggering an enhanced sentence under certain federal statutes and guideline application.

Per BAC2210-40, I will address my comments, concerns, and the particular problems in which I believe should be addressed as a "proposed priority." My interests encompass the following: sentencing issues relevant to "crimes of violence", "escapes", and "career offender enhancements." I am specifically concerned about the current definition that any type of "escape" is considered a "crime of violence" for the purpose of calculating an offender's base offense level and criminal history category.

**Statement of the Issue:**

The current Federal Criminal Code and guideline application utilized to define and enhance a sentence for the passive criminal conduct of "failing to report" back to a non-secure halfway house is currently charged as an "escape" and defined as a "crime of violence."

The confusing, unclear, and subjective terminology utilized to define "crimes of violence" such as; the "propensity and / or the substantial risk of physical force" being committed while on escape status, escaping and / or being apprehended from an "escape." These terms are examples are nothing more than extreme "subjective terms."

**This terminology makes it virtually, almost absolutely, impossible to define the terms in a manner that allows any individual working within the federal judiciary to analyze them and come to the same conclusion. The inability to concisely define what is a "crime of violence", or "what type of escape equates to a crime of violence" has resulted in sentencing disparity among offenders with similar histories and is in direct conflict with the duties of the United States Sentencing Commission.**

**In accordance with the Federal Criminal Code and Rules 18 - 924(3)(A)(B) (Criminal Procedure). Specifically, for purpose of this subsection the term "crime of violence" means an offense that is a felony and - (A) has as an element the use, attempted use, or threatened use of physical force against a person or property of another - (B) or by nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.**

**The application of this definition of "crimes of violence" has resulted in Judicial Districts throughout the United States reaching different conclusions concerning what is and what is not a "crime of violence." Thus causing sentencing disparity. The United State Probation Offices are unable to clearly analyze the terminology concerning "crimes of violence" and they are also in conflict concerning this issue. Unable to define a "crime of violence" in a coherent manner that results in each individual offender's conduct resulting in similar sentencing throughout the United States Judiciary.**

**In accordance with the the United States Sentencing Commission Guidelines Manual 2P1.1 - this guideline specifically addresses Escape, Instigating or Assisting Escape. The guideline address Specific Offense Characteristics and how the base offense levels will be increased or decreased according to the severity of the "escape."**

**2P1.1(b)(1) - increases the base offense level if the use or physical against any person was involved during the "escape."**

**2P1.(b)(2) - decreases the base offense level if the escape was from a non-secure custody and the defendant returned voluntarily within a ninety-six hour period. And while away from the facility, the defendant could not have committed any federal, state, or local law punishable by more than one year.**

**2P1.1(b)(3) - decreases the base offense level if the defendant escaped from the non-secure custody of a community corrections center, community treatment center, "halfway house" or similar facility and subsection (b)(2) can not be applicable.**

Also in accordance with the United States Sentencing Commission Guideline Manuel 4B1.1(a) - A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the 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 for either a crime of violence or a controlled substance.

Due to the debate concerning what form / type of "escape" constitutes a "crime of violence, the United States Sentencing Commission must finally address the issue that an "escape" which the conduct was merely a passive act of "non-action" ie, "Failure to Report back to a non-secure halfway house" is NOT a crime of violence for the purpose any sentencing enhancement.

If you will consider that an offender, over a period of twenty-one years, was arrested and convicted of two felony controlled substance violations. Then factor in that the same offender "failed to return" to an non-secure half way house within that twenty-one year period. This "failure to return" had NO element of being a violent crime. Yet, according to the United States Criminal Code and the United States Sentencing Manual, this offender would be sentenced as a "career offender." The "career offender enhancement" results in an extraordinary, punitive, and excessive term of incarceration. These practices can and have resulted in enhanced sentences of approximately twelve additional years of incarceration. Twelve additional years due to an interpretation that a "non-act", a "passive act" ie, "failure to report/return" is a "crime of violence." This enhancement defies logic and common sense.

I have documented, to the best of my ability, the Criminal Code and the Sentencing Guideline to present a foundation to express my concerns (statement) about the broad, and confusing language concerning "crimes of violence" in direct correlation to the legal terms, interpretation, definition, federal charging, and guideline application of "escapes." And how defining a "non-violent offense" as "violent conduct" can put an offender in the category of being a "career offender" resulting in unwarranted punitive sentencing practices within the United States Judiciary.

The criminal act of 'escape' can encompass conduct that has no element of "violence." In fact, the conduct of an offender who "fails to report" back to a non-secure halfway house has done an act/conduct of "non action." The conduct is "passive."

When an offender "fails to report" back to a non-secure facility and no "physical force" "no threat of force was utilized" or "any act of violence" was an element of the the conduct this criminal act should not be interpreted as a "crime of violence."

Throughout the United States Judiciary cases are being decided in multiple Judicial Districts. New case precedents that either recognize an "escape" from a non-secure facility as not being a "crime of violence" or Judicial Districts are contradicting each other and determining that an "escape" from a non-secure facility is a "crime of violence."

To further support the ambiguity concerning the terminology of "crimes of violence" on the United States Sentencing Commission website the United States Probation Office Advisory Group are requesting clarity concerning the issues stated above. The professionals tasked with interpreting sentencing guidelines, applying sentencing guidelines in these areas are also confused by the ambiguous terminology. So confused that multiple times they have documented their need for clarification.

Specific concerns that Probation Officer Advisory Group has advised you, in writing, that they are in need of assistance for correct interpretation and guidance are as follows:

#### **Probation Advisory Group - Priority Meeting minutes (July 14 - 15, 2009)**

POAG members expressed a desire for the Commission to address the priority identified at number 6, relating to a study of the statutory and guideline definitions of "crime of violence", "aggravated felony", "violent felony", and "drug trafficking crime", including an examination of relevant circuit conflicts regarding whether any offense is categorically a "crime of violence", "aggravated felony", "violent felony", or "drug trafficking crime" for purposes of triggering an enhanced sentence under certain federal statutes and guidelines.

#### **Probation Advisory Group - Position Paper (July 24, 2008)**

##### **Definition for Crimes of Violence (In General)**

The guidelines continue to contain a number of differing definitions for crimes of violence, some of which, recognizably, are based on statutory directives. POAG believes that the guideline- application process would be greatly simplified if a more universal definition could be adopted. Having only one definition for a crime of violence would minimize misapplication and/or inconsistency in application, as well as time spent responding to counsel's objections in this area. POAG believes that any step toward unifying the statutory and guideline definitions of a crime of violence would prove beneficial, and create more uniformity in guideline application.

##### **Circuit Conflicts**

POAG encourages the Commission to continue to resolve circuit conflicts whenever possible.

There is a lack of concise direction and definition of what is and what is not a crime of violence concerning "escape from correctional facilities." An "escape" theoretically could be from a BOP maximum security facility, a BOP medium security facility, a BOP camp, a non-secure halfway house, or the custody of a law enforcement officer.

Language contained in the "escape" statute and guideline manual are subjective, confusing, they do not address individual cases/offenders/circumstances, and does not reflect accurate criminal conduct that differs from one form of escape to another.

Passive action concerning "failure to report" back to a non-secure half way house should never have been categorized as a "crime of violence" of which then could potentially result in an offender being classified as a "career offender."

**The purposes of the United States Sentencing Commission are to:**

**(1) establish sentencing policies and practices for the Federal criminal justice system that**

**(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;**

**(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and**

**(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and**

**(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.**

As the United States Sentencing Commission, the Judiciary, and Congress have recognized through the years, since the promulgation of the Sentencing Guidelines, that changes have been required, definitions clarified, criminal statutes amended, legislation enacted to address new and complex criminal conduct, guideline applications, and criminal conduct.....

It is time for the Judiciary, Congress, and the United States Sentencing Commission to right the wrong of enhancing sentences for defendants who are charged with "escape - presently defined as a crime of violence" where no criminal conduct in the offense or act has any element of physical force, threat, implied threat, or violence.

It is time for the Commission to recognize that this category of "escape from a non-secured halfway house" is "non-action" conduct. Therefore, should not have ever been considered or punished as a crime of violence. And further interpretation of this type of "escape" being a crime of violence defies logic, common sense, and is incomprehensible.

In addition, any change to the definition, the Criminal Code, Guideline Manual, or amended legislation concerning the definition of a "crime of violence, - ie, "failure to report" to a non-secure halfway house", **the change should be and must be retroactive** in the interest of justice. An offender should never have his/her sentenced enhanced for conduct that was of a "non-violent" act. Conduct considered for the purpose of categorizing an offender as a "career offender" when the elements of a "career offender" are completely absent.

Once again it defies common sense that a change/amendment, legislative amendment in any interpretation of "crimes of violence" or "escapes." Application of guidelines, and sentencing practices as an "escape" is defined as a "crime of violence" can only bring justice to all those wrongly sentenced, wrongly enhanced, and wrongly severely punished by increased guideline application. **The change concerning this issue must be retroactively imposed. Common sense would require the new definition and guideline applications be retroactive.**

If the statute, guideline, or judicial precedent states that a category of "escape" is not a crime of violence in the present, how can anyone in the Judiciary justify that the same conduct that was a violent offense prior to properly recognizing and amending this criminal conduct will not be retroactively corrected.

For example: If "escape - failure to report" from a "non-secure halfway house will not be considered a "crime of violence" for example in one month from this date, how can the same conduct have been a "violent" offense two years ago? Retroactivity of any changes is the only manner to right this wrong. It's logical and a common sense approach to this issue.

The following duty of the United States Sentencing Commission encompasses virtually ever aspect of "righting a wrong" that has incorrectly categorized non-violent offenders as "violent criminals."

This duty documents "fairness", the concept of "similar criminal conduct", and "factors not taken into account" when the sentencing guidelines were promulgated.

Your Commission has been directed to consider the following concerning federal criminal conduct, sentencing practices, and individualized sentences:

The issue concerning "escape" which is the purpose of this communication should be afforded the following duties:

Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

In the interest of justice, in the interest of fair sentencing practices, and the need to recognize the obvious differences in the criminal act of "escape" major overhaul in this area is long overdue.

The broad definition of a "crime of violence" in which "propensity" to be "violent" is an absolute subjective / abstract term that its interpretation and application for fair sentencing practices is virtually impossible for the Courts, Congress, and the United States Probation Officers who interpret the guidelines.

It is long overdue for the United States Sentencing Commission, the United States Courts, and Congress to retroactively right this wrong.

The wrong can be solved by a common sense approach to review "escapes" and recognize the many differences concerning the conduct involved in "escape." Categorize them with different legal definition. Different guideline application. Clearly address and correct subjective language used to define a "crime of Violence." Address the "conduct" of the "escape" and not the word "escape." Address "escapes" where "non-action" is clearly apparent and therefore, have no element of "violent behavior."

An amended statute, new legislation from Congress, an amendment to the United States Sentencing Manual are possible solutions to this overdue review of the definition of "crimes of violence" and the guideline application of "crimes of violence" concerning "escapes."

For your review, I submit the following judicial case decision that address my specific standing and statement. In addition, they address the career offender enhancement which is applied to defendant's who may have, for example; two prior felonies such as controlled substance violations, and then are career offenders due to an "escape" which was merely a "Non-violent" "failure to return/report" to a non-secure halfway house.

The "career offender enhancement" should NOT be applied in this circumstance due to, the "Failure to Report - non-secure facility" is NOT a crime of violence for enhancement purposes.

Chambers v United States, 129 S.ct 687 (2009)

(United States Supreme Court)

The Supreme Court held that a "crime of failure to report for a penal confinement falls outside the scope of the Armed Career Criminal Act's violent felony definition."

The United States Supreme Court in Chambers, no longer allows a categorical approach for career-offender enhancement for non-violent escape.

United States v Hart, 578 F.3d 674 (2009)

(Seventh Circuit)

The Seventh Circuit held that defendant's prior federal escape conviction was not a crime of violence under the career offender guideline. Following Chambers v. United States, 129 S.Ct. 687 (2009), the court utilizes a three-step inquiry to determine whether a conviction under a broadly-worded escape statute is a crime of violence. First, the court looks to whether the statute is divisible because it punishes more than one category of crime. Second, the court determines if any crimes within the scope of the statute are not crimes of violence. If so, the court then determines whether or not the crime committed by the defendant was a crime of violence. The federal escape statute at issue here, 18 U.S.C. § 715(a), "covers a wide range of conduct, from violent jailbreaks to quiet walkaways to passive failures to report. It does not, however, enumerate explicitly the different ways in which the statute can be violated. Under [Seventh Circuit precedent] it is an indivisible statute." The court then held that because one can commit escape without putting anyone in harm's way, it is not a crime of violence under the guidelines.

Begay v United States, S.ct 1581 (2008)

and;

United States v Templeton, 543 F.3d 378, 383 (2008)

(Tenth Circuit)

In light of the Supreme Court's opinion in Begay v United States, the court recognized in United States v Templeton, that a walkaway escape from a non-secure halfway house is not a crime of violence under the guideline.

United States v Ford, 560 F.3d 420, 421 (2009)

(Sixth Circuit)

and;

United States v Shipp, 589 F.3d 1084 (2009)

(tenth Circuit)

Retroactivity was recognized in the 7th Circuit case of Welch v United States, Criminal Law Review, Vol. 87 No. 7 at page 208 (7th Circuit appeal No. 08-3108)

Teague v Lane, 489 U.S. 288 (1989)

(New Rule United States Supreme Court)

A new rule established by the United States Supreme Court is not applied retroactively on collateral review unless it is substantive or it is a "watershed" rule of criminal procedure. The tenth Circuit has ruled retroactivity applies to this change in the law as well as in USA v Ship, supra.

I anticipate that the cases I have included for your review may not be inclusive of all cases decided and / or precedent that have been decided throughout the United States District and Appellate Courts in the United States. However, the above cases support my "statement." In light of these judicial decision, retroactively, the all encompassing definition of a "Failure to Report" back to a halfway house, Walk away from a non-secured correctional facility, or Failing to Report for a Term in Incarceration categorically should NOT be considered a "crime of violence."

The extreme/excessive terms of incarceration due to this type of conduct defies justice, fairness and the principles of the United State Sentencing Guideline.

In addition, I have attached what is referenced In Chambers v United States, Appendix B to opinion of the Court.

This report was prepared by your agency, the United States Sentencing Commission, to assist the United States Supreme court concerning the ruling in Chambers v United States. The report provided statistics that clearly reflect the following:

1. Leaving Non-Secure custody: Statistic - number of cases = 177. Number of cases in which an offender used force = 3 (1.7%) - Number of cases in which a dangerous weapon was used = 4 (2.3%) - Number of cases in which injury occurred = 3 (1.7%)
2. Failing to Report: Statistic - number of cases = 42. Number of cases in which an offender used force = 0 (0.0%). Number of cases in which a dangerous weapon was used = 3 (7.1%). Number of cases in which injury occurred = 0 (0.0%)
3. Failing to Return: Statistic - number of cases = 118. Number of cases in which an offender used force = 0 (0.0%). Number of cases in which a dangerous weapon was used = 2 (1.7%). Number of cases in which injury occurred = 0 (0.0%).

These statistics prepared by your agency, the United States Sentencing Commission, support the absolute fact that Leaving a Non-Secure custody, "failure to report/return", have virtually no statistical evidence that any of these acts result in violent conduct.

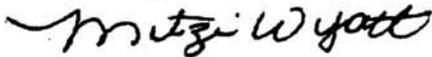
I respectfully request that my concern about "crimes of violence", and the interpretation of crimes of violence as it pertains to "failure to report/return" back to a non-secure halfway house will be a "proposed priority" to the United States Sentencing Commission.

Lastly, I urge the United States Sentencing Commission to finally address these issue and retroactively address and amend "escapes" that are categorically currently viewed as "all one form of conduct." No variation for the severity of the "escape" conduct. No recognition that there are multiple types of "escapes" "multiple escape conduct", and those who have been charged with a "non-violent" "escape"

should and must have their cases reviewed, remanded for re-sentencing, guideline application re-calculated, and finally receive a "fair and just" sentence that addresses "conduct" not subjective rhetoric.

Thank you in advance for your consideration in this matter. In addition, please advise me of any and all hearings that may be conducted concerning these matters.

Mitzi Wyatt

A handwritten signature in cursive script that reads "Mitzi Wyatt".

1202 Mallette #1703, Victoria, Texas 77904

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## CHAMBERS v. UNITED STATES

Appendix B to opinion of the Court

## APPENDIX B TO OPINION OF THE COURT

Report on Federal Escape Offenses in Fiscal Years 2006 and 2007, p. 7, fig. 1 (Nov. 2008).\*

	Leaving Secure Custody	Leaving Law Enforcement Custody	Leaving Nonsecure Custody	Failing to Report	Failing to Return
Number of Cases	64	13	177	42	118
Force	10 (15.6%)	1 (7.7%)	3 (1.7%)	0 (0.0%)	0 (0.0%)
Dangerous Weapon	20 (31.3%)	1 (7.7%)	4 (2.3%)	3 (7.1%)	2 (1.7%)
Injury	7 (10.9%)	2 (15.4%)	3 (1.7%)	0 (0.0%)	0 (0.0%)

\* Cases can fall into more than one category. For example, one case could involve both force and injury. Such a case would be represented in the table for force and also for injury. Therefore, the reader should not aggregate the numbers in any column.