



U.S. Department of Justice  
Criminal Division

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August 10, 2018

The Honorable William H. Pryor, Jr.  
Acting Chair, United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Pryor:

The Criminal Division of the U.S. Department of Justice is pleased to submit its annual report to the U.S. Sentencing Commission pursuant to 28 U.S.C. § 994(o). Please also consider this report to be the Department's response to the Federal Register notice requesting public comment on the Commission's proposed priorities for 2018-2019.<sup>1</sup>

Recent judicial decisions that apply the categorical approach to convictions involving violent felonies and drug offenses have impaired the proper functioning of sentencing enhancements available under the Armed Career Criminal Act, the career offender guideline, and § 2K2.1. As a result, many plainly violent offenses, such as robbery, no longer qualify as a violent felony under the Armed Career Criminal Act or as a crime of violence under the Guidelines. If left unaddressed, the damage these decisions will do to the Department's ability to prosecute and incapacitate the most dangerous, recidivist offenders in the federal criminal justice system will be substantial—as will be the attendant threat to public safety in communities across the nation.

Only Congress has the authority to amend the Armed Career Criminal Act, but the Commission has a statutory duty to ensure that federal sentencing accurately reflects the seriousness of offenses committed by criminal defendants. The Department therefore respectfully urges the Commission to amend the Guidelines' definition of what constitutes a crime of violence and address the many serious, unjust, and unsustainable inconsistencies created by the categorical approach which have made the Guidelines more cumbersome, more complex, and

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<sup>1</sup> See Notice of Proposed 2018-2019 Priorities, 83 Fed. Reg. 30477 (June 6, 2018), available at <https://www.federalregister.gov/documents/2018/06/28/2018-13937/proposed-priorities-for-amendment-cvclle>.

less effective at incapacitating violent offenders. The Department concludes this report with several additional priorities which we respectfully request that the Commission take up during the upcoming amendments cycle.

Thank you for considering the Department's views on these important matters.

### ***I. The Armed Career Criminal Act, the Career Offender Guideline, and Section 2K2.1***

The U.S. Sentencing Commission ("Commission") was established by the Sentencing Reform Act of 1984 ("SRA"),<sup>2</sup> which directed the Commission to draft guidelines providing sentences at or near the maximum term for offenders convicted of a third felony crime of violence or particular controlled substance offenses.<sup>3</sup> This directive, which led to the creation of the career offender guideline,<sup>4</sup> remains applicable and has been codified at 28 U.S.C. § 944(h).

The Crime Control Act of 1984 accompanied passage of the SRA and included the Armed Career Criminal Act of 1984 ("ACCA").<sup>5</sup> As originally enacted, the ACCA provided a mandatory minimum sentence of 15 years for a felon who had three previous convictions for robbery or burglary and was subsequently convicted under 18 U.S.C. § 922(g) for illegally obtaining a firearm.<sup>6</sup> In 1986, § 1402 of the Career Criminals Amendment Act enlarged the scope of qualifying offenses by adding "violent felonies" and "serious drug offenses" as predicates.<sup>7</sup> Congress removed the term "robbery" from the statute and subsequently redefined a "violent felony" to include any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."<sup>8</sup> The offenses that qualify as predicates for ACCA's mandatory minimum sentence make the rationale

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<sup>2</sup> See Title II, Sentencing Reform 648, Pub. L. No. 98-473, § 211, 98 Stat. 1987 (1984).

<sup>3</sup> *Id.* § 211, 98 Stat. 2021.

<sup>4</sup> See *United States v. Stewart*, 761 F.3d 993, 996-97 (9th Cir. 2014) (Section 994(h) "directs the [Sentencing] Commission to 'assure' that the guidelines specify a sentence 'at or near' the statutory maximum for career offenders. Carrying out this mandate, the Commission promulgated the career offender guidelines, which categorize an adult defendant as a 'career offender' when the defendant (1) is convicted of 'a felony that is either a crime of violence or a controlled substance offense' and (2) 'has at least two prior felony convictions of either a crime of violence or a controlled substance offense.'" (quoting 28 U.S.C. § 994(h) & U.S.S.G. § 4B1.1(a)).

<sup>5</sup> Now codified at 18 U.S.C. § 924(e).

<sup>6</sup> See H.J. Res. 648, 98th Cong., 98 Stat. 1976 (1984).

<sup>7</sup> Career Criminals Amendment Act of 1986, Expansion of Predicate Offenses for Armed Career Criminal Penalties, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 39-40 (1986).

<sup>8</sup> *Id.* As discussed, *infra*, in *Johnson v. United States*, the Supreme Court struck as void for vagueness what is commonly referred to as the residual clause: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. 2551 (2015).

for the statute self-evident: recidivist felons who have amassed three convictions for a combination of murder, rape, robbery, assault, burglary, arson, extortion, or drug trafficking are overwhelmingly likely not only to reoffend but to do so by committing additional violent crimes.

### *A. The importance of incapacitating armed, career felons*

The importance of incapacitating armed, career felons cannot be overstated. According to a Commission analysis, the rate of recidivism for ACCA defendants and other career offenders is a staggering 69.5 percent.<sup>9</sup> The Commission analysis also indicates that the risk of recidivism—i.e., re-arrest, re-conviction, or re-incarceration—during an eight-year period following release climbs in direct proportion to the severity of an offender’s criminal history. The likelihood of recidivism is:

- 33.8% for defendants with 0-1 criminal history points (criminal history category I);
- 54.3% for defendants with 2-3 points (criminal history category II);
- 63.3% for defendants with 4-6 points (criminal history category III);
- 74.7% for defendants with 7-9 points (criminal history category IV);
- 77.8% for defendants with 10-12 points (criminal history category V); and
- 80.1% for defendants with 13 or more points (criminal history category VI).<sup>10</sup>

Following the Supreme Court’s 2015 *Johnson*<sup>11</sup> decision which invalidated the ACCA’s residual clause, 1,903 defendants have successfully petitioned the courts to have their sentences reduced.<sup>12</sup> By matching Commission data with records from the Bureau of Prisons (“BOP”) and FBI, BOP researchers studied the outcomes for these defendants, all of whom had a felony conviction which, after

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<sup>9</sup> U.S. SENTENCING COMM’N, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* 19, Fig. 7B (2016).

<sup>10</sup> *Id.* at 18, Fig. 7A; *see also id.* at 27 (concluding that “an offenders’ total criminal history points, as determined under Chapter Four of the Commission’s *Guidelines Manual*, were closely correlated with recidivism rates”). Note that only a prior felony conviction where the sentence is greater than one year and one month counts as 3 points under the guidelines. *See* U.S.S.G. § 4A1.1.

<sup>11</sup> 135 S. Ct. 2551 (2015). The Commission struck the identical clause in 2016. *See* U.S.S.G. App. C, Amend. 798 at 125-32 (Supp. Aug. 2016).

<sup>12</sup> U.S. Sentencing Commission data file, provided to the Department of Justice on May 24, 2018 (prisoners petitioned under either 18 U.S.C. §§ 2255 (habeas) or 3742 (direct review)).

*Johnson*, no longer qualifies as a violent felony under the now-void residual clause. From this 1,903-defendant cohort, 1,461 (77%) have already been released as of June 2018.<sup>13</sup> Even though most of these defendants were not released until 2016 or 2017, the damage to public safety they have already caused has been dramatic. Of these 1,461 defendants, 609 (42%) have already been re-arrested or returned to BOP custody for a violation of the terms of their supervised release.<sup>14</sup> Each of these defendants has been rearrested an average of three times, for a total of 1,796 arrests.<sup>15</sup>

These newly released ACCA defendants have already victimized hundreds of our fellow citizens: 10 defendants were arrested for murder; 14 for kidnapping; 11 for sexual assault; 37 for robbery; 218 for assault; 56 for burglary; 156 for larceny; and 13 for auto theft.<sup>16</sup> In addition, 53 defendants were re-arrested for drunk driving; 81 returned to drug trafficking; and 166 were re-arrested for other drug crimes.<sup>17</sup> Similarly disturbing was the finding that 100 defendants were re-arrested for weapons offenses.<sup>18</sup>

### ***B. The categorical approach and its impact on the Guidelines***

Unfortunately, despite the vital importance of incapacitating these classes of defendants, the ACCA, the career offender guideline, and § 2K2.1 of the Guidelines are not working as intended. Instead, litigation involving these provisions now consumes untold amounts of time and resources with the frequent result that violent, recidivist offenders do not qualify for applicable sentencing enhancements. An ever-growing list of state and federal offenses obviously intended to qualify as a violent felony or serious drug offense under the ACCA—or as a crime of violence or a controlled substance offense under the Guidelines—no longer qualifies in several federal circuits. Ironically, even convictions under a number of state robbery statutes no longer qualify under the ACCA or the Guidelines, despite the fact that robbery was one of the two original ACCA predicates.

Such incongruous results follow from the application of what is commonly referred to as the “categorical approach,” which involves matching the elements of the state (or federal) offense to the elements of a so-called “generic” version of the offense.<sup>19</sup> Although the categorical approach was first conceived to address the

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<sup>13</sup> BOP Analysis of Commission data files, FBI data files, and BOP data files (June 2018). Even with a reduced sentence, many defendants still have time to serve for their sentence under § 922(g).

<sup>14</sup> *Id.*

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

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

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

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

<sup>19</sup> The “generic version” is defined by contemporary usage and “roughly corresponds to the definitions of the offense in a majority of the States’ criminal codes.” *United States v. Garcia-Santana*, 774 F.3d 528, 534 (9th Cir. 2014) (citing *Taylor v. United States*, 495 U.S. 575, 589 (1990)). If the instant

definition of a violent felony under the ACCA, courts in all circuits use it in the Guidelines context as well.<sup>20</sup> Most vexingly, the categorical approach prohibits courts from considering the facts and circumstances of the particular offense conduct committed by a defendant.<sup>21</sup>

We set forth below some recent developments in the Courts of Appeals which have stymied proper application of the Guidelines to violent, career offenders, and which we believe the Commission should address in the upcoming amendments cycle.

### 1. Robbery

Robbery was one of the two original ACCA predicates.<sup>22</sup> According to the FBI's Uniform Crime Reporting statistics, nearly every robbery involves a weapon or strong-arm tactics.<sup>23</sup> Yet robbery convictions under a growing number of state statutes, in a growing number of federal circuits, no longer qualify as a crime of violence under the Guidelines.

According to the Ninth Circuit's recent decision in *United States v. Edling*,<sup>24</sup> for example, Nevada state robbery does not categorically match "generic robbery" under the enumerated-offenses clause of § 4B1.2 since the state offense can be

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offense "sweeps more broadly than the generic crime," a conviction under that statute cannot count as a predicate under the applicable guideline. *Descamps v. United States*, 570 U.S. 254, 261 (2013). Moreover, if the statutory offense is divisible into two or more distinct versions, each defined by alternative elements, and at least one of those alternatives matches or is subsumed by the generic definition of the crime in the Guidelines, only then can a court examine a limited class of documents (e.g., jury instructions) to inquire further regarding the nature of an offense. *Id.* at 261-62. Not all alternatively phrased statutes are divisible, however, and in each case a court must determine whether the statutory offense includes alternative "elements" or various factual "means" of committing a single element of the crime. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).  
<sup>20</sup> See, e.g., *United States v. Simmons*, 782 F.3d 510 (9th Cir. 2015); *United States v. Jones*, 878 F.3d 10 (2d Cir. 2017); *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017).

<sup>21</sup> See, e.g., *United States v. Ruvalcaba*, 627 F.3d 218, 221 (6th Cir. 2010) (noting that in deciding whether a prior conviction is a "crime of violence, courts must use a 'categorical approach' and look only to the fact of conviction and the statutory definition—not the facts of the underlying offense—to determine whether the definition supports a conclusion that the conviction was for a crime of violence." (quoting *United States v. Barte*, 529 F.3d 357, 359 (6th Cir. 2008) (internal quotation marks omitted))).

<sup>22</sup> See H.J. Res. 648, 98th Cong., 98 Stat. 1976 (1984).

<sup>23</sup> The 2015 data from the FBI's Uniform Crime Reporting Program confirm the dangerousness of robberies nationwide: strong-arm tactics were used in 42.2 percent, firearms in 40.8 percent, and knives or cutting instruments in 7.9 percent of 294,578 robberies the FBI analyzed. See FEDERAL BUREAU OF INVESTIGATION, 2015 CRIME IN THE UNITED STATES, Robbery (2015), available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/robbery>; see also *id.* at Tab. 19, available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-19>.

<sup>24</sup> 891 F.3d 1190 (9th Cir. 2018), amended and superseded by *United States v. Edling*, 2018 WL 3387366 (9th Cir. July 12, 2018).

accomplished by instilling fear of injury to property alone.<sup>25</sup> Thus, even though the defendant in *Edling* put a gun to a victim's head and actually shot a second victim, the Ninth Circuit held that the defendant's robbery conviction is nonetheless not a crime of violence for purposes of § 4B1.2 because a hypothetical defendant could have violated the state statute by obtaining the victim's property "merely" by threatening to burn down his home or business.<sup>26</sup> It is hard to imagine how such a holding encourages public confidence in the federal judicial system.

Unfortunately, this holding will likely soon expand to similar robbery statutes from California<sup>27</sup> and Washington State.<sup>28</sup> The effect of this new rule will pose a substantial threat to public safety: none of the more than 14,000 state convictions for robbery in California each year—no matter how heinous or violent the offense conduct—will qualify as a crime of violence in the nation's largest federal judicial circuit.<sup>29</sup>

Similarly, following the Sixth Circuit's decision in *United States v. Yates*,<sup>30</sup> Ohio state robbery is no longer a crime of violence under the Guidelines. The circuit reasoned that, in contrast to the elements clause of § 4B1.2, "only a minimal level of force is needed to sustain a conviction" for robbery in Ohio and, regarding the enumerated-offenses clause, that the state robbery statute "reaches conduct outside

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<sup>25</sup> *Id.* at \*3-\*4. Moreover, although the Commission recently adopted a non-generic definition of "extortion" for § 4B1.2—one that explicitly excludes non-violent, extortionate threats, i.e., blackmail-type offenses—the Ninth Circuit interpreted the Commission's new definition as broadly excluding all extortionate threats aimed at property, no matter how violent or dangerous. *Id.* at \*4-\*5 (analyzing U.S.S.G. App. C, Amend. 798 at 125-32 (Supp. Aug. 2016)).

<sup>26</sup> See Pre-Sentence Investigation Report, *United States v. Edling*, 891 F.3d 1190 (9th Cir. 2018).

<sup>27</sup> See, e.g., *United States v. Nickles*, Order Sustaining Defense Objection To Recommended Offense Level, 249 F. Supp. 3d 1162, 1163 (N.D. Cal. 2017) ("As the court determined at the sentencing hearing, under the Sentencing Guidelines currently in effect, robbery under California law no longer qualifies as a 'crime of violence' as defined in § 4B1.2").

<sup>28</sup> Compare Nev. Rev. Stat. Ann. § 200.380 (1995) ("Robbery is the unlawful taking of personal property from the person of another...against his or her will, by means of force or violence or fear of injury...to his or her person or property..."), with Cal. Penal Code § 211 (1872) (Robbery is "unlawfully tak[ing] personal property from the person of another...against his or her will by the use or threatened use of immediate force, violence, or fear of injury" and defining "fear" as including "[t]he fear of an unlawful injury to the person or property of the person robbed"), and Wash. Rev. Code § 9A.56.190 (2011) ("Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force, violence, or fear of injury to that person or his or her property or the person or property of anyone").

<sup>29</sup> According to the California Department of Justice ("CDJ"), there were 178,553 violent crime arrests in California during 2017, and 56,609 of these (31.7%) were for robbery. Cal. Dep't of Justice, Open Justice, Crimes and Clearances, <https://openjustice.doj.ca.gov/crime-statistics/crimes-clearances>. CDJ also reports a total of 45,667 felony convictions for violent offenses during 2017. Cal. Dep't of Justice, Crime in California 2017 tbl. 39 (2017), <https://openjustice.doj.ca.gov/downloads/pdfs/cd17.pdf>.

<sup>30</sup> 866 F.3d 723 (6th Cir. 2017).

the scope of that covered by the generic definition.”<sup>31</sup> Accordingly, the defendant, who had amassed an encyclopedic rap sheet consisting of 24 felonies—including convictions in Ohio for robbery and drug trafficking<sup>32</sup>—nevertheless fails to qualify as a career offender in the Sixth Circuit.<sup>33</sup> The First and Fourth Circuits have likewise issued problematic opinions with respect to state robbery statutes from New York and Georgia.<sup>34</sup>

Nor are federal criminal statutes immune from the consequences of the categorical approach. In a case in which the defendant obtained controlled substances from a pharmacy employee by threatening violence while carrying a firearm, the Tenth Circuit held that a defendant’s conviction for Hobbs Act robbery under 18 U.S.C. § 1951 is not a crime of violence under the enumerated-offenses clause of § 4B1.2(a)(2).<sup>35</sup> The circuit concluded that although Hobbs Act robbery both encompasses robbery and extortion, it is somewhat broader than generic robbery and, as concerns extortion, encompasses mere threats to property, which have been excluded from the Guidelines’ definition of extortion since August 2016.<sup>36</sup>

## **2. Controlled substance offenses and offers to sell**

Courts are also applying the categorical approach to the definition of a controlled substance offense with results that vitiate the proper application of the Guidelines to recidivist offenders. For example, in the Fifth Circuit, a Texas state conviction for selling cocaine no longer qualifies as a “controlled substance offense” for purposes of the career offender guideline because the Texas statute includes an “offer to sell,” whereas the definition contained under § 4B1.2 does not mention such conduct.<sup>37</sup> Since 2009, however, § 2L1.2 defines “drug trafficking offenses” to include offers to sell.<sup>38</sup> The perplexing result is that a Texas conviction for drug trafficking, which qualifies as a “drug trafficking” conviction under § 2L1.2 nevertheless does not qualify as a “controlled substance offense” under § 4B1.2.

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<sup>31</sup> *Id.* at 734 (quoting *United States v. Cooper*, 739 F.3d 873, 880 (6th Cir. 2014)).

<sup>32</sup> Transcript of Record at 15, *United States v. Yates*, No. 5:10-CR-489 (N.D. Ohio. Aug. 11, 2016).

<sup>33</sup> See *Yates*, 866 F.3d at 729 *et seq.*

<sup>34</sup> See *United States v. Steed*, 879 F.3d 440, 450-51 (1st Cir. 2018) (New York state second-degree robbery not a crime of violence); *United States v. Jackson*, 713 Fed. App’x 172, 174 (4th Cir. 2017) (Georgia state robbery not a crime of violence).

<sup>35</sup> *United States v. O’Connor*, 874 F.3d 1147, 1153 (10th Cir. 2017).

<sup>36</sup> *Id.*

<sup>37</sup> *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017) (Texas conviction for possession with intent to deliver controlled substance not a “controlled substance offense” for purposes of § 2K1.2 because Texas Code § 481.112(a) criminalizes a “greater swath of conduct than the elements of the relevant [Guidelines] offense”) (quoting *United States v. Hinkle*, 832 F.3d 569, 576 (5th Cir. 2016) (internal quotation marks omitted)).

<sup>38</sup> See U.S.S.C. App. C, Amend. 723 (2009) (“The amendment clarifies that an ‘offer to sell’ a controlled substance is a ‘drug trafficking offense’ for purposes of subsection (b)(1) of § 2L1.2 by adding ‘offer to sell’ to the conduct listed in Application Note 1(B)(iv).”).

### 3. *Conspiracies and overt acts*

In *United States v. McCollum*, the Fourth Circuit held that a defendant's previous conviction for conspiracy to commit murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) was not a crime of violence for purposes of § 2K2.1.<sup>39</sup> The circuit observed that "there is no single federal definition of conspiracy that we can assume the Commission intended to adopt when it included conspiracy in the commentary to § 4B1.2."<sup>40</sup> Thus, applying the categorical approach, the circuit read § 4B1.2(a)(2) to apply a generic definition of conspiracy that requires an overt act. But since an overt act is not an element of federal conspiracy to commit murder in aid of racketeering, the § 1959 conviction fails to qualify as a crime of violence.<sup>41</sup> Judge Traxler's concurring opinion recognizes the frustratingly "odd results" of this reasoning.<sup>42</sup> What's more, the Fourth Circuit's holding in *McCollum* further deepens a circuit split: its rationale is consistent with that of the Tenth Circuit, but at odds with the Ninth and Sixth Circuits.<sup>43</sup>

In addition, the Fourth Circuit recently applied *McCollum* to a defendant who received a career offender enhancement for a third drug conviction and held that none of the defendant's previous federal drug convictions constituted controlled substance offenses under the Guidelines.<sup>44</sup> Although the Guidelines provide that a controlled substance offense includes the offense of conspiracy,<sup>45</sup> the circuit reasoned that the Guidelines do not define conspiracy and, applying the categorical approach, that the term should therefore be read to refer to the generic contemporary meaning of the crime, which requires an overt act, unlike the federal drug conspiracy statute, 21 U.S.C. § 846.<sup>46</sup>

### 4. *Attempts*

Serious problems have arisen regarding inchoate offenses. A previous conviction in any State for attempted drug distribution now no longer qualifies as a

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<sup>39</sup> 885 F.3d 300 (4th Cir. 2018).

<sup>40</sup> *Id.* at 306.

<sup>41</sup> *Id.* at 308-09.

<sup>42</sup> *Id.* at 309 (Traxler, J., concurring) ("The law in this area...leads to some seemingly odd results with which I do not think any of us are particularly happy.").

<sup>43</sup> Compare *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016) (conspiracy under § 846 is a categorical mismatch for the generic definition of "conspiracy" in U.S.S.G. § 2L1.2 Application Note 5) with *United States v. Rivera-Constantino*, 798 F.3d 900 (9th Cir. 2015) ("[W]e conclude that the clear intent of the Sentencing Commission in drafting section 2L1.2 and its accompanying commentary was to encompass a prior federal drug conspiracy conviction under 21 U.S.C. § 846.") and with *United States v. Sanbria-Bueno*, 549 Fed. App'x 434, 439 (6th Cir. 2013) ("The Commission expressly intended that a conviction under 21 U.S.C. § 846 for conspiracy to commit a federal drug offense proscribed by § 841 is a 'drug trafficking offense' as defined in the Guidelines.").

<sup>44</sup> *United States v. Whitley*, No. 17-4343 (4th Cir., June 12, 2018).

<sup>45</sup> U.S.S.G. § 4B1.2 comment (n.1).

<sup>46</sup> *Whitley*, No. 17-4343 at 5.

controlled substance offense under the Guidelines in the D.C. Circuit following its decision in *United States v. Winstead*.<sup>47</sup> The circuit so held despite an application note in the commentary that specifically includes attempts. According to the D.C. Circuit, however, “if the Commission wishes to expand the definition of ‘controlled substance offenses’ to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review.”<sup>48</sup>

The circuit’s rationale presupposes that Congress did not have an opportunity to modify or reject the amendments adding attempts to the application note. But this is not the case. The SRA required the Commission to submit the initial Guidelines for congressional review.<sup>49</sup> Accordingly, the Commission promulgated guidelines including commentary stating that “controlled substance offenses” include attempts.<sup>50</sup> These guidelines were reviewed by Congress and published in 1987. Congress therefore had a substantial opportunity to review the initial Guidelines and reject the commentary defining a “controlled substance offense,” but instead allowed the definition to take effect.

### 5. *Circuit splits*

Making matters worse, circuit splits have developed, such that the same state or federal offense qualifies as a predicate crime of violence or controlled substance offense in some circuits but not others. For example, as noted above, conspiracy to commit a crime of violence under the Guidelines—even conspiracy to commit murder in aid of racketeering—requires an overt act in the Fourth Circuit but not in the Sixth or Ninth Circuits. Likewise, a conviction for conspiracy to possess with intent to distribute 50 kilograms of marijuana in violation of 21 U.S.C. § 846 does not qualify as a controlled substance offense under the Guidelines in the Tenth Circuit because generic conspiracy requires an overt act in that circuit, whereas conspiracy under the federal drug conspiracy statute does not.<sup>51</sup> In contrast, a Nevada state conviction for conspiracy to commit murder qualifies as a crime of violence under the Guidelines in the Fifth Circuit because the generic definition of conspiracy to commit murder, which is consistent with the definition of conspiracy in 16 States, some federal statutes, and the Model Penal Code, does not

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<sup>47</sup> 890 F.3d 1082 (D.C. Cir. 2018).

<sup>48</sup> *Id.* at 1092.

<sup>49</sup> Title II, Sentencing Reform 648, Pub. L. No. 98-473, § 235(a)(1), 98 Stat. 1987, 2032 (1984).

<sup>50</sup> U.S.S.G. § 4B1.2 comment (n.2) (1987) (“‘Controlled substance offense’ means any of the federal offenses identified in the statutes referenced in § 4B1.2, or substantially equivalent state offenses. These offenses include manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.”).

<sup>51</sup> See *United States v. Martinez-Cruz*, 836 F.3d 1305, 1310, 1314 (10th Cir. 2016) (citing *United States v. Shabani*, 513 U.S. 10 (1994) (holding, in the context of a § 846 conspiracy conviction, that “the Government need not prove the commission of any overt acts in furtherance of the conspiracy”)).

require an overt act.<sup>52</sup> Further, the D.C. Circuit decision in *Winstead*, noted above, holding that attempted drug distribution is not a controlled substance offense under the Guidelines, is at odds with decisions from the First, Sixth, and Tenth Circuits.<sup>53</sup> Such fundamental disparities are antithetical to fairness and consistency in federal sentencing.

The Commission has a unique responsibility to resolve such circuit splits based on interpretation of the Guidelines. As the Commission itself has recently noted, the Supreme Court “acknowledges that the initial and primary task of eliminating conflicts among the circuit courts with respect to the statutory interpretation of the guidelines lies with the Commission.”<sup>54</sup> Indeed, federal law requires the Commission to assure that the Guidelines are consistent with the enumerated purposes of sentencing described in 18 U.S.C. § 3553,<sup>55</sup> one of which is to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>56</sup> Given that the recommended sentencing ranges for defendants convicted of many serious federal and state offenses depends, perversely, on the federal circuit in which the defendant is sentenced, the Department respectfully urges the Commission to take action to resolve the disparities.

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<sup>52</sup> *United States v. Pascacio-Rodriguez*, 749 F.3d 353 (5th Cir. 2014).

<sup>53</sup> See *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017) (Puerto Rico conviction for attempt to possess with intent to distribute controlled substances is a “controlled substance offense” under the Guidelines); *United States v. Solomon*, 592 F. App’x 359, 361 (6th Cir. 2014) (Michigan conviction for attempted possession of marijuana with intent to deliver is a “controlled substance offense” under the Guidelines); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011) (“Commission acted within this broad grant of authority in construing attempts to commit drug crimes as controlled substance offenses for purposes of determining career offender status”).

<sup>54</sup> See U.S. SENTENCING COMM’N, SELECTED SUPREME COURT CASES ON SENTENCING ISSUES 59 (May 2018), available at <https://www.ussc.gov/sites/default/files/pdf/training/case-law-documents/2018-supreme-court-cases.pdf>. See also *Braxton v. United States*, 500 U.S. 344, 348 (1991) (“The Guidelines are of course implemented by the courts, so in charging the Commission periodically [to] review and revise the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the duty to review and revise the guidelines, Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power has been implemented in Guideline § 1B1.10, which sets forth the amendments that justify sentence reduction.”) (internal quotation marks and citation omitted).

<sup>55</sup> See 28 U.S.C. § 994(m) (Duties of the Commission).

<sup>56</sup> 18 U.S.C. § 3553(a)(6).

### ***C. Impact on application of the ACCA, Career Offender, and Section 2K2.1 enhancements***

As a result of these serious problems and disparities created by the categorical approach, the frequency of enhancements under the ACCA, § 2K2.1, and the career offender guideline have all fallen off dramatically since 2010:

- The ACCA applied to 276 defendants during FY 2017, a 55% drop since FY 2010, when the ACCA applied to 616 defendants;<sup>57</sup>
- 781 defendants were subject to sentencing enhancements for two previous crimes of violence or controlled substance offenses under § 2K2.1 in FY 2017, a 37% drop since FY 2010, when the enhancement applied to 1,241 defendants;<sup>58</sup> and
- The career offender guideline applied to 1,593 defendants during FY 2017,<sup>59</sup> a 31% drop since FY 2010, when the guideline applied to 2,314 defendants.<sup>60</sup>

Moreover, the impact on sentences for felon-in-possession defendants under 18 U.S.C. § 922(g) is concerning. During FY 2017, defendants with three prior felony convictions, but none qualifying as either a crime of violence or a controlled substance offense, received an average sentence of 43.5 months, barely one third of the 10-year statutory maximum.<sup>61</sup>

### ***D. The Commission should act to address the current impairment of Section 4B1.2***

As Justice Alito noted in his concurring opinion in *Chambers v. United States*, the definition of what constitutes a violent felony, a critical provision of the ACCA, is not functioning as it should and the ACCA is not being applied as Congress intended.<sup>62</sup> That is, as Justice Alito observes, a problem for Congress to solve.<sup>63</sup> In

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<sup>57</sup> Compare U.S. SENTENCING COMM'N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Table 20 with U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Table 20.

<sup>58</sup> The proportion of such cases to all cases sentenced under § 2K2.1 dropped from 20.3 percent in 2010 to 12.3 percent in 2017. There were 6,108 firearms cases sentenced under § 2K2.1 during FY 2010, and 6,366 cases during FY 2017. Office of Policy & Legislation, Criminal Division, U.S. Dep't of Justice, Analysis of U.S. Sentencing Comm'n FY 2017 data file.

<sup>59</sup> U.S. Sentencing Comm'n, Quicks facts, Career Offenders (2018).

<sup>60</sup> U.S. Sentencing Comm'n, Quicks facts, Career Offenders (2015).

<sup>61</sup> Office of Policy & Legislation, Criminal Division, U.S. Dep't of Justice, Analysis of U.S. Sentencing Comm'n FY 2017 data file.

<sup>62</sup> See 555 U.S. 122, 132-33 (2009) (Alito, J., concurring).

<sup>63</sup> *Id.* ("At this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement. That is

contrast, however, it is the Commission's role to remedy the impaired functioning of the career offender guideline and § 2K2.1 by amending the definition of what constitutes a crime of violence under § 4B1.2. Indeed, the Commission has done so as recently as 2016.<sup>64</sup>

Moreover, 28 U.S.C. § 994 directs the Commission to ensure that the Guidelines specify at or near maximum-term penalties for defendants who commit, among other things, a crime of violence when the defendant has previous convictions for two crimes of violence. It follows that to be in full compliance with current congressional directives embodied under Title 28, the Commission must do all that it can to assure that the Guidelines adequately reflect and appropriately punish the degree of violence involved in a defendant's criminal history, and to ensure that the Guidelines do not advise courts to ignore violent conduct in a defendant's criminal history. This is not a policy choice—it is a statutory obligation.

The Commission has a number of solutions at its disposal to remedy the problem. For example, the Commission could instruct courts that they may consider all relevant evidence, including conduct, for purposes of determining whether a previous conviction is a crime of violence or controlled substance offense under § 4B1.2. Courts already do this when applying factors under 18 U.S.C. § 3553 in determining whether to depart or vary from the Guidelines because of the defendant's background or social history, and § 3553 explicitly instructs courts to consider the "nature and circumstances of the offense."<sup>65</sup> The current text of the Guidelines in fact lends itself to this approach as well: the Guidelines already provide that "in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the *conduct* of which the defendant was convicted) is the focus of inquiry."<sup>66</sup>

Alternatively, the Commission could specifically reference federal and state statutes which qualify as crimes of violence under § 4B1.2 of the Guidelines, starting, this amendment cycle, with those discussed above, e.g., Hobbs Act robbery and state robbery statutes in Nevada, California, New York, Ohio, and elsewhere. At the same time, the Commission could clarify that:

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the approach that Congress took in 1984, when it applied ACCA to two enumerated and expressly defined felonies. And that approach is the only way to right ACCA's ship.") (internal citation omitted).

<sup>64</sup> See U.S.S.G. App. C, Amend. 798 (Supp. Aug. 2016).

<sup>65</sup> 18 U.S.C. § 3553 ("The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant....").

<sup>66</sup> § 4B1.2 Comment (n.2), Offense of Conviction as the Focus of Inquiry (emphasis added). See also § 4A1.2 (Definitions and Instructions for Computing Criminal History), Comment (n.1) (Prior Sentence) ("the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to § 4A1.3 (Adequacy of Criminal History Category)").

- A defendant attempts or conspires to commit a crime of violence or a controlled substance offense regardless of whether proof of an overt act is required under the applicable state or federal law;
- A defendant commits a controlled substance offense even if the applicable state law includes an “offer to sell,” just as is already the case for a “drug trafficking offense” under § 2L1.2; and
- A controlled substance offense includes the offenses of aiding and abetting, conspiracy, and attempt, just as had been the case for a drug trafficking offense until the Commission revised § 2L1.2 in 2016.

These practical amendments would considerably ameliorate the current, unsustainable sentencing disparities caused by application of the categorical approach. Such amendments would also help to resolve incongruous Guidelines interpretations, unfair jurisdictional differences and circuit splits, and inconsistencies within the Guidelines themselves.

Should the Commission elect not to address career-criminal or crime-of-violence issues more generally, the Department respectfully urges the Commission to—at a minimum—address the anomalies that have inadvertently been created by application of the categorical approach to the terms “conspiracy” and “attempt” under long-standing federal statutes, as well as circuit splits regarding the application of Guidelines standards. For example, there is no reasonable basis to question whether Congress actually intended the federal drug conspiracy statute, 18 U.S.C. § 846, to serve as the general conspiracy offense provision for conspiracies to violate the Controlled Substances Act. Nonetheless, the lack of a statutory element requiring proof of an overt act has effectively disqualified courts from considering a conviction under § 846 to be a “controlled substance offense” for purposes of § 4B1.2 owing to the application of the categorical approach by certain federal courts. This outcome—never intended by Congress or the Commission—is a legal absurdity that the Commission could easily cure with an amendment clarifying that a person conspires to commit a crime of violence or a controlled substance offense irrespective of whether proof of an overt act is required under state or federal law.

These are a few of the options at the Commission’s disposal. The Department urges the Commission to choose one and to make it the Commission’s top priority for the upcoming amendment cycle.

\* \* \* \* \*

## II. Other Department Priorities

### A. Cyber intrusions with a foreign nexus

Some of the most significant cyber intrusions in recent years have been perpetrated by foreign intelligence services, transnational criminal organizations, and their proxies reaching into the United States from perceived safe harbors abroad.<sup>67</sup> These attacks frequently have significant, deleterious impacts on the U.S. financial system.<sup>68</sup> The Department prosecutes such offenses under several statutes, and we recommend adding an enhancement to the Guidelines for charges often used in cybercrime prosecutions to address those offenses that involve a foreign nexus. Amending the Guidelines in this respect would be consistent with the enhancement that the Commission added to § 2B1.1 in 2013 for trade secrets offenses.<sup>69</sup>

These proposed enhancements should apply if the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, foreign terrorist organization, or foreign agent.<sup>70</sup> An enhancement should also apply if the defendant misappropriated information or anything of value knowing or intending for it to be transmitted outside the United States.<sup>71</sup> These amendments would appropriately reflect the serious economic and national security impact of cyber intrusions with a nexus to foreign governments or foreign terrorist organizations.

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<sup>67</sup> See, e.g., *United States v. Netyksho*, No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018) (alleging Russian military intelligence officers conspired to hack into email accounts and computer networks of Democratic National Committee); *United States v. Bondarenko*, No. 2:17-cr-00306-JCM-PAL (D. Nev. Oct. 31, 2017) (charging 36 members of international cyberfraud enterprise responsible for \$2.2 billion in intended loss to U.S. consumers and financial institutions); *United States v. Wang Dong*, No. 2:14-cr-00118-UNA (W.D. Pa. May 1, 2014) (charging Chinese military officials with hacking, economic espionage, and other offenses directed at American victims in nuclear power, metals, and solar products industries); *United States v. Romar*, No. 1:15-mj-00498 (E.D. Va. Sept. 29, 2015) (Syrian national affiliated with Syrian Electronic Army pled guilty to conspiring to receive extortion proceeds and conspiring to unlawfully access computers of perceived detractors of Syrian President Bashar al-Assad); *United States v. Fathi*, No. 16-CR-48 (S.D.N.Y. Jan. 21, 2016) (indicting seven Iranian nationals who worked on behalf of Iranian Government on computer hacking charges related to involvement in extensive campaign of distributed denial of service attacks).

<sup>68</sup> The June 2017 “NotPetya” attack caused billions of dollars in damage. Statement from the Press Secretary (Feb. 15, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-25/>.

<sup>69</sup> See § 2B1.1(b)(13)(B) (providing a four-level enhancement if the defendant knew or intended “that the offense would benefit a foreign government, foreign instrumentality, or foreign agent”).

<sup>70</sup> The enhancements should apply to: § 2B1.1(b)(18) for violation of 18 U.S.C. §§ 1028, 1029, or 1030(a)(2), (4), (5), or (6); § 2B2.3(b) for violation of 1030(a)(3); § 2B3.2(a) for violation of 18 U.S.C. § 1030(a)(7); and § 2H3.1(b) for violation of 18 U.S.C. § 2511(1)(a), (c), (d).

<sup>71</sup> This enhancement should apply to §§ 2B1.1(b)(18) and 2H3.1(b).

### ***B. Attempt and conspiracy to provide material support for terrorism***

The Commission should clarify that the default three-level reduction for conspiracies and attempts does not apply to material support under 18 U.S.C. § 2339B or other offenses sentenced under the material support for terrorism guideline. Specifically, the Commission should amend the title of the material support guideline, § 2M5.3, to include attempts and conspiracies and add § 2M5.3 to the list of guidelines addressing attempts and conspiracies in the relevant application note of the Guidelines for conspiracies, attempts, and solicitations.<sup>72</sup>

This clarification would also ensure a consistent approach to the sentencing of conspiracy and attempt under two different material support statutes—§§ 2339A and 2339B. Conspiracy and attempt to commit material support under § 2339A are already largely exempt from this reduction, so it is anomalous that conspiracy and attempt under § 2339B is still treated differently.

### ***C. Sex trafficking conspiracy under 18 U.S.C. § 1594(c)***

In the past two years, courts in the Fourth, Fifth, Sixth, and Eleventh Circuits have applied a base offense level of 34 or 30 to sex trafficking conspiracy convictions, applying § 2X1.1 in combination with § 2G1.1 (Promoting commercial sex act or prohibited sexual conduct with an individual other than a minor) and § 2G1.3 (Promoting a commercial sex act or prohibited sexual conduct with a minor, transporting of minors to engage in commercial sex act or prohibited sexual conduct, travel to engage in commercial sex act or prohibited sexual conduct with a minor, sex trafficking of children, use of interstate facilities to transport information about a minor).<sup>73</sup> In a recent opinion, however, the Ninth Circuit departed from this practice and instead applied the default subsection under the relevant guidelines rather than the subsection specifically applicable to 18 U.S.C. § 1591 (Sex trafficking of children by force, fraud, or coercion), resulting in a dramatically lower base offense level of 14 or 24.<sup>74</sup> This Ninth Circuit opinion conflicts with a plain reading of the Guidelines, with established sentencing practice in some districts, and, we are told, with guidance from Commission staff to

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<sup>72</sup> See U.S.S.G. § 2X1.1.

<sup>73</sup> See, e.g., *United States v. Bonner*, 713 Fed. App'x 342, 343 (5th Cir. 2018) (dismissing appeal challenging BOL sentence of 30 for sex trafficking conspiracy conviction); *United States v. Cortes-Castro*, 511 Fed. App'x 942, 944 (11th Cir. 2013) (discussing BOL of 34 for sex trafficking conspiracy calculated in plea agreements); *United States v. Wallace*, 600 Fed. App'x 322, 330 (6th Cir. 2015) (affirming district court decision that set BOL of 34 for sex trafficking conspiracy under §§ 2G1.3 and 2X1.1); *Castillo v. United States*, No. CV-116-189, 2017 WL 3444746 at \*3 (S.D. Ga. July 11, 2017) (noting Defendant's BOL was set at 30 pursuant to §§ 2G1.3 and 2X1.1); *Footte v. United States*, No. JKB-14-015, 2015 WL 9435164 at \*1 (D.Md. Dec. 24, 2015) (defendant pled guilty to sex trafficking conspiracy and stipulated to BOL of 34 in plea agreement pursuant to § 2G1.1(a)(1)); *Williams v. United States*, No. EP-15-CV-275-FM, 2015 WL 12516636 at \*1 (W.D. Tex. Oct. 8, 2015) (noting total offense level of 40 for sex trafficking conspiracy conviction).

<sup>74</sup> See *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016).

some probation offices. Nevertheless, some lower courts have begun to follow the Ninth Circuit precedent to reach results contrary to the prevailing approach.<sup>75</sup>

The Ninth Circuit's approach results in anomalies within the Guidelines that undermine Congress' objectives of uniformity and proportionality in sentencing. For example, a defendant convicted of a substantive sex-trafficking offense with an adult victim in the Ninth Circuit now receives a higher sentence than a defendant convicted of a substantive labor-trafficking offense, while a defendant convicted of sex-trafficking conspiracy with an adult victim receives a lower sentence than a defendant convicted of labor-trafficking conspiracy.<sup>76</sup> In addition, the Ninth Circuit's opinion fails to take into account the principle of proportionality, especially considering that the sex-trafficking conspiracy statute carries a maximum life sentence.

The Commission should resolve these anomalous outcomes. One option would be to add an application note clarifying that a base offense level of 34 applies to § 1594(c). Given the severe impact sex trafficking has on its victims, the Department feels strongly that base offense levels of 24 or 14 do not adequately punish those who conspire to perpetrate such despicable acts of exploitation.<sup>77</sup>

\* \* \* \* \*

Thank you for considering the Department's perspective on these matters. The Commission serves an important purpose in our criminal justice system, and the Department looks forward to working with you in the coming year.

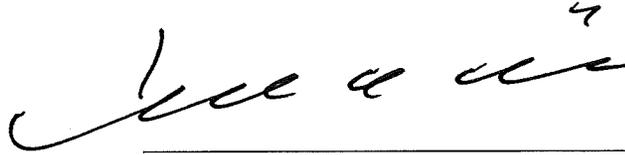
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<sup>75</sup> See, e.g., *United States v. Jackson*, No. 2:16-cr-00054-DCN, 2018 WL 1316933 at \*1 (D.S.C. March 14, 2018) (relying on *Wei Lin* to decide that BOL of 34 was incorrect for conviction under § 1594(c) because the offense of conviction necessarily falls into second category of § 2G1.1(a), mandating base offense level of 14). See also *Jackson v. United States*, No. CV17-5064 RJB, 2017 WL 1408174 at \*5 (W.D. Wash. Apr. 20, 2017) (discussing *Wei Lin* in considering § 2255 motion for ineffective assistance when counsel failed to argue that BOL was 14 instead of 34 when calculating sentence for sex trafficking conspiracy).

<sup>76</sup> Applying § 2H4.1 for conspiracy to violate 18 U.S.C. §§ 1589 or 1590.

<sup>77</sup> See Wendy Macias-Konstantopoulos, *Human Trafficking: The Role of Medicine in Interrupting the Cycle of Abuse and Violence*, 165 ANNALS OF INTERNAL MEDICINE 582, 583 (2016); see also E.K. Hopper & L.D. Gonzalez, *A Comparison of Psychological Symptoms in Survivors of Sex and Labor Trafficking*, 44 BEHAVIORAL MEDICINE 1, 7 (2018); Elizabeth K. Hopper et al., *STARS Experiential Group Intervention: A Complex Trauma Treatment Approach for Survivors of Human Trafficking*, 15 JOURNAL OF EVIDENCE-INFORMED SOCIAL WORK 215, 222 (2018).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Rybicki", with a small number "4" written above the end of the signature.

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David Rybicki  
Commissioner, *ex officio*,  
U.S. Sentencing Commission &  
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Criminal Division

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