

Let me start by agreeing with the Commission that the categorical approach is an anchor around the necks of all stakeholders that needs to be removed.

However, I think you have substituted one unduly complicated mess for another. Let me be clear: Most of the time documents from state court convictions do not exist, cannot be obtained or for various reasons are not helpful. Perhaps the parties "waived factual basis." Or the facts are generic to the tune of the defendant admits "the elements of the offense." The fantasy is that mining these documents brings clarity. Reality - not so much.

This proposal is label changing without significant relief. For enumerated offenses (which is actually worse than the categorical approach applied to a specific statute) we have to look at 50+ jurisdictions to determine what is "generic." And you get totally absurd results like 21 USC 846 is not generic conspiracy because generic conspiracy requires an overt act. And, apart of generic offense issues, you still employ the categorical approach by restricting the court's factual examination to certain documents. Adding to the universe of documents looked at is still the categorical approach with a new label - Commission approach.

Divorce yourself entirely from this approach. Do something like convicted of any offense denominated by the convicting jurisdiction as any of the following type of offense: x,y,z. Trust that if a state calls something an assault, you should get an enhancement for that. Then create a reduction or dial back if the defendant can establish that the actual conduct did not involve a,b,or c. Then it is simple - if the State calls it assault, it counts. If defendant can show through any means that the actual conduct was non-violent, not involve drugs, whatever - then a dial back (whole or partial) can occur.

What you are proposing is simply not a fix. It is an overly cautious movement resembling a turtle peeking its head out from under its shell. I honestly do not see how you have convinced yourselves that what you have proposed is meaningfully different from the categorical approach. It is not.

This is lipstick on a pig, and crappy, cheap lipstick at that.

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