

Memorandum

For: United States Sentencing Commission
From: Timothy M. Tymkovich
Chief Judge, United States Court of Appeals for the Tenth Circuit
Date: February 19, 2019
Subject: United States Sentencing Commission Request for Comment

The United States Sentencing Commission requests comments on the proposed amendments to United States Sentencing Guidelines §4B1.2. The amendments would allow courts to consider the actual conduct of defendants in determining whether an offense is a crime of violence. I write in support of this proposed amendment and to provide specific comments. As a federal appellate judge for over fifteen years, I have reviewed hundreds of criminal convictions, many of them involving crimes of violence. The existing categorical approach hampers a judge's ability to properly sentence defendants who commit violent offenses and subsequently creates unnecessary litigation. Amending § 4B1.2 will enable sentencing courts to provide just punishment, afford adequate deterrence, protect the public, and promote consistency among sentences of like-defendants.

Background

In the Sentencing Commission's 2016 report to Congress, it noted the "complexity of applying the career offender guideline and other similar recidivist enhancements." U.S. Sent'g Commission, Report to the Congress: Career Offender Sent'g Enhancements 3 (Aug. 2016). It also concluded the result of the categorical approach has been to significantly increase litigation, which has led to over a dozen Supreme Court opinions. *Id.* at 50. The report recommended Congress should address the issue by adopting a uniform definition of "crime of violence." *Id.* But Congress has not acted. And when it comes to applying the Guidelines, an advisory set of rules promulgated by the Sentencing Commission, the Commission is in the best position to recommend changes. In this case, the Commission has recommended expanding the scope of materials a judge can consider when determining whether a conviction falls under the generic definition of the crime for purposes of the Armed Career Criminal Act.

Analysis

The proposed amendment should be adopted for several reasons. First, the proposed amendments are consistent with the Commission's authority under 28 U.S.C. § 4(a)-(f), (h). The Commission is authorized to "promulgate . . . general policy statements

regarding application of the guidelines or any other aspect of sentencing.” *Id.* § 994(a)(2). The Commission is also charged with promulgating guideline sentences that provide “certainty and fairness in sentence and reduc[e] unwarranted sentence disparities.” *Id.* § 994(f). Giving judges the ability to assess a defendant’s conduct “permit[s] individualized sentences when warranted by mitigating or aggravating factors” like violence. *Id.* § 991(b)(1)(B).

The proposed amendment, as written, allows courts to consider sources expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). Together, *Taylor* and *Shepard* allow district courts to consider the conduct of the defendant—but only to the extent the underlying conduct was clear and agreed upon by the defendant. Anything else might raise serious constitutional concerns and expand the scope of judicial factfinding in criminal sentencing. *See Descamps v. United States*, 570 U.S. 254, 269 (2013) (“The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.”). *Taylor* and *Shepard* anticipated the constitutional concerns and instructed district courts to consider materials only where there is a “certainty of a generic finding.” *Shepard*, 544 U.S. at 25. Materials like the charging document, jury instructions, plea agreement, transcript of the colloquy, and any explicit factual finding by the trial judge to which the defendant assented provide certainty in a finding of fact. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). The materials listed in the proposed amendment preclude judicial factfinding while still simplifying the process by which a judge can determine whether the elements of the generic offense have been met.

In addition to allowing courts to use *Taylor* and *Shepard* documents, the Commission should set forth specific definitions for the enumerated offenses in § 4B1.2(a)(2). These definitions should include clear elements so when courts are considering the underlying facts, they can properly assess whether the facts fall within a certain offense. By listing elements, the Commission would make the enumerated felonies in § 4B1.2(a)(2) more consistent with the “elements clause” of § 4B1.2(a)(1), where it is somewhat easier to determine whether certain conduct qualifies as a crime of violence. *See Mathis v. United States*, 136 S. Ct. 2243, 2297–98 (2013) (“If they are elements, the court should do what we have previously approved: . . . [apply the categorical approach].”).

At a minimum, the Commission should address what constitutes murder, specifying whether it includes felony murder, depraved heart murder, or murder resulting from conduct intending to cause bodily injury. *See* Letter from Criminal Div. of the U.S. Dep’t of Justice to Judge William H. Pryor, Jr. (July 31, 2017). Under the current

Guidelines, defendants will argue murder should be interpreted narrowly and the “crime of violence” enhancement should only apply to intent-to-kill murders. Because the goal of the ACCA is to appropriately punish violent recidivists, murder should be defined broadly to include all types of murder. This simple change would provide clarity to sentencing judges and reduce litigation associated with determining whether a specific murder constitutes a crime of violence.

Conclusion

In conclusion, I support the Commission’s proposed amendment to allow district court judges to consider *Taylor* and *Shepard* documents in determining whether a defendant has committed a crime of violence. In addition, I support further clarification of the enumerated felonies clause in § 4B1.2(a)(2). By providing definitions of the enumerated felonies and listing the elements associated with the felonies, the Commission will make it easier to consider a defendant’s underlying conduct and determine whether that conduct falls within the generic definition of a violent offense. The changes proposed by the Commission will ultimately provide more clarity to sentencing judges, help preempt litigation, and promote consistency among the sentences of violent, repeat offenders.