

# Criminal Justice Legal Foundation

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October 17, 2022

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The Honorable Carlton W. Reeves, Acting Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Re: Comment on USSC Proposed Priorities for Amendment Cycle Ending May 1, 2023

Dear Judge Reeves:

On behalf of the Criminal Justice Legal Foundation (CJLF), we appreciate the opportunity to provide comment on the Commission's proposed priorities for the 2022-2023 amendment cycle.<sup>1</sup> CJLF is a non-profit public interest law organization dedicated to restoring a balance between the rights of crime victims and the criminally accused. Our purpose is to assure that people guilty of committing crimes receive swift and certain punishment in an orderly and constitutional manner. After reviewing the Commission's proposed priorities, we respectfully submit the following comments.

### **PRIORITY NO. 6: CONTINUE MULTIYEAR WORK ON §4B1.2**

We fully support Proposed Priority No. 6. and respectfully urge the Commission to consider possible amendments to §4B1.2 section (A): providing an alternative approach to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense" under § 4B1.2. **Specifically, we request that the Commission amend the definition of what constitutes a "crime of violence."**

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

The Commission originally implemented the career offender guideline in response to the Sentencing Reform Act of 1984, with the purpose of ensuring that violent repeat offenders serve longer imprisonment terms. Per the guideline, an offender should be eligible to receive an enhanced sentence, above the typical guideline recommendation, if

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1. U.S. Sentencing Commission, Federal Register Notice of Proposed 2022-2023 Priorities (September 2022), [https://www.usc.gov/sites/default/files/pdf/amendment-process/federal-register-,notices/20220929\\_fr-proposed-priorities.pdf](https://www.usc.gov/sites/default/files/pdf/amendment-process/federal-register-,notices/20220929_fr-proposed-priorities.pdf).

they have two or more prior violent felony convictions.<sup>2</sup> Research from the Commission shows that people with multiple felony convictions are more likely to recidivate.<sup>3</sup> So, incapacitating violent repeat offenders would keep our streets safer.

To determine whether a prior crime was violent, the federal courts have used a statutory-based categorical approach, where a “crime of violence” is defined based on the statutory definition of the offense. The elements of the statutory definition are matched to a so-called “generic” version of the offense.<sup>4</sup> The unfortunate consequence is that courts exclude any conviction under a statute broad enough that it is possible to commit without violence, even if the defendant’s actual conduct or the typical violation of that statute is violent. Under the current system, many offenses that are clearly violent do not qualify as such. As a result, violent repeat offenders are frequently not subject to sentence enhancements.

The categorical approach is also used in other contexts, and its use is always controversial.<sup>5</sup> While in other contexts action by Congress or the Supreme Court would be necessary, in this context the Sentencing Commission can and should take the needed corrective action.

The categorical approach makes the application of the career offender guideline turn as much on the irrelevant fact of how broadly the prior jurisdiction defined a crime as it does on the defendant’s actual conduct. This makes the guideline less effective at incapacitating the worst offenders and more arbitrary in its application.

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2. U.S.S.G. §4B1.1(a), <https://guidelines.usc.gov/gl/%C2%A74B1.1>.
  3. U.S. Sentencing Commission, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (March 2017), [https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309\\_Recidivism-CH.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf).
  4. U.S. Sentencing Commission, *Primer on Categorical Approach* (2021), [https://www.usc.gov/sites/default/files/pdf/training/primers/2021\\_Primer\\_Categorical\\_Approach.pdf](https://www.usc.gov/sites/default/files/pdf/training/primers/2021_Primer_Categorical_Approach.pdf).
  5. See, e.g., *Sessions v. Dimaya*, 138 S.Ct. 1204, 1258-1259 (2018) (Thomas, J., dissenting) (calling for rejection of categorical approach); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (“to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach”).

Two offenders with prior convictions in different states and identical actual conduct could have very different sentences because of the wording of the different state statutes. This effect represents the opposite of what the Sentencing Reform Act of 1984 was intended to achieve. People with violent prior convictions should be eligible for sentence enhancements based on the prior conduct that led to the conviction, which very important when considering future behavior and potential dangerousness.

***B. Previous efforts to fix the categorical approach***

The Commission amended the categorical approach in 2016 to include additional named offenses that are clearly violent, but the solution was still not perfect, and the Commission continued to receive negative feedback regarding the approach.<sup>6</sup> In response, during the 2019 amendment cycle, the Commission again proposed to amend §4B1.2.<sup>7</sup>

Per the proposed 2019 amendment, the categorical approach would no longer apply when determining whether a conviction was a “crime of violence” or “controlled substance offense” for purposes of sentence enhancements under §4B1.2. Instead, courts would “consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction.” The amendment stipulated that courts could utilize a “wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction.” The list of potential sources included (as applicable): charging documents, jury instructions, judges’ formal rulings, plea agreements, “any explicit factual finding by the trial judge to which the defendant assented,” and any information comparable to the above. The rationale for these amendments was to maintain a connection to the elements of the offense for which the defendant was convicted, but without requiring an overly narrow legal analysis imposed by the categorical approach.

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6. U.S. Sentencing Commission, Federal Register Notice of Proposed 2019 Amendments (December, 2018), <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2019-amendments>.

7. *Ibid.*

The proposed amendment was well-supported by several entities<sup>8</sup>, including the U.S. Department of Justice (DOJ) which has “long sought amendments of this nature.”<sup>9</sup> Unfortunately, the Guidelines were never formally amended in this way because the Commission was unable to vote on proposed amendments. Now that 2023 priorities have been proposed, we are grateful that the Commission is considering continuing their multiyear work on revising §4B1.2.

***C. Challenges in repairing the “crime of violence” definition and potential solutions***

Importantly though, as many supporters pointed out, there are challenges to coming up with an alternative to the categorical approach. One of the most daunting is that courts would often not be able to assess an individual’s prior conduct using sources from the judicial record. There are many cases where documents from state court convictions do not exist, cannot be obtained for various reasons, or are unhelpful. This is especially true when a defendant has pled guilty; judicial records are scant, and there is no true record of the underlying facts. In other cases, the documents can be obtained, but they lack sufficient detail to determine the conduct involved in an offense. For example, in many state court cases, the charging document simply lists the elements of the offense by reciting statutory language. Thus, there is concern that judicial records would not have sufficient factual detail to adequately determined the conduct involved in an offense.

Below, we offer a few suggestions on how to possibly mitigate this problem:

- First, the applicable evidence for court consideration need not be limited to the judicial record. The Commission could allow courts to consider all relevant evidence, including evidence not contained in the judicial record—subject to objection and challenge by the defense—to prove that the conduct giving rise to the prior conviction was, in fact, violent. Courts already do this when determining whether to depart or vary from the

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8. U.S. Sentencing Commission, Public Comment on Proposed 2019 Amendments (February 2019), <https://www.ussc.gov/policymaking/public-comment/public-comment-february-19-2019>.
  9. Rybicki, D., Public Comment on Proposed 2019 Amendments (February 2019), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20190219/DOJ.pdf>.

Guidelines because of the defendant's background or social history. To prevent consideration of unreliable evidence, the Commission should reiterate that the court may consult “any information as long as it has sufficient indicia of reliability to support its probable accuracy,”<sup>10</sup> just as they do in all other guideline contexts.

- Alternatively, the Commission could essentially trust the prior classification: if a state labels a certain crime as violent, it is violent, and should be considered as such for purposes of an enhancement. A dial back (whole or partial) of the enhancement could be considered if the defendant can establish through any means that their actual conduct was not violent.
- The Commission could specifically reference which federal and state statutes qualify as crimes of violence under §4B1.2.

### CONCLUSION

The career offender guideline has not been effective at achieving its intended purpose. In the current state, many dangerous repeat offenders do not receive sentence enhancements due to the flawed approach that is used to define prior “crimes of violence.” This undermines the entire utility of the career offender guideline, which was originally intended to incapacitate violent repeat offenders. For this reason, there has been much debate around the approach, and it has been a topic of discussion at the Commission for several years now.

The Commission has a statutory duty to ensure that federal sentencing accurately reflects the seriousness of offenses committed by criminal defendants and appropriately punishes violent repeat offenders. The Commission must do all that it can to assure that the Guidelines adequately consider the degree of violence involved in a defendant's criminal history, rather than advising courts to ignore it.

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10. 0 §6A1.3 (Resolution of Disputed Factors) (“When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. 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”).

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**Therefore, we respectfully urge the Commission to amend the definition of what constitutes a “crime of violence” under § 4B1.2.** We believe this would allow courts to conduct a more meaningful analysis, focusing on the facts of each case, when considering whether a defendant’s prior conduct was violent. This would help ameliorate the current sentencing disparities caused by the categorical approach and help resolve jurisdictional differences.

If left unaddressed, the damage these decisions will do to the threat to public safety is substantial. There are challenges to doing away with the categorical approach, but we believe these challenges can be mitigated. While it would take effort, we believe the changes are long overdue, and would be well worth it for the benefits.

Once again, we are pleased that the Commission included possible revisions to §4B1.2 within their list of 2023 proposed priorities. We thank the Commission for the opportunity to provide comment, and we appreciate your consideration of our views on these important matters.

Sincerely,  
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