Written Statement of Marjorie Meyers

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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

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Thank you for providing me with the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the Commission's proposals related to various criminal history calculations under the guidelines. I would like to address my remarks to three proposals: (1) "Sentence Imposed" in §2L1.2; (2) Categorical Approach; and (3) Burglary of a Non-Dwelling.

To summarize our position, we believe that the Commission should (1) follow the majority approach as to how the term "sentenced imposed" in §2L1.1 should be interpreted; (2) resist the temptation to specify the kinds of documents a court may examine in applying the modified categorical approach; and (3) specify that burglary of a non-dwelling is not a "crime of violence."

I. PROPOSED AMENDMENT TO §2L1.2 "SENTENCE IMPOSED"

The Commission should amend §2L1.2 to clarify that a revocation sentence imposed after a defendant's deportation is not included in the "sentence imposed" for purpose of §2L1.2(b)(1). This rule is expressed in the first bracketed language (hereinafter Option 1), which codifies the majority view of what §2L1.2 currently means, fits better with the penalty scheme of § 1326, and reflects better sentencing policy.

We believe Option 1 clarifies the commentary by stating what §2L1.2 already requires. The introductory clause states that the enhancement provisions apply when certain things happen prior to deportation. To qualify for a 16-level enhancement, a defendant must have been convicted "for a felony that is a drug trafficking offense for which the sentence imposed exceeded 13 months." If, prior to deportation, a defendant was convicted of a drug trafficking offense that received less than 13 months, then the 12-level enhancement applies.

The circuit split has arisen out of commentary to §2L1.2: "The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release." USSG §2L1.2, comment. n.1(B)(vii). This note, however, "does not alter the temporal constraint inherent in §2L1.2." *United States v. Rosales-Garcia*, __ F.3d __, 2012 WL 375518, at *4 (10th Cir. 2012). In light of the temporal provisions of the guideline itself, the best interpretation of "any term of imprisonment" is any term of imprisonment imposed prior to deportation. Thus, under the existing guideline, "the determinative factor is . . . what sentence

was imposed for that crime before the defendant was deported." *United States v. Lopez*, 634 F.3d 948, 953 (7th Cir. 2011).[1] We believe that Option 1 states what §2L1.2 already requires.

This is the view that a majority of circuits has taken. The Commission has already acknowledged the decisions from the Fifth, Seventh, and Eleventh Circuits that have essentially adopted Option 1.[2] Since the Commission issued its request for comments, the Tenth Circuit has joined these circuits.[3] The Ninth Circuit has also indicated that it would adopt this rule.[4] Only the Second Circuit has taken a different view.[5]

The distribution of these decisions is significant because they include all circuits on the southern border and control in the vast majority of illegal reentry cases. In FY2010, 28,504 defendants were sentenced for immigration offenses.[6] Of these defendants, 11,926 were in the Fifth Circuit, 259 were in the Seventh Circuit, 3,460 were in the Tenth Circuit, and 1,291 were in the Eleventh Circuit. Include the 8,600 defendants from the Ninth Circuit, which has endorsed this rule,[7] and we see a total of 25,536 defendants. The Second Circuit involved only 726 cases. By adopting Option 1, the Commission leaves the law unchanged for the vast majority of illegal reentry cases.

Furthermore, Option 1 better reflects the penalty scheme of 8 U.S.C. § 1326, which draws a bright line at the date of deportation and does not carry the commentary that has caused the confusion with respect to the guideline. Section 1326 measures the seriousness of an illegal

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[1] *See also United States v. Bustillos-Pena*, 612 F.3d 867, 868 (5th Cir. 2010) (stating that the "most natural" reading of §2L1.2 supports this rule); *Rosales-Garcia*, 2012 WL 375518 at *6 ("the best understanding of §2L1.2 incorporates a temporal restraint with regard to the imposition of the defendant's earlier sentence").

[2] *See Bustillos-Pena*, 612 F.3d at 869; *Lopez*, 634 F.3d at 950; *United States v. Guzman-Bera*, 216 F.3d 1019, 1020-21 (11th Cir. 2000).

[3] *Rosales-Garcia*, 2012 WL 375518.

[4] *United States v. Jimenez*, 258 F.3d 1120, 1125–26 (9th Cir. 2001) (explaining that aggregation of revocation sentence would apply only if "both statutory elements of an aggravated felony [the fact of conviction and a 'sentence imposed' of a particular length] were met prior to his deportation").

[5] *United States v. Compres-Paulino*, 393 F.3d 116 (2d Cir. 2004).

[6] USSC, *Federal Sentencing Statistics by State, District & Circuit for Fiscal Year 2010*, http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2010/JP2010.cfm. For all circuits, the data cited is found in Table 1, Distribution of Guideline Defendants Sentenced by Primary Offense Category. Although these tables do not show the distribution of §2L1.2 cases across circuits, they do show the distribution of all immigration offenses across circuits. Presumably, the distribution of §2L1.2 cases is similar.

[7] *Jimenez*, 258 F.3d at 1125–26.

reentry by convictions imposed prior to an alien's deportation. A violation of section 1326 is subject to an increased statutory maximum if the defendant was deported "subsequent to a conviction" for certain types of crimes.[8] Under this statutory scheme, the timing of a prior conviction in relation to the deportation is a necessary part of the statutory sentencing enhancement.[9]

The most significant increase, of course, is for aggravated felonies, which trigger a 20-year maximum penalty. In some cases, classification as an aggravated felony depends on the length of the sentence imposed.[10] However, the application note that has created confusion under §2L1.2 does not apply to the statute. We are aware of only one case that has addressed this issue in the context of a conviction that was not an aggravated felony at the time of deportation but became one based on a subsequent probation violation. In *United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000), the Eleventh Circuit held that a "theft offense" that was not an aggravated felony when the defendant was deported did not support a sentencing enhancement, even though it "may have become an aggravated felony after his reentry into the United States and he received the [revocation sentence]." For aggravated felonies under the statute, a reentry prosecution would look only at the sentence imposed prior to deportation and would not allow a post-deportation probation revocation to turn a "theft offense" into an aggravated felony.[11]

Thus, under 8 U.S.C. § 1326, a court must consider a defendant's record on the day he was deported. Nothing after that date matters for purposes of the enhancement. The Commission should continue to follow that scheme in its guideline enhancement.

Furthermore, Option 1 better recognizes the purpose of Chapter 2 (in contrast to Chapter 4) of the guidelines. The Fifth Circuit stated:

> It seems counterintuitive that a guideline enhancement designed to reflect the nature of a defendant's illegal reentry offense could be triggered by unrelated conduct that occurred long after the reentry. Unrelated conduct is normally assessed in the form of criminal history points or, where the

[8] 8 U.S.C. § 1326(b).

[9] *See, e.g., United States v. Rojas-Luna*, 522 F.3d 502, 504-07 (5th Cir. 2008) (holding that the enhancing conviction must occur prior to the admitted or proved deportation).

[10] *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F),(G) (including "crime of violence" and "theft offense" that received a term of imprisonment of at least one year).

[11] *Id*. at 1021. *See also Jimenez*, 258 F.3d 1120 at 1125–26.

> court departs from the Sentencing Guidelines, as part of the 18 U.S.C. § 3553(a) factors.[12]

As the Fifth Circuit observed, the Chapter 4 criminal history guidelines address considerations about a defendant's criminal history that suggest a particular defendant may have a greater need for deterrence than other defendants.[13] Under Chapter 4, a defendant whose probation was revoked on an earlier case will face a sentence increase based on the probation revocation. He will receive 2 criminal history points for returning to the U.S. while on probation for another offense.[14] He also will also receive 3 points for a conviction that originally would have received only 1 or 2.[15] In this way, a defendant whose probation is revoked upon his return to the United States will be at least one criminal history category higher than a defendant who does not violate probation on his return.

In contrast, the Chapter Two guidelines set forth the considerations that measure the seriousness of a defendant's offense conduct and establish his "offense level."[16] Under §2L1.2, the seriousness of a defendant's offense conduct is measured by the facts as they were when he decided to return, specifically, his pre-deportation criminal record. Thus, while it makes sense to include a revocation sentence when that revocation sentence precedes the deportation and unlawful reentry, it does not make sense to increase a defendant's offense level for conduct that occurred after he committed the offense. In contrast, such considerations are properly made in the context of a defendant's criminal history calculation. The Seventh and Tenth Circuits both recognize that Option 2 would be inconsistent with "both the purpose behind the enhancement and the larger goal of consistent application of the Sentencing Guidelines." *Lopez*, 634 F.3d at 951 (noting that [t]he fact that [a defendant's] probation was later revoked . . . tells us nothing about the relative seriousness of the original drug trafficking offense or the illegal reentry").[17]

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[12] *Bustillos-Pena*, 612 F.3d at 867.

[13] *See* USSG Ch. 4, Pt. A, intro comment.

[14] USSG §4A1.1(d).

[15] USSG §4A1.1(a), (b), (c).

[16] *See* USSG Ch.2, intro.comment.

[17] S*ee also Rosales-Garcia*, 2012 WL 375518 at *5 (noting that the "act of illegally reentering the country reveals nothing about the seriousness of his drug trafficking conviction at the time he violated 8 U.S.C. § 1326" and that "[i]t would be inconsistent with the purpose of §2L1.2" to consider time imposed on a probation revocation that happened after deportation).

A related problem with Option 2 is that it will create unwarranted disparity.[18] Rather than being based on his pre-deportation criminal record, a reentry defendant's sentence will turn on "the happenstance that [his] state probation was revoked before his federal probation commenced."[19] The Fifth Circuit explained:

> Illegal reentry by a defendant who received a probated sentence is not as great a cause for concern as illegal reentry by a defendant who was given an actual sentence of imprisonment for the same offense, because the probated defendant's offense was not deemed to be as serious by the court of conviction. [Option 1] allows the guideline to punish the probated defendant more leniently than the defendant who reentered after receiving an actual sentence. [Option 2] would treat these two defendants the same if, sometime after he reentered the country, the probated defendant's probation were revoked. It is counterintuitive that a guideline enhancement designed to reflect the nature of a defendant's illegal reentry offense could be triggered by unrelated conduct that occurred long after the reentry [i.e., the probation revocation].[20]

Even though the offense conduct would be the same—returning to the U.S. while on probation—the sentence will depend not on differences in the defendants' conduct but on whether their state probation happened to be revoked prior to sentencing on the federal case. Finally, Option 1 better balances government and defendant interests under the new, nationwide fast-track policy. Under this option, defendants convicted of drug trafficking prior to their deportation inevitably face a hefty, 12-level enhancement, so it is not the case that their prior crimes go unrecognized. In cases where the government believes a guideline sentence does not adequately reflect the seriousness of a prior offense, they can ask for an upward departure.[21] However, under the government's new fast-track policy, a reentry defendant who believes his sentence is too high may not seek a similar reduction.[22] In the end, the government loses little under Option 1.

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[18] 18 U.S.C. § 3553(a)(6).

[19] *Rosales-Garcia*, 2012 WL 375518 at *6.

[20] *Bustillos-Pena*, 612 F.3d at 867.

[21] USSG §2L1.2, comment.(n.7).

[22] Memorandum from James M. Cole, Deputy Attorney General, *Dep't Policy on Early Disposition or "Fast-Track" Program* 3 (Jan. 31, 2012) (stating that to qualify for fast-track, a defendant must "waive the right to argue for a variance under 18 U.S.C. § 3553(a)"), http://www.justice.gov/dag/fast-track-program.pdf.

In short, the Commission should adopt Option 1, recognizing that it better fits the current language and purpose of §2L1.2 and § 1326 and reflects better sentencing policy.

II. CATEGORICAL APPROACH

The Commission proposes an amendment, with four options, which would address the types of documents a court can consider in determining whether a prior conviction fits within a category of crimes. The Commission also asks whether this amendment should apply to §2L1.2 alone, the entire guideline manual, or some subset of guidelines. The Federal Defenders oppose this amendment, in any form, because it is not needed and will result in extensive litigation in both the trial and appellate courts.

Courts currently apply the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S.13 (2005), to guideline enhancements that are based on the nature of a prior conviction.[23] To the extent a prior conviction is used to increase a statutory maximum, the categorical approach is constitutionally required. *See Shepard*, 544 U.S. at 24. This approach is the most fair and effective way to determine Guideline enhancements.

The categorical approach is designed to determine what offense the defendant was convicted of and whether that offense fits the specified category. This approach "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense," asking whether the prior conviction fits within the defined category. *Taylor*, 495 U.S. at 602. Usually, there is no need to look beyond the judgment of conviction to see what the defendant was convicted of, and the only issue for the court is whether that conviction fits within the category of offenses. As long as the statute of conviction is clear, there is no need to resort to *Shepard*-approved documents.[24]

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[23] *See, e.g., United States v. Brown*, 631 F.3d 573, 577 (1st Cir. 2011) (career offender); *United States v. Folkes*, 622 F.3d 152, 157 (2d Cir. 2010) (crime of violence under §2L1.2); *United States v. Mahone*, 662 F.3d 651, 652 (3d Cir. 2011) (crime of violence under §2K2.1); *United States v. Donnell*, 661 F.3d 890, 892 (4th Cir. 2011) (crime of violence under §2K2.1); *United States v. Reyes-Mendoza*, 665 F.3d 165, 166 (5th Cir. 2011) (drug trafficking offense under §2L1.2); *United States v. Rodriguez*, 664 F.3d 1032, 1036 (6th Cir. 2011) (career offender); *United States v. Curtis*, 645 F.3d 937, 939 (7th Cir. 2011) (career offender); *United States v. Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011) (crime of violence under §2L1.2); *United States v. Rivera*, 658 F.3d 1073, 1078 (9th Cir. 2011) (aggravated felony under §2L1.2); *United States v. Perez-Jimenez*, 654 F.3d 1136, 1140 (10th Cir. 2011) (career offender); *United States v. Martinez-Gonzalez*, 663 F.3d 1305, 1310 (11th Cir. 2011) (aggravated felony under §2L1.2); *United States v. De Jesus Ventura*, 565 F.3d 870, 875 (D.C. Cir. 2009) (crime of violence under §2L1.2).

[24] *See, e.g., United States v. Rodriguez*, 664 F.3d 1032, 1036 (6th Cir. 2011) (holding that Ohio assault statute was a "crime of violence" without reference to *Shepard* documents).

In some cases, the judgment alone does not make clear what the defendant was convicted of. Thus, *Taylor* authorizes a "narrow" factual inquiry to discern what crime the defendant was actually convicted of. For example, this need may arise where a defendant was convicted of violating a statute that had two subparts—one that fit within the category and one that did not. The Supreme Court has explained:

> When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which [are violent felonies] and some of which [are] not, the modified categorical approach that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.[25]

In such cases, a review of court records may show which subsection provided the basis for conviction. In those cases, and only those cases, does a court look beyond the judgment to determine whether the conviction fell within the category. This effort to narrow a broad statute of conviction based on approved records is known as the "modified categorical approach."[26]

While Option A appears to be based on the *Shepard*-approved documents, it allows recourse to the modified categorical approach in every case. Moreover, it does not appropriately limit consideration of some of these documents. For example, the charging instrument can be considered only to the extent that the allegations in that document were proven to a jury beyond a reasonable doubt or admitted by the defendant. Allegations that are not part of the elements of the offense cannot form the basis for enhancement. *See, e.g. United States v. Calderon-Pena*, 383 F.3d 254, 257-59 (5th Cir. 2004) (en banc). With this misunderstanding, a court might find a crime of violence based on language in a charging document, although the plea did not admit all of the facts alleged in the indictment.[27]

One concern we have with the proposed amendment is that it seems to allow recourse to *Shepard*-approved documents in any case where the court applies the categorical approach and not just those cases where the modified categorical approach is required. As it is written, the proposed amendment applies any time a court has to consider "whether a prior conviction falls

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[25] *Johnson v. United States*, 130 S. Ct. 1265, 1273 (2009).

[26] *See, e.g., United States v. Ventura-Perez*, 666 F.3d 670, 673 (10th Cir. 2012) (discussing the modified categorical approach).

[27] *See, e.g., United States v. Lipscomb*, 619 F.3d 474 (5th Cir. 2010) (holding that felon-in-possession conviction was a crime of violence because indictment alleged the gun was a sawed-off shotgun).

within a category of offense," and it invites the court in all such cases to look "beyond the fact of conviction and the statutory definition of the prior offense." Despite this open invitation, under the categorical approach, exploration beyond the fact of conviction and the statutory definition of the prior offense are appropriate only under the modified categorical approach. The proposed language does not explain that these documents are relevant only when determining which crime a defendant was convicted of when the statute of conviction sets forth multiple elements. In the absence of such clarity, it gives the wrong impression that approved documents are always relevant.

The Supreme Court made clear that basing an enhancement on prior conduct rather than convictions entailed "practical difficulties and potential unfairness."[28] The *Taylor/Shepard* approach to determining the nature of prior convictions is the most "pragmatic" and workable solution. *Shepard*, 544 U.S. at 20. This approach is driven by the need to avoid elaborate, protracted "collateral trials" about prior proceedings. *Id*. at 23. If the Commission were to expand the scope of documents that could be considered in determining whether a prior conviction is a qualifying predicate, it would undermine a benefit of the categorical approach by inviting such mini-trials, and courts would be required to resolve a myriad of disputes.[29] Given the large number of criminal cases involving recidivist enhancements, it would be hard to justify asking a busy federal district court to resolve disputes about whether a document accurately and reliably reflects what happened in another criminal case, often years before and in another jurisdiction. Under the *Taylor/Shepard* approach, it is easy to determine what an individual was convicted of: "Simply look to the record of the prior conviction." *United States v. Hayes*, 555 U.S. 415, 436 (2009) (Roberts, C.J., dissenting).

Furthermore, expanding the guideline analysis beyond the categorical approach approved by the courts will create further confusion and inconsistencies as courts are forced to apply different rules in a single case. Some of the enhancements at issue come into play under both the guidelines and the statute. For example, if the expanded record supports a finding that a prior conviction is an aggravated felony, but the *Shepard/Taylor* review does not, a court may be forced to conclude that the prior conviction was an aggravated felony for purposes of §2L1.2 but not for purposes of 8 U.S.C. § 1326.[30] It would be a grave mistake for the Commission to amend

[28] *Shepard*, 533 U.S. at 13.

[29] *See* USSG §6A1.3 (Resolution of Disputed Factors); Fed. R. Crim. P. 32(I). For a discussion of how the use of documents such as police reports and complaint applications would make evidentiary hearings "unavoidable," *see United States v. Shannon*, 110 F.3d 382, 385 (7th Cir. 1997). *See also United States v. Austin*, 426 F.3d 1266, 1270 (10th Cir. 2005) ("The categorical approach allows the sentencing court to examine sources of undisputed information rather than conduct a fact finding inquiry, thereby sparing it from conducting mini-trials on prior offenses which have already been adjudicated.").

[30] Similar difficulties would arise under USSG § 2K2.1 and 18 U.S.C. § 924(e).

the Guidelines in a way that would set up a different method for determining the nature of prior convictions under the Guidelines than what courts use to determine the nature of prior convictions for purposes of statutory sentencing enhancements.

As to unfairness, the Court in *Shepard* made clear that its holding was necessary to preserve *Taylor's* categorical approach. *Shepard*, 544 U.S. at 23 and n.4. Justice O'Connor suggested an extension, which the Commission incorporates in Option B.[31] The problem is that the other suggested documents, such as affidavits, police reports and presentence reports often contain allegations that do not ultimately pertain to the offense of conviction. These affidavits and reports are based on an officer's preliminary investigation. A defendant's plea is the result of an adversary process where the parties weigh what can be proved. It is one thing for a court to rely on statements in a police report in determining a defendant's conduct in the instant offense. At least, the defendant and his attorney are in a position to investigate and litigate those allegations. The same cannot be said of allegations made concerning prior convictions, allegations that may have been made years earlier when witnesses are no longer readily available.

Our preceding comments apply generally to any effort to expand the list of approved sources beyond *Shepard*. Some comments specific to the proposed options are in order. The Commission should not adopt Option B or C because the Supreme Court has specifically disapproved this language. Whatever merit the Commission may find in looking beyond convictions to conduct, this particular language has already been rejected as inconsistent with the categorical approach. Perhaps more significantly, we think it a grave mistake to suggest to courts that applications in support of criminal complaints and police reports are presumptively reliable. Police reports are neither inherently reliable nor unreliable. Their probable accuracy must be examined on a case-by-case basis. *United States v. Leekins*, 493 F.3d. 143, 149 (3d Cir. 2007).

The Commission should not adopt Option C because it confuses the question of general admissibility with the question of relevance under the categorical approach. This option tracks the language of §6A1.3, which speaks generally to the admissibility of "reliable" evidence at sentencing.[32] The proposed amendment implies that all evidence that is reliable is also relevant. As discussed above, evidence of conduct beyond the offense of which the defendant was convicted is not relevant to whether a conviction-based enhancement should apply. Adopting

[31] *Id.* at 36 (O'Connor, J., concurring).

[32] In 2011, we raised concerns about the weak procedural protections in USSG §6A1.3. Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patty B. Saris, Chair, U.S. Sentencing Comm'n, at 16-18 (June 6, 2011).

this language is sure to confuse the courts about what issues are at stake under the categorical approach.

To summarize, on the question of which documents should be included under the categorical approach, we respond that the only relevant sources are those documents that establish what elements were proven by the jury verdict or guilty plea. These documents have been approved by the Supreme Court in *Shepard*, and we see no obvious analogues that ought to be included. On the question of how broadly to apply these amendments should the Commission choose to do so, we urge the Commission to apply them as narrowly as possible.

In conclusion, we believe the Commission's proposals are unnecessary and will lead to greater confusion at sentencing and more litigation, not less.

III. BURGLARY OF A NON-DWELLING

A. Burglary of a Non-Dwelling Should Not Count as A Crime of Violence

The Federal Public and Community Defenders urge the Commission to adopt the second proposed option, amending §4B1.2 to specify that burglary of a non-dwelling is not a "crime of violence." As to the first issue for comment, we submit that the Commission should not direct courts to determine case by case (or category by category) whether any particular burglary "involves conduct that presents a serious potential risk of physical injury to another." This language is far less amenable to consistent and fair application than a simple dwelling/non-dwelling test. As to the second issue for comment, we submit that the Commission should not back-track from its revision of §2L1.2 in 2001 to provide that only burglaries of dwellings are crimes of violence.

1. Section 4B1.2 should be amended to specify that burglaries of non-dwellings are not crimes of violence.

Focusing inquiry on whether the defendant burglarized a dwelling will promote fairness, accuracy, and proportionality in sentencing by distinguishing between burglaries that fairly qualify as crimes of violence and those better characterized as property crimes. Burglary of a non-dwelling ordinarily does not involve a serious potential risk of physical injury because such burglary usually involves an intent to commit theft, not any crime against the person, and the offender will in most instances endeavor not to encounter anyone else unexpectedly. It is therefore not surprising that grading schemes typically make the fact of a dwelling one element of an aggravated burglary offense.[33] Because state statutes often distinguish between burglary of a dwelling and burglaries in other places, judges should be able to apply a dwelling/non-dwelling distinction in a reliable and uniform fashion across the country. For these reasons, adoption of

[33] *E.g.*, Calif. Penal Code § 460 ("inhabited dwelling" defines burglary in first degree)

the second option set forth in Proposed Amendment #7 would both streamline the "crime of violence" inquiry and improve the guidelines' accuracy in identifying defendants whose violent recidivism may warrant extended imprisonment.

2. The fact of a dwelling remains a fundamental distinction in burglary law.

The crime of burglary has been traditionally associated with the home. In fact, the etymological roots of the word "burglar" literally mean "house-thief." 3 E. Coke, Institutes of the Laws of England 63 (1644). At common law, the fact of a "dwelling house of another" was an element of the crime, *Taylor v. United States*, 495 U.S. 575, 580 n.3 (1990), and "burglary was considered to be an offense against habitation rather than against property," *United States v. McClenton*, 53 F.3d 584, 587 (3d Cir. 1995).[34]

While the contemporary, generic definition includes burglary of a structure, *Taylor*, 495 U.S. at 589, state codes continue to treat the burglary of a dwelling more severely than the burglary of any other building or structure. In most states — including nine of the ten most populous[35] — the fact of a dwelling remains an element of either an aggravated burglary or burglary itself.[36] The Model Penal Code preserves the distinction as well. *See* Model Penal Code § 221.1(2) (grading burglary as second-degree felony if "perpetrated in the dwelling of another at night").[37]

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[34] The common law defined burglary as "'the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony.'" *Taylor*, 495 U.S. at 580 n.3 (citations omitted). By contrast, the "generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

[35] The exception is the State of Georgia. *See* Ga. Code Ann. § 16-7-1.

[36] *See* Wayne R. LaFave, *Substantive Criminal Law* § 21.1 at nn.83, 87 and accompanying text (2d. ed. 2011) (non-exhaustive lists naming 28 states). *See also* Fla. Stat. Ann. § 810.02(3)(a),(b); 18 Pa. C. S. § 3502(b)(2) (structure "adapted for overnight accommodation"); Ohio Rev. Code Ann. § 2911.12(A)(2) ("permanent or temporary habitation"); Wash. Rev. Code § 9A.52.025; Ky. Rev. Stat. Ann. § 511.030.

[37] *See also United States v. Rivera-Oros*, 590 F.3d 1123, 1131 (10th Cir. 2009) ("[T]he MPC recognizes that burglary of a dwelling is a substantially more serious offense than other forms of burglary."); *United States v. Echeverria-Gomez*, 627 F.3d 971, 976 (5th Cir. 2010) ("entry into an *inhabited* structure is recognized as most dangerous and most likely to create personal injury") (citation omitted); Michael J. Stephan et.al., *Identity Burglary*, 13 Tex. Rev. L. & Pol. 401, 408 (2009) ("typical burglary statutes indicate criminal activity including intrusion into private spaces (such as residential buildings) is traditionally considered particularly offensive and worthy of more significant punishment than criminal activity occurring in non-residential public spaces").

The Commission itself followed suit in the federal burglary guideline at §2B2.1, which fixes the base offense level solely by reference to whether the burglary was of a "residence." *See* §2B2.1(a) (providing base offense level of 17 if burglary was of residence; 12 otherwise). This has been true ever since the Guidelines were adopted. *See* USSG §§2B2.1, 2B2.2) (1988). Indeed, the Commission initially promulgated wholly separate guidelines for home burglary and other burglary, situating non-residential burglary on a continuum with simple larceny. *Id*. §2B2.2 comment. backg'd. Although the Commission decided to promulgate a single burglary guideline, the commentary explains that "the base offense level for residential burglary is higher than for other forms of burglary because of the increased risk of physical and psychological injury." USSG §2B2.1, comment. (backg'd.).

Underscoring the distinction between dwelling and non-dwelling burglary, the federal courts of appeals have commonly held that burglaries of various types of non-dwellings are not crimes of violence because they do not present a serious potential risk of physical injury to another. *See United States v. Brown*, 631 F.3d 573 (1st Cir. 2011) (holding night-time burglary of a building, as defined by Massachusetts law, is not a crime of violence); *United States v. McFalls*, 592 F.3d 707, 715 (6th Cir. 2010) (burglary of a building, as defined by South Carolina law to include sheds within 200 feet of a dwelling, not a crime of violence); *United States v. Matthews*, 374 F.3d 872, 880 (9th Cir. 2004) ("[B]urglary of an occupied building ― where 'occupied' merely indicates lack of abandonment and does not indicate a person's physical presence ― is simply too broad a category to necessarily 'present a serious potential risk of physical injury to another,' as required by U.S.S.G. § 4B1.2(a)(2)."); *United States v. Hoults*, 240 F.3d 647, 652 (7th Cir. 2001) (burglary of an "apartment" not a crime of violence when record foreclosed any conclusion that conviction was for burglary of a dwelling); *United States v. Jackson*, 22 F.3d 583, 585 (5th Cir. 1994) (burglary of vacant house not a crime of violence).

Given these decisions, the distinction between burglary of a residence and of other structures recognized in §2B21.1 and in state sentencing provisions , the second option of Proposed Amendment #7 accords with well-established sentencing practice. A contrary rule would seriously undermine the principle of proportionality by punishing persons with less severe prior convictions the same as those with more serious convictions.

3. The fact of a dwelling is a sound proxy for whether a burglary was a "crime of violence."

For several reasons, the fact of a dwelling functions effectively to distinguish "violent" from "non-violent" burglaries. The first relates to the degree of risk involved. Unlike other structures, dwellings are reasonably likely to be occupied at any given time: people do not keep "home hours," but come and go as they please. *See Brown*, 631 F.3d at 579 (observing that dwellings, unlike many buildings, are "regularly occupied at all hours"). Moreover, it is much more difficult to tell whether someone is inside a home than it is to tell whether other kinds of

buildings and structures are occupied. In an office, darkness and silence mean no one is present; in a home, such quietude may equally well mean that the residents are asleep.

The violent aspect of burglary consists largely in the potential for a startling, unexpected confrontation between the burglar and another person. *See Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011). Because a dwelling may be occupied at any time, even when it appears empty from the outside, burglary of a dwelling creates a much greater risk of violence than does burglary of a non-dwelling. *McClenton*, 53 F.3d at 588 (recognizing as "obvious" that there is greater possibility of confrontation in burglaries of dwellings than burglaries of structures "not intended for use as habitation, such as an office building after office hours or a warehouse").[38] Moreover, the home burglar intrudes into a space to which others have retired for shelter and safety. Should a confrontation occur, residents are unlikely to perceive any possibility of further retreat, thus further increasing the possibility that a confrontation will precipitate violence. *See James v. United States*, 550 U.S. 192, 226 (2007) (Scalia, J., dissenting) (noting significance of confrontation's occurrence in "the confined space of the victim's home," given the "greater likelihood of the victim's initiating violence inside his home to protect his family and property").

A second reason why the fact of a dwelling is a sound proxy for "violent" burglary is that burglars of non-dwellings rarely if ever act with an intent to commit another felony against a person. When a person burglarizes a non-dwelling such as a store or office, it would be extraordinary for his intent to be anything other than the theft of property. By contrast, a person convicted of burglarizing a home may be intent on assaulting, raping, or otherwise injuring a resident. Only in the case of home burglaries can there be any likelihood that the burglar's intent is to commit a crime against the person. For this reason, dwelling house burglars are typically more culpable than those who burglarize other structures.

Given these distinctions, the fact of a dwelling is probably the single best indication of whether the offender was at least aware of, and may have intended to create, a "serious potential risk of physical injury to another." By contrast, in the ordinary burglary of a non-dwelling, the offender commonly has reason to believe that the risk of physical injury is slight or even non-existent, and certainly does not intend to cause any such injury. *See Brown*, 631 F.3d at 579 (observing that "the threat of violence during the offense is fairly speculative" when state law defines burglary to reach "detached garages and storage facilities").[39] Specifying that burglaries of non-dwellings are not crimes of violence therefore promises to ensure that the highest

[38] *See also Brown*, 631 F.3d at 579 (concluding that risk associated with burglary of a "building," considered categorically, is not "comparable to" risk associated with burglary of a dwelling); *Jackson*, 22 F.3d at 585 (same).

[39] See also *United States v. Howze*, 343 F.3d 919, 924 (7th Cir. 2003) (finding that burglary clearly involves less than a two percent risk of physical injury, without stating how much less).

sentences are reserved for those defendants whose criminal history properly warrants special concern for incapacitation.[40]

4. Permitting non-dwelling burglaries to count as crimes of violence would sweep too broadly, waste correctional resources, and provide judges less reason to follow the Career Offender guideline.

It is important to draw a bright line between qualifying and non-qualifying burglaries not only as a matter of fairness, but also as a matter of the sound use of correctional resources and to avoid even more dissatisfaction with the severity of the Career Offender guideline. Given the breadth of today's state burglary laws[41]— it is not surprising that burglary convictions are far more common than convictions for other offenses that Congress and the Commission have identified as crimes of violence. In fact, more defendants are convicted each year of burglary than of murder, manslaughter, sexual assault, and robbery — combined.[42] At the same time, state

[40] It should be borne in mind that, insofar as any particular non-dwelling burglary features unusually aggravated circumstances, a district court can always account for that fact by selecting a higher point within a Guidelines range, finding that the defendant's criminal history score is underrepresented and departing upward pursuant to U.S.S.G. § 4A1.3, or varying upward in the exercise of discretion under 18 U.S.C. § 3553(a).

[41] We note here that there is no standard definition of "burglary" in state statutes and option 1 of the proposed amendment offers no definition. *Taylor* identified a clear generic definition of burglary that includes any building or structure. The burglary statutes of many states, however, include the unlawful entry into a water craft, motor vehicle, tents, booths, sheds, and even vending machines. *See United States v. Wilson*, 168 F.3d 916, 927 (6th Cir. 1999) (discussing breadth of Illinois burglary statute); *Illinois v. Beauchamp*, 944 N.E.2d 319 (Ill. 2011) (upholding burglary conviction for theft of rear hatchback window from SUV); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (describing Oregon burglary statute reaching "any booth, vehicle, boat, aircraft or other structure adapted for carrying on business therein"); *United States v. Stymiest*, 581 F.3d 759, 768 (8th Cir. 2009) (describing South Dakota statute, which describes "structure" to include "motor vehicles, watercraft, aircraft, railroad cars, trailers, and tents"); *United States v. McFalls*, 592 F.3d 707, 715 (6th Cir. 2010) (describing South Carolina statute reaching "uninhabitable sheds up to 200 yards from a generic dwelling"); Tex. Penal Code Ann. § 30.03 (West 2012) (setting forth offense of burglary of coin-operated or Coin Collection Machines); *Taylor*, 495 U.S. at 591 (remarking on sweep of state burglary statutes). If the Commission chooses to expand the definition to include burglary of non-dwellings, which we believe it should not, it should limit it to burglary of a structure.

[42] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts* tbl.1.1 (Dec. 2009), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2152. The Justice Department survey estimated that in 2006 there were just shy of 100,000 burglary convictions entered in state courts, whereas there were about 42,000 robbery convictions, 33,000 sexual assault convictions, and far fewer murder and manslaughter convictions. *Id.* In 2010 alone, there were 495,749 nonresidential burglaries reported to the FBI. U.S. Dept't of Justice, Federal Bureau of Investigation, *Crime in the United States 2010*, Table 23, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl23.xls#overview.

prison sentences for each of these other crimes of violence, as well as for aggravated assault, are longer than sentences for burglary.[43]

Consistent with these statistics, the Supreme Court and individual Justices have concluded that burglary creates a smaller risk of physical injury than most or all other "crimes of violence." *See James*, 550 U.S. at 225 (Scalia, J., dissenting) ("I think it obvious that burglary is ... the least inherently risky of the four crimes enumerated in § 924(e)(2)(B)(ii)"); *id*. at 227 (describing "assault" as "far more serious" than attempted burglary). *See also Sykes*, 131 S. Ct. at 2273-74 (opinion of Court) (stating that vehicle flight "presents more certain risk" than burglary); *id.* at 2279 (Thomas, J., concurring) (vehicle flight involves "much more" risk than burglary).

One leading circuit decision illuminates how broadly the Career Offender guideline can sweep absent a dwelling condition. In *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2009) (en banc), the court overruled its earlier decision in *United States v. Fiore*, 983 F.3d 1 (1st Cir. 1992), which had held that burglary of a non-dwelling was categorically a crime of violence. Timothy Giggey, the defendant, was originally designated a Career Offender on the basis of a conviction for burglarizing a bottle redemption center in an effort to collect "empties" that could be "re-redeemed," as it were, for five cents each. This would seem a prototypical (and rather pathetic) case of property crime. Yet until the First Circuit reversed itself, it was treated as a "crime of violence" triggering the Career Offender enhancement.

Given that burglary convictions are far more common and usually less serious than convictions for other "crimes of violence," a dwelling precondition is essential. By distinguishing burglaries that are in essence property crimes from burglaries in which the offender knowingly or deliberately creates a serious potential risk of injury, the dwelling requirement will ensure that §4B1.2 does a better job of identifying defendants whose histories may warrant expenditure of the correctional resources entailed by extra years of imprisonment.

In promulgating guidelines, the Commission is statutorily mandated to take into account the "nature and capacity of the penal, correctional, and other facilities and services available," 28 U.S.C. § 994(g). While we are unaware of any prison and sentencing impact analysis the Commission has done with regard to option 1, the prison and fiscal impact of expanding the definition of crime of violence to include "burglary" would be staggering. For instance, the defendant in the First Circuit's decision in *Brown*, 641 F.3d 573, was sentenced to 75 months imprisonment. Had his prior conviction for breaking and entering into a sporting goods store counted as a "crime of violence," he would have received an additional 187 months under the

[43] *Felony Sentences in State Courts*, *supra* note 41, at tbl. 1.3, 2d col. *See also* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 70 fig. 2 (June 18, 1987) (illustrative bar graph showing that burglary sentences have traditionally been about one-quarter the length of sentences for robbery and offenses against the person).

Career Offender guideline. That additional 187 months would have cost $440,761[44] – the same amount of money it would cost to purchase substance abuse treatment for 886 offenders or cognitive-behavioral mental health treatment for 747 offenders.[45]

The cumulative prison and fiscal impact of the hefty increases in sentences that would occur with option 1 is even more striking.[46] In just seven of the cases discussed herein, not counting a prior non-residential burglary conviction saved 60.3 years in prison time at a cost-savings of 1.7 million dollars.[47] That same amount of money would purchase substance abuse treatment for 3431 offenders, cognitive-behavioral treatment for 2890 offenders, and sex offender treatment for 1209 post-conviction offenders.

Should the Commission pursue option 1 notwithstanding its many failings, it will not only waste correctional resources, but it will fuel additional criticism of a guideline that produces "some of the most severe penalties imposed under the guidelines."[48] Dissatisfaction with the Career Offender guideline is evidenced by the high rate of non-government sponsored below

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[44] The monthly cost of imprisonment for FY 2010 was $2357.01. Matthew Roland, Depute Ass't Director, Administrative Office of U.S. Courts, *Costs of Incarceration and Supervision* (June 2011), http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2011_Archive/ppsad000182.html.

[45] Costs are calculated using FY 2010 costs of imprisonment; *see id*, and FY 2010 average expenditures per client for various treatments. *See* Honorable Robert Holmes Bell, Chair, Judicial Conference Committee on Criminal Law, *Cost-Containment Strategies Related to Probation and Pretrial Services Offices* 6-7 (Feb. 2012), http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2012_Archive/Dir12015.html.

[46] Even without an expansive change like option 1, the number of defendants sentenced as Career Offenders increased 144 percent from FY1996 to FY2010, whereas the total number of cases sentenced under the Guidelines increased 97.8 percent. USSC, *2010 Sourcebook of Federal Sentencing Statistics* , Tbl. 22 (2010) (hereinafter *2010 Sourcebook*); USSC, *1996 Sourcebook of Federal Sentencing Statistics*, Tbl. 22 (1996).

[47] *See* Addendum A.

[48] USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004). *See generally* Amy Baron-Evans, Jennifer Coffin, and Sara Silva, *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39, 80-83 (2010) (discussing judicial criticism of Career Offender guideline). *See also United States v. Woody*, 2010 WL 2884918, *9 (D. Neb. 2010) (varying from Career Offender guideline range of 262-327 months where, inter alia, defendant was not typical Career Offender inasmuch as her "violent felony conviction was for an offense, burglary of a storage unit, that is less serious than most crimes that are characterized as violent"); *United States v. Corber*, 593 F. Supp. 2d 1236, 1237 (D. Kan. 2009) (court imposed sentence below Career Offender guideline because defendant's prior residential burglary convictions did not involve actual or serious potential risk of violence or injury).

guideline sentences – 27.7 percent in FY 2010 Career Offender cases compared to 17.8 percent for all cases.[49]

In the absence of strong empirical evidence that lengthening prison sentences on the basis of prior nonresidential burglaries would promote public safety or otherwise serve the purposes of sentencing, option 1 should be rejected.

5. USSG §§4B1.1 and 4B1.2 Do Not Parallel 18 U.S.C. § 924(e).

The notion that the guidelines should count all burglaries as crimes of violence simply because they are violent felonies under a similar clause in 18 U.S.C. § 924(e) is specious. The Career Offender guideline is already substantially broader than § 924(e). Under § 924(e), the instance offense of conviction must be under 18 U.S.C. § 922(g). Under the Career Offender guideline, the instant offense can be any one of a number of crimes of violence or controlled substance offense. Under § 924(e), the defendant must have three convictions committed on occasions different from one another. Under the Career Offender guideline, the defendant need only have two convictions that are counted separately for criminal history purposes. Under § 924(e), a predicate drug offense must be punishable by ten years of imprisonment or more. Under the Career Offender guideline, a drug offense need only by punishable by a term of one year or more.

Given the broad reach of the Career Offender provisions, it is unremarkable that the number of defendants sentenced under the Career Offender guideline is almost four times greater than the number sentenced under the Armed Career Criminal provision.[50] We believe that far too many offenders currently receive severe sentences under the Career Offender guideline and no sound penological reason supports expanding the definition of crime of violence to include non-dwelling burglaries so that even more defendants are subject to overly harsh sentences.

B. The Commission should not direct courts to determine case by case (or category by category) whether a burglary "involves conduct that presents a serious potential risk of physical injury to another."

The Commission seeks comment on whether it should consider a "third option," whereby §4B1.2(a) would be amended to specify that courts should determine whether burglary "involves conduct that presents a serious potential risk of physical injury to another" based on "the individual circumstances of each case." United States Sentencing Commission, Sentencing Guidelines for United States Courts, 77 Fed. Reg. 2778, 2791-92 (Jan. 19, 2012). Such an

[49] Source: FY 2010 Data Monitoring Set; USSC, *2010 Sourcebook* 50.

[50] *2010 Sourcebook*, Tbl. 22 (616 cases sentenced under armed career criminal provision; 2314 sentenced under Career Offender guideline).

approach would have significant disadvantages that can be avoided by specifying that burglaries of non-dwellings are not crimes of violence.

The "serious potential risk" test appears in the so-called "residual clause" of §4B1.2(a), providing that an offense is a "crime of violence" if it "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." It may be tempting to imagine this "eminently reasonable but entirely abstract condition" being applied "case by case in its pristine abstraction." *James*, 530 U.S. at 229-30 (Scalia, J., dissenting). Unfortunately, however, unraveling the meaning of "serious potential risk" has proved an endeavor that consumes substantial judicial resources only to generate an apparently perpetual need for more. "The residual-clause series," Justice Scalia has warned, "will be endless, and we will be doing ad hoc application of [its language] to the vast variety of state criminal offenses until the cows come home." *Sykes*, 131 S. Ct. at 2287. The Ninth Circuit adds that "over the past decade, perhaps no other area of the law has demanded more of our resources." *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) (en banc).

At present, courts continue to struggle to define even what "offense" it is that must be considered for purposes of the "serious potential risk" inquiry. Generally, it has been thought that courts should take a "categorical" approach, which looks to the elements defined by law, rather than the particulars of the defendant's conduct. *See James*, 550 U.S. at 208; Sentencing Guidelines for United States Courts, 77 Fed. Reg. at 2789 (explaining that "lower courts have ... applied the 'categorical approach' ... to guideline provisions"). But it may be that the "offense" is whatever conduct was expressly charged in the count of which the defendant was found guilty. *See* §4B1.2 comment. (n.1). Alternatively, the "offense" may be the conduct described by those facts "necessarily" found to support the conviction. *Shepard v. United States*, 544 U.S. 13, 26 (2005). As to what "necessarily" means, some think it means "necessary" in light of the theory submitted by the government, *see Aguila-Montes de Oca*, 655 F.3d at 936-37 (6-5 decision), while others would look to what is "necessary" as a matter of law, *see id.* at 956-57 (Berzon, J., dissenting). If all this is not enough, there is further debate over what documents are sufficiently reliable to support judge-made findings of fact that result in sentencing ranges providing for years upon years of additional incarceration. *See* Sentencing Guidelines for United States Courts, 77 Fed. Reg. at 2789-90.

Thankfully, greater clarity is possible with respect to burglary offenses. The existence of a dwelling element under most state grading schemes ensures that reliable court records — charging documents, jury instructions, and plea colloquies — disclose whether or not a burglary was of a dwelling. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) ("An indictment must set forth each element of the crime that it charges.") (internal quotation marks omitted). By specifying that burglaries of dwelling are crimes of violence while burglaries of

non-dwellings are not, the Commission will thus supply courts with a rule that is amenable to consistent application across the country. There will be no occasion for judges to sift competing statistical analyses about the likelihood of physical injury, nor will judges be left to subjective assessments of risk that can vary widely from one person to another. Whatever "serious potential risk of physical injury" may prove to mean — and even should it prove too vague to have any meaning, *see Derby v. United States*, 131 S. Ct. 2858 (2011) (Scalia, J., dissenting from denial of certiorari) — adoption of a simple dwelling/non-dwelling distinction provides guidance "concrete" enough to ensure that the Career Offender and firearms guidelines, among others, "will be applied with an acceptable degree of consistency by the hundreds of district judges who impose sentences every day." *James*, 550 U.S. at 215 (Scalia, J., dissenting).

C. No change should be made to §2L1.2.

The second issue for comment asks whether, should §4B1.2 be amended, a parallel change should be made to the definition of "crime of violence" in §2L1.2. Any such change should be rejected, as it would amount to a reversal of the course the Commission has followed for the last decade.

In contrast to the Career Offender guideline, the immigration guideline does not define "crime of violence" in terms of whether an offense presents a serious potential risk of physical injury to another. Instead, the §2L1.2 definition enumerates 12 offenses that qualify, including "burglary of a dwelling," and then directs courts also to count "any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." §2L1.2 comment. (n.1(B)(iii)). Burglary, be it of a dwelling or otherwise, does not have as an element the use, attempted use, or threatened use of physical force. *See Taylor*, 495 U.S. at 598. Thus, only burglary of a dwelling, as one of the 12 specifically enumerated offenses, constitutes a crime of violence for purposes of the immigration guideline.

Section 2L1.2's present treatment of burglary traces to that guideline's wholesale revision in 2001. Before that time, an offense could trigger a 16-level enhancement in base offense level if it was an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43), which in turn covers "crimes of violence" meeting this definition:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its 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.

18 U.S.C. § 16. As amended in 2001, §2L1.2 came to provide that a conviction's character as an "aggravated felony," without more, triggers an 8-level enhancement, whereas "crimes of violence" ― *e.g.*, "burglary of a dwelling" ― continues to trigger a 16-level enhancement. The amendment addressed "concerns raised by judges, probation officers and defense attorneys, particularly in the district along the southwest border between the United States and Mexico, that §2L1.2 ... sometimes results in disproportionate penalties because of the 16-level enhancement provided in the guideline.... The Commission also observed that the criminal justice system has been addressing this inequity on an *ad hoc* basis in such cases by increased use of departures." USSG App. C, Amend. 632 (Nov. 1, 2001). The amendment "responded to those concerns by providing a more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant." *Id*. In establishing this graduated scheme, the Commission properly distinguished between burglaries of dwellings and burglaries of non-dwellings.

Judges, probation officers and defense attorneys continue to express concerns that the 16-level "crime of violence" enhancement remains excessive in many cases. In FY2010, 68.1 percent of defendants facing the 16-level enhancement received a below-Guidelines sentence, of which 43.8 percent were the result of a government request.[51] Significantly, where the government has chosen not to use its fast-track departure authority to soften the enhancement's impact, the courts have responded on an "ad hoc" basis. Thus, in the Southern District of Texas, which has one of the largest immigration dockets in the country, 34 percent of defendants facing the 16-level enhancement received a non-government-requested below-guidelines sentence ― a striking contrast with the relatively low rate of departures in that district across all prosecutions.[52]

Were the Commission to revise §2L1.2 to permit non-dwelling burglaries to trigger a 16-level enhancement, it would only exacerbate the lack of uniformity that already appears in the immigration guideline's application. The Commission should not take a step backward from the partial improvement achieved by the 2001 amendment. Accordingly, we urge the Commission not to amend §2L1.2 in the fashion contemplated by the second issue for comment.

CONCLUSION

For many of our clients, the amount of time they will serve behind bars depends upon whether they are subject to recidivist sentencing provisions. Their prior convictions are often counted in their criminal history score and then to increase the offense level or mark them as career offenders. The use of prior convictions to increase sentences should be reserved for those

[51] Source: FY 2010 Data Monitoring Set.

[52] *Id.*

offenders who truly need to be incapacitated for longer periods of time because they present a genuine danger to the community. Defendants with prior convictions for burglary of a non-dwelling or whose probation was revoked on a drug trafficking offense after they returned to this country rarely, if ever, fall within the worst-of the-worst.

The current categorical approach to classifying prior offenses, which relies on *Shepard* approved documents, works well enough. It permits courts to identify those offenders whose prior convictions may be serious enough to warrant increased punishment while at the same time avoiding protracted litigation about the conduct underlying the prior offense.

Addendum

Effect of counting burglaries of non-dwellings as "crimes of violence"

Case	Counting BND as COV	Not counting BND as COV
United States v. Brown, 631 F.3d 573 (1st Cir. 2011)	262 months	27-33 months[1]
United States v. McFalls, 592 F.3d 707 (6th Cir. 2009)	188 months	77 months
United States v. Matthews, 374 F.3d 872 (9th Cir. 2004)	120 months (922(g) conviction)	90 months
United States v. Hoults, 240 F.3d 647 (7th Cir. 2001).	262 months	115 months
United States v. Jackson, 22 F.3d 583 (5th Cir. 1994).	54 months (922(g) conviction)	30 months
United States v. Giggey, 551 F.3d 27 (1st Cir. 2009) (en banc)	95 months (pursuant to Judge Hornby's 4A1.3 downward departure to range of 140-175 months, and further unspecified "agreed-to adjustments")	42 months
United States v. Wilson, 168 F.3d 916 (6th Cir. 1999)	360 months	188 months

[1] From the government's brief on appeal in *Brown*: "After appellant Robert Brown, III, was convicted of distributing cocaine, his report of presentence investigation (PSI) revealed that his record of prior convictions made him a Career Offender (PSI ¶15). Within the Career Offender range, the court sentenced him to imprisonment for 262 months (Docket #276). When the Government consented to a remand in light of *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (en banc), the sentencing court ruled that a 1988 Massachusetts conviction for breaking and entering in the nighttime did not qualify as a Career Offender predicate (D.A 61). Although the resulting Guideline range was imprisonment for 27 to 33 months, the court imposed a variant sentence of 75 months, which was effectively time served (D.A. 71)."