

**United States Sentencing Commission Public Meeting Minutes**  
**August 7, 2015**

Chair Patti B. Saris called the meeting to order at 1:00 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Chair Saris called for a motion to adopt the April 9, 2015, public meeting minutes. Commissioner Barkow made a motion to adopt the minutes, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris reported that the Commission submitted to Congress its report assessing the impact of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, which, among other things, reduced the statutory 100-to-1 drug quantity ratio of crack to powder cocaine. The Commission's report found that the Fair Sentencing Act reduced the disparity between crack and powder cocaine sentences, substantially reduced the federal prison population, and resulted in fewer federal prosecutions for crack cocaine. Despite the reduction in penalties, the Chair noted, the rates of crack cocaine offenders cooperating with law enforcement have not changed. The Chair added that all the foregoing occurred while crack cocaine use continued to decline. The full report is available on the Commission's website.

Chair Saris announced that approximately 1,000 individuals have registered to attend the Commission's 2015 National Training Program at the Hilton Riverside in New Orleans, LA, on September 16-18, 2015. She added that registration was closed.

Chair Saris noted that in October, David Debold's final term as Chair of the Commission's Practitioners Advisory Group (the "PAG") will expire. She thanked Mr. Debold on behalf of the Commission for his exemplary years of service to the Commission.

Chair Saris recounted how, in January 2009, the Commission adopted a formal written charter for the PAG. The Commission did so in order to ensure that a diverse cross-section of the private defense bar was well-represented on the advisory group. The charter also empowered the Chair and Vice Chair of the PAG to appoint attorneys and other professionals in criminal defense fields as non-voting members. She stated how it was important to the Commission to have the newly constituted PAG be chaired by an individual highly versed in federal criminal defense matters and that requirement led the Commission to select Mr. Debold to serve as the Chair.

Chair Saris noted that Mr. Debold is a partner in the Washington, D.C., office of Gibson, Dunn & Crutcher LLP where he practices in the Litigation Department, with special emphasis on appellate matters, internal investigations and complex civil and criminal cases. Prior to joining Gibson Dunn, Mr. Debold was an assistant United States attorney in Detroit, Michigan, where he served in both the criminal and appellate divisions. In 1991 he served as special counsel to the Commission and has lectured nationally on federal sentencing issues. He graduated magna cum laude from Harvard Law School, and was a law clerk to the Honorable Cornelia G. Kennedy of the United States Court of Appeals for the Sixth Circuit.

Chair Saris noted that Mr. Debold's contribution to the Commission's work has been considerable and that he will be missed when his term expires. On behalf of the Commission and staff, Chair Saris thanked Mr. Debold for his service.

Chair Saris next introduced two individuals who recently joined the staff of the Commission for one year details. Mr. David Porter is an Assistant Federal Public Defender from the Eastern District of California, where he has worked since 1995. Chair Saris expressed the Commission's pleasure that the Federal Public Defenders have continued their commitment to provide a detailee to the Commission. She stated that the commissioners value the input that they routinely receive from the Federal Public Defenders and having a Federal Public Defender from the field join the staff of the Commission provides meaningful assistance to the Commission in the development of sentencing policy.

Chair Saris next introduced Ms. Cynthia Lie, an Assistant United States Attorney from the District of Hawaii where she has prosecuted fraud and financial crimes since 2012. Prior to joining that office, Ms. Lie worked for 12 years as a federal prosecutor in the Chair's District of Massachusetts in the major crimes unit.

Chair Saris called on Ms. Grilli to inform the Commission on a possible vote to promulgate technical amendments to the commentary in the Guidelines Manual.

Ms. Grilli stated that the proposed amendment, attached hereto as Exhibit A, makes certain technical and conforming changes to commentary in the Guidelines Manual. First, the proposed amendment reorganizes the commentary to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), so that the order of the application notes better reflect the order of the guideline provisions to which they relate. The proposed amendment also makes stylistic changes to the commentary to §1B1.3, such as adding headings to certain application notes. To reflect the renumbering of application notes in §1B1.3, conforming changes are also made to the

commentary to §§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2X3.1 (Accessory After the Fact), and 2X4.1 (Misprision of Felony).

Second, the proposed amendment makes clerical changes to correct typographical errors in Application Note 8(D) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and Application Note 7 to §8C2.8 (Determining the Fine Within the Range (Policy Statement)).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Chair Saris stated that the next item of business was a possible vote to adopt the final policy priorities for the 2015-2016 amendment cycle. She called on the General Counsel, Ms. Grilli, to advise the Commission on that matter.

Ms. Grilli explained that a notice of possible policy priorities was published in the Federal Register on June 25, 2014, and that the Commission received and reviewed public comment pursuant to that notice. Ms. Grilli advised the commissioners that a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission's 2015-2016 amendment cycle, attached hereto as Exhibit B, would be in order.

Chair Saris called for a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission's 2015-2016 amendment cycle. Vice Chair Breyer made such a motion, with Commissioner Pryor seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris stated that the next item of business was a possible vote on adoption of a revised statement of reasons form. She called on the General Counsel, Ms. Grilli, to advise the Commission on that matter.

Ms. Grilli explained that pursuant to 28 U.S.C. § 994(w), sentencing courts' are required to provide a written statement of the reasons for the sentence imposed and that those reasons must "be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." At the direction of the Commission, the existing statement of the reasons form, last revised in September 2011, has been further revised, in large part, to obtain information about the reasons underlying a sentencing court's decision to vary from the guideline range pursuant to the court's authority under 18 U.S.C. §

3553(a). Ms. Grilli noted that the revised form was before the commissioners for their consideration and that a motion to adopt the revised form would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to adopt the revised statement of reasons form, with Vice Chair Breyer seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris explained that, in the current version of the statement of reasons form, when a court varies from the guideline range pursuant to one of the section 3553(a) factors, the court checks a box on the form to indicate the particular factor or factors that the court determined to be relevant. For example, the court could check the box next to the section 3353(a)(1) factor for “the nature and circumstances of the offense and the history and characteristics of the defendant.” The current form also includes a section in which the court can explain those facts which justified its sentence. The Chair noted that while some judges complete this section, others do not.

Chair Saris stated that the revised form the Commission just adopted added additional check boxes to the form under the relevant section 3553(a) factors with reasons for variances commonly supplied by courts on the current form. With the advent of the new form, she continued, the Commission hopes to collect more robust data about variances that will guide the Commission’s development of sentencing policy in the future. The revised form will also provide a better record of the court’s reasons.

Chair Saris explained that the new form does not take effect immediately. It still must be issued by the Judicial Conference. The Chair stated that she has been advised that the Criminal Law Committee has recommended that consideration of the revised form be included on the Judicial Conference’s consent calendar for its September 2015 meeting. Assuming that the Conference approves issuance of the form, the Chair added, the new form would take effect at the beginning of the fiscal year- or on October 1, 2015. If so, the Commission will notify courts about the revised form and will provide the necessary training on proper completion of the form.

Chair Saris stated that the next item of business was a possible vote to publish in the Federal Register a proposed guideline amendment and issues for public comment responding to the Supreme Court’s recent case of Johnson v. United States.<sup>1</sup> She called on the General Counsel, Ms. Grilli, to advise the Commission on that matter.

Ms. Grilli stated that the proposed amendment, attached hereto as Exhibit C, was a result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). The proposed amendment was also informed by the Supreme Court’s recent

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<sup>1</sup> See \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551 (2015).

decision in Johnson, relating to the statutory definition of “violent felony” in 18 U.S.C. § 924(e), which held that an increased sentence under the “residual clause” of that definition violates due process. The proposed amendment contains several parts.

Part A of the proposed amendment amends §4B1.2 (Definitions of Terms Used in Section 4B1.1) to delete the residual clause from the definition of “crime of violence.” In addition, the proposed amendment amends §4B1.2 to revise the list of enumerated offenses, move all enumerated offenses to the guideline, and provide definitions for the enumerated offenses in the commentary.

Part B amends how to use a state’s felony classification in determining whether an offense qualifies as a “felony” under §4B1.2. The proposed amendment would require that, to qualify as a felony that is a crime of violence or a controlled substance offense for purposes of the career offender guideline at §4B1.1 (Career Offender), the offense must also have been classified at the time defendant was initially sentenced as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted.

Part C revises the definitions of “crime of violence” and “drug trafficking offense” in §2L1.2 (Unlawfully Entering or Remaining in the United States) to bring them more into parallel with the definitions in §4B1.2. Under the proposed amendment, the definitions in §2L1.2 would generally follow the definitions in §4B1.2, as revised by Parts A and B of the proposed amendment.

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a public comment period ending November 12, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Vice Chair Breyer seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris explained that with the vote to publish the proposed amendment, the Commission is seeking comment on proposed changes to existing guideline definitions relating to the nature and impact of a defendant’s prior convictions for a “crime of violence.” The proposed changes are primarily intended to comport the sentencing guideline provision applicable to certain repeat “career offenders” to the Supreme Court’s recent decision in Johnson v. United States.

In Johnson, the Supreme Court struck down as unconstitutionally vague a portion of the statutory definition of “violent felony” used in a similar penalty provision in the Armed Career Criminal Act (ACCA). While the Supreme Court in Johnson did not consider or address sentencing guidelines, the statutory language the Court found unconstitutionally vague, often referred to as the “residual clause,” is identical to language contained in the “career offender” sentencing guideline.

Chair Saris stated that, consistent with Johnson, the proposal would eliminate from the guideline

definition of “crime of violence” the residual clause, which provides that a “crime of violence” includes a felony offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” In addition, the proposal would provide definitions for several enumerated crimes of violence

Chair Saris noted that the Commission has already seen litigation over the impact of Johnson on the sentencing guidelines. In light of uncertainty resulting from the Johnson decision, the Commission believes that it is prudent to begin considering whether, as a matter of policy, the guidelines should also eliminate the residual clause. She explained that the Commission wanted to begin the process of seeking public comment so that the Commission could vote on a guideline amendment as early as possible, perhaps as soon as January 2016. However, Chair Saris emphasized, the proposed amendment is only preliminary and we look forward to public comment furthering informing us on this complex topic. She noted that the Commission also intends to continue to study recidivist enhancements including those based on prior drug convictions in the guidelines throughout the upcoming amendment cycle.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Breyer made a motion to adjourn, with Commissioner Pryor seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:20 p.m.

EXHIBIT A

**PROPOSED AMENDMENT: TECHNICAL**

**Synopsis of Proposed Amendment:** *This proposed amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.*

*First, the proposed amendment reorganizes the commentary to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), so that the order of the application notes better reflects the order of the guideline provisions to which they relate. The Commission had previously reorganized notes 1 and 2 into notes 1 through 4, also redesignating notes 3 through 10 as notes 5 through 12, in a recently promulgated amendment. See Amendment 1 of the amendments submitted by the Commission to Congress on April 30, 2015, 80 Fed. Reg. 25782 (May 5, 2015). This proposed amendment would further rearrange the commentary, specifically notes 5 through 12. The following table shows the renumbering of notes 5 through 12 that would result from the proposed amendment in comparison to the current Guidelines Manual and the recently promulgated amendment to §1B1.3.*

<i>2014 Guidelines Manual</i>	<i>Recently Promulgated Amendment</i>	<i>Proposed Technical Amendment</i>
3	5	5(A)
9	11	5(B)
8	10	5(C)
4	6	6(A)
5	7	6(B)
6	8	7
7	9	8
10	12	9

*The proposed amendment also makes stylistic changes to the commentary to §1B1.3, such as adding headings to certain application notes. To reflect the renumbering of application notes in §1B1.3, conforming changes are also made to the commentary to §§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2X3.1 (Accessory After the Fact), and 2X4.1 (Misprision of Felony).*

*Second, the proposed amendment makes clerical changes to correct typographical errors in Application Note 8(D) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and Application Note 7 to §8C2.8 (Determining the Fine Within the Range (Policy Statement)).*

**Proposed Amendment:**

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on

the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
  - (i) within the scope of the jointly undertaken criminal activity,
  - (ii) in furtherance of that criminal activity, and
  - (iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

- (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

#### Commentary

#### Application Notes:

1. **Sentencing Accountability and Criminal Liability.**—*The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable*



*guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*

2. Accountability Under More Than One Provision.—*In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.*

3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—

(A) In General.—*A “jointly undertaken criminal activity” is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

*In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:*

- (i) *within the scope of the jointly undertaken criminal activity;*
- (ii) *in furtherance of that criminal activity; and*
- (iii) *reasonably foreseeable in connection with that criminal activity.*

*The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., “within the scope,” “in furtherance,” and “reasonably foreseeable”) is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.*

(B) Scope.—*Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the “jointly undertaken criminal activity” is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant’s agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).*

*In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the*

*contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.*

*A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.*

- (C) *In Furtherance.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.*
- (D) *Reasonably Foreseeable.—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.*

*Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).*

*With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.*

*The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).*

4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—

(A) Acts and omissions aided or abetted by the defendant.—

- (i) *Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.*

*In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.*

(B) Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.—

- (i) *Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the*

money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.—

- (i) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the \$800 check).
- (ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.
- (iii) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not within the scope of his jointly

*undertaken criminal activity (the importation of the single shipment of marihuana).*

- (iv) *Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.*
- (v) *Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).*
- (vi) *Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.*
- (vii) *Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant*

*S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).*

- (viii) *Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B).*

5. **Application of Subsection (a)(2).—**

- (A) **Relationship to Grouping of Multiple Counts.—**“Offenses of a character for which §3D1.2(d) would require grouping of multiple counts,” as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to

apply.

As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

⚡ (B) **“Same Course of Conduct or Common Scheme or Plan”.**—“Common scheme or plan” and “same course of conduct” are two closely related concepts.

(A*i*) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; *i.e.*, the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(B*ii*) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (*e.g.*, a defendant’s failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

- ~~10.~~ (C) **Conduct Associated with a Prior Sentence.**—For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

*Examples:* (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

6. **Application of Subsection (a)(3).**—

(A) **Definition of “Harm”.**—“Harm” includes bodily injury, monetary loss, property damage and any resulting harm.

7. (B) **Risk or Danger of Harm.**—If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the



determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.

8.7. **Factors Requiring Conviction under a Specific Statute.**—A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant “was convicted under 18 U.S.C. § 1956”. Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) (“if the offense involved conduct described in 18 U.S.C. § 2242”).

Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of §2S1.1.

9.8. **Partially Completed Offense.**—In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).

12.9. **Solicitation, Misprision, or Accessory After the Fact.**—In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

\* \* \*

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

Commentary

\* \* \*

Application Notes:

\* \* \*

8. Use of Drug Equivalency Tables.—

\* \* \*

(D) Drug Equivalency Tables.—

\* \* \*

Date Rape Drugs (except flunitrazepam, GHB, or ketamine)

1 ml of 1,4-butanediol =	8.8 gm marihuana
1 ml of gamma butyrolactone =	8.8 gm marihuana

\* \* \*

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

14. Application of Subsections (b)(6)(B) and (c)(1).—

\* \* \*

(E) Relationship Between the Instant Offense and the Other Offense.—*In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.*

\* \* \*

(i) Firearm Cited in the Offense of Conviction. *Defendant A’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.*

*Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note ~~H~~5(B) to §1B1.3). The use of the shotgun “in connection*

with” the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) (“any other information specified in the applicable guideline”).

- (ii) Firearm Not Cited in the Offense of Conviction. Defendant B’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note ~~115(B)~~ to §1B1.3).

\* \* \*

**§2X3.1. Accessory After the Fact**

\* \* \*

Commentary

\* \* \*

Application Notes:

- 1. Definition.—For purposes of this guideline, “underlying offense” means the offense as to which the defendant is convicted of being an accessory, or in the case of a violation of 18 U.S.C. § 2339A, “underlying offense” means the offense the defendant is convicted of having materially supported after its commission (i.e., in connection with the concealment of or an escape from that offense), or in the case of a violation of 18 U.S.C. § 2339C(c)(2)(A), “underlying offense” means the violation of 18 U.S.C. § 2339B with respect to which the material support or resources were concealed or disguised. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note ~~129~~ of the Commentary to §1B1.3 (Relevant Conduct).

\* \* \*

**§2X4.1. Misprision of Felony**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. “Underlying offense” means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note ~~12~~<sup>9</sup> of the Commentary to §1B1.3 (Relevant Conduct).

\* \* \*

**§8C2.8. Determining the Fine Within the Range (Policy Statement)**

\* \* \*

Commentary

Application Notes:

\* \* \*

7. Under subsection (b), the court, in determining the fine within the range, may consider any factor that it considered in determining the range. This allows for courts to differentiate between cases that have the same offense level but differ in seriousness (e.g., two fraud cases at offense level 12, one resulting in a loss of \$21,000, the other \$40,000). Similarly, this allows for courts to differentiate between two cases that have the same aggravating factors, but in which those factors vary in their intensity (e.g., two cases with upward adjustments to the culpability score under §8C2.5(c)(2) (prior criminal adjudications within 5 years of the commencement of the instant offense, one involving a single conviction, the other involving two or more convictions)).

\* \* \*

**UNITED STATES SENTENCING COMMISSION**

**Final Priorities for Amendment Cycle**

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of final priorities.

**SUMMARY:** In June 2015, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2016. See 80 FR 36594 (June 25, 2015). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

**FOR FURTHER INFORMATION CONTACT:** Jeanne Doherty, Public Affairs Officer,  
202-502-4502, [jdoherthy@ussc.gov](mailto:jdoherthy@ussc.gov).

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously

promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2016. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2016. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2016.

As so prefaced, the Commission has identified the following priorities:

(1) Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, titled Mandatory Minimum Penalties in the Federal Criminal Justice System, including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the "safety valve" at 18 U.S.C. § 3553(f), and elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c), and to develop appropriate

guideline amendments in response to any related legislation.

(2) Continuation of its multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate. As part of this examination, the Commission intends to study possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities, (B) appropriately account for the defendant's role, culpability, and relevant conduct, and (C) encourage the use of alternatives to incarceration.

(3) Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense") and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.

(4) Continuation of its study of the guidelines applicable to immigration offenses and related criminal history rules, and consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study.

(5) Continuation of its comprehensive, multi-year study of recidivism, including (A)

examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and (C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(6) Continuation of its multi-year review of federal sentencing practices pertaining to imposition and violations of conditions of probation and supervised release, including possible consideration of amending the relevant provisions in Chapters Five and Seven of the Guidelines Manual.

(7) Continuation of its work with Congress and other interested parties on child pornography offenses to implement the recommendations set forth in the Commission's December 2012 report to Congress, titled Federal Child Pornography Offenses.

(8) Implementation of the USA FREEDOM Act of 2015, Pub. L. 114–23, and any other crime legislation enacted during the 114th Congress warranting a Commission response.

(9) Study of animal fighting offenses and consideration of any amendments to the Guidelines Manual that may be appropriate.

(10) Possible consideration of amending the policy statement pertaining to “compassionate release,” §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).



(11) Resolution of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(12) Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources.

**AUTHORITY:** 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Patti B. Saris

Chair

## EXHIBIT C

### PROPOSED AMENDMENT: “CRIME OF VIOLENCE” AND RELATED ISSUES

**Synopsis of Proposed Amendment:** *This proposed amendment is a result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). See United States Sentencing Commission, “Notice of Final Priorities,” 79 FR 49378 (Aug. 20, 2014); “Proposed Priorities for Amendment Cycle,” 80 FR 36594 (June 25, 2015).*

*The proposed amendment is also informed by the Supreme Court’s recent decision in Johnson v. United States, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551 (2015), relating to the statutory definition of “violent felony” in 18 U.S.C. § 924(e), which held that an increased sentence under the “residual clause” of that definition violates due process. As the Court explained in Johnson, the term “residual clause” refers to the closing words of the statutory definition of “violent felony.” Under those closing words, a crime is a “violent felony” if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.” See 18 U.S.C. § 924(e)(2)(B)(ii) [emphasis added]. This clause, the Court held in Johnson, is unconstitutionally vague. The Court’s holding did not implicate other parts of the statutory definition; a crime may still qualify as a “violent felony” under the statute if, for example, it “has as an element the use, attempted use, or threatened use of physical force against the person of another” (sometimes referred to as the “elements” clause) or if it “is burglary, arson, or extortion” (sometimes referred to as the “enumerated” clause).*

#### Procedure

*The Commission’s ordinary practice with amendments to the sentencing guidelines is to publish proposals for comment in January, hold hearings in February or March, promulgate amendments in April, and submit final amendments to Congress on or shortly before May 1, to take effect on November 1. However, the Commission’s organic statute authorizes the Commission to promulgate and submit amendments at any point after the beginning of a session of Congress and to specify an effective date sooner than November 1. See 28 U.S.C. § 994(p). Publishing this proposed amendment at this time allows for the possibility that an amendment could be promulgated and submitted to Congress earlier than May 1 and could take effect earlier than November 1.*

*Accordingly, the Commission anticipates that in Fall 2015 it will hold a hearing on the proposed amendment and that in January 2016 it may, if appropriate, promulgate a final amendment and submit it to Congress (to take effect earlier than November 1) or publish a revised version of this proposed amendment for an additional period of comment.*

#### Parts of the Proposed Amendment

*The proposed amendment contains several parts. The Commission is considering whether to promulgate any one or more of these parts, as they are not necessarily mutually exclusive. Issues for comment are also included.*

##### A. Elimination of “Crime of Violence” Residual Clause and Related Revisions to Definition of “Crime of Violence”

*The guidelines definition of “crime of violence” in §4B1.2(a) was modeled after the statutory definition of “violent felony.” This guidelines definition is used in determining whether a defendant is a career offender under §4B1.1 (Career Offender), and is also used in certain other guidelines. See, e.g., §§2K1.3*

*(Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms and Ammunitions), 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 5K2.17 (Semiautomatic Firearms Capable of Accepting Large Quantity Magazine (Policy Statement)).*

*While the statutory definition of “violent felony” in section 924(e) and the guidelines definition of “crime of violence” in §4B1.2 are not identical in all respects — for example, they have different “enumerated” clauses — their residual clauses are identical. The proposed amendment amends §4B1.2 to delete the residual clause.*

*In addition, the proposed amendment amends §4B1.2 to clarify and revise the list of “enumerated” offenses. While some offenses covered by the definition are listed in the guideline (such as burglary of a dwelling, arson, and extortion), many other offenses covered by the definition are listed in the commentary instead (e.g., murder, kidnapping, aggravated assault, robbery). The proposed amendment makes some revisions to the list of enumerated offenses, moves all enumerated offenses to the guideline, and provides definitions for the enumerated offenses in the commentary.*

**B. Use of the State Felony Classification in Determining Whether an Offense Qualifies as a “Felony” Under §4B1.2**

*Under the career offender guideline, the court must analyze both the instant offense of conviction and the defendant’s prior offenses of conviction. To be a career offender, the court must find (1) that the instant offense is a felony that is a crime of violence or a controlled substance offense, and (2) that the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. See §4B1.1(a), 4B1.2; see also 28 U.S.C. § 994(h).*

*To implement the requirement that the offense be a “felony,” the definitions in §4B1.2(a) and (b) specify that the instant offense (whether a “crime of violence” or a “controlled substance offense”) must have been an offense under federal or state law, punishable by imprisonment for a term exceeding one year. The proposed amendment adds an additional requirement: the offense must also have been classified [at the time defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted. If the jurisdiction does not have a “felony” classification, the offense must have been given a classification comparable to a felony classification.*

**C. Corresponding Changes to the Illegal Reentry Guideline, §2L1.2**

*The definition of “crime of violence” in §4B1.2 is not the only definition of “crime of violence” in the guidelines. In particular, §2L1.2 (Unlawfully Entering or Remaining in the United States) sets forth a definition of “crime of violence” that contains a somewhat different list of “enumerated” offenses and does not contain a “residual” clause. It also sets forth a definition of “drug trafficking offense” that is somewhat different from the definition of “controlled substance offense” in §4B1.2.*

*The proposed amendment would revise the definitions of “crime of violence” and “drug trafficking offense” in §2L1.2 to bring them more into parallel with the definitions in §4B1.2. Under the proposed amendment, the definitions in §2L1.2 would generally follow the definitions in §4B1.2, as revised by Parts A and B of the proposed amendment.*

**Proposed Amendment:**

(A) “Crime of Violence” in §4B1.2

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, [burglary of a dwelling][[burglary], burglary of a dwelling, arson, or extortion, or involves use of explosives, ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another.~~
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. For purposes of this guideline—

*“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.*

*~~“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.~~*

~~“Crime of violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.~~

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

~~Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed off shotgun or sawed off rifle, silencer, bomb, or machine gun) is a “crime of violence”.~~

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

3. **Enumerated Offenses under Subsection (a).**—For purposes of subsection (a):

(A) “Murder” is (i) the unlawful killing of a human being with malice aforethought (including killing a human being purposefully, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life); or (ii) causing the death of a human being in the course of committing another felony offense.

- (B) “Voluntary manslaughter” is (i) the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion; or (ii) causing the death of a human being through actions intended to cause serious physical injury to another human being.
- (C) “Kidnapping” is an offense that includes at least (i) an act of restraining, removing, or confining another; (ii) an unlawful means of accomplishing that act; and (iii) at least one or more of the following aggravating factors: (I) the offense was committed for a nefarious purpose; (II) the offense substantially interfered with the victim’s liberty; or (III) the offense exposed the victim to a substantial risk of bodily injury, sexual assault, or involuntary servitude.
- (D) “Aggravated assault” is (i) attempting to cause serious or substantial bodily injury to another, or causing such injury purposefully, knowingly, or recklessly; or (ii) attempting to cause, or purposefully, knowingly, or recklessly causing, bodily injury to another through use of a deadly weapon.
- (E) A “forcible sex offense” is any offense requiring a sexual act or sexual contact to which consent to the actor’s conduct (i) is not given, or (ii) is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The terms “sexual act” and “sexual contact” have the meaning given in 18 U.S.C. § 2246.
- (F) “Robbery” is the misappropriation of property under circumstances involving immediate danger to the person of another.
- (G) [“Burglary of a dwelling” is an unlawful or unprivileged entry into or remaining in a dwelling with intent to commit a [crime][felony].] [“Burglary” is an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a [crime][felony].]
- (H) “Arson” is the intentional damaging, by fire or the use of explosives, of any building, vehicle, or other real property.
- (I) “Extortion” is obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

23. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, 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.

34. The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

\* \* \*

**(B) Requirement That Offense Be Classified as Felony Under State Law**

**§4B1.2. Definitions of Terms Used in Section 4B1.1**

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year and classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted, that—
- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - (2) 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.
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year and classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

\* \* \*

Commentary

Application Notes:

1. For purposes of this guideline—

\* \* \*

*“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year and classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).*

\* \* \*

**(C) Corresponding Revisions to §2L1.2**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic



(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

*Statutory Provisions:* 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

- (iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*
- (B) *Definitions.—For purposes of subsection (b)(1):*
- (i) *“Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*
- (ii) *“Child pornography offense” means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (iii) *“Crime of violence” has the meaning given that term in §4B1.2(a). However, for purposes of subsection (b)(1)(E), which applies to misdemeanor crimes of violence, the requirements in §4B1.2(a) that the offense be a felony (i.e., punishable by a term more than one year and classified as a felony) do not apply. means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or 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.*
- (iv) *“Drug trafficking offense” means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.*
- (v) *“Firearms offense” means any of the following:*
- (I) *An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*
- (II) *An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*
- (III) *A violation of 18 U.S.C. § 844(h).*
- (IV) *A violation of 18 U.S.C. § 924(c).*
- (V) *A violation of 18 U.S.C. § 929(a).*

- (VI) *An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vi) *“Human trafficking offense” means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vii) *“Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.*
- (viii) *“Terrorism offense” means any offense involving, or intending to promote, a “Federal crime of terrorism”, as that term is defined in 18 U.S.C. § 2332b(g)(5).*
- (C) *Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.*
2. *Definition of “Felony.”—For purposes of subsection (b)(1)(A), (B), and (D), “felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year. In addition, a crime of violence or a drug trafficking offense is a “felony” only if it was classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted.*
3. *Application of Subsection (b)(1)(C).—*
- (A) *Definitions.—For purposes of subsection (b)(1)(C), “aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*
- (B) *In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).*
4. *Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):*
- (A) *“Misdemeanor” means a federal or state offense, punishable by a term of imprisonment, that is not a “felony” as defined in Application Note 2 ~~any federal, state, or local offense punishable by a term of imprisonment of one year or less.~~*
- (B) *“Three or more convictions” means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).*

## Issues for Comment:

1. *The Commission invites broad comment on the “residual clause” in the definition of “crime of violence” in §4B1.2. Should the residual clause be eliminated, as proposed by the proposed amendment? If so, what other changes, if any, should be made to the guidelines definition of “crime of violence”?*

*In the alternative, should the residual clause be revised? If so, how should it be revised? Should the Commission consider a different type of residual clause, such as the residual clause in 18 U.S.C. § 16?*

2. *The Commission similarly invites broad comment on the list of “enumerated” offenses in the definition of “crime of violence” in §4B1.2. Should the list of enumerated offenses be clarified and revised, as proposed by the proposed amendment? What offenses should be enumerated, and how (if at all) should they be defined?*

*For example, should the list of enumerated offenses be limited to common law offenses against the person? Should the list also include any offense resulting in death or bodily injury to another if the defendant’s conduct was knowing, intentional, or reckless?*

*Should the list of enumerated offenses include offenses where harm did not result, but could have resulted because of the risk involved? If so, what offenses should be included on the list, and how (if at all) should they be defined?*

3. *The Commission seeks comment on offenses against property and the extent to which they should be included in the guidelines definition of “crime of violence.” Statutory definitions relating to “violent” offenses account for property offenses in various ways. For example, the statutory definition of “crime of violence” in 18 U.S.C. § 16 does not enumerate any specific property offenses, but its elements clause extends to offenses that have as an element the use, attempted use, or threatened use of physical force against the property of another, and its residual clause extends to offenses that involve a substantial risk of physical force against the property of another. In contrast, the statutory definition of “violent felony” in 18 U.S.C. § 924(e) enumerates arson and burglary, but its elements clause and residual clause do not extend to property offenses. How, if at all, should the guidelines definition of “crime of violence” apply to property offenses?*

4. *The proposed amendment seeks comment on the enumerated offense definitions, as set forth in Part A of the proposed amendment. The definitions were derived from broad contemporary, generic definitions of the elements for the listed offenses. The Commission seeks comment generally on whether providing definitions for enumerated offenses is appropriate and specifically on whether the definitions provided are appropriate. Are there offenses that are covered by the proposed definitions but should not be? Are there offenses that are not covered by the proposed definitions but should be?*

*In addition, the Commission seeks specific comment on the following:*

- (A) *The proposed definition of “murder” would include offenses in which the defendant causes the death of another in the course of committing any felony. This definition is worded more broadly than felony murder statutes in some states to minimize complexity and avoid difficulties with differing state law definition. The Commission seeks comment on whether such a definition is appropriate.*

- (B) *The proposed definition of “kidnapping” attempts to capture the kinds of aggravating factors that some courts have held are present in state statutes. The Commission seeks comment on whether there are other factors that should be included as possible elements of kidnapping.*
- (C) *The proposed definition of “aggravated assault” does not include as an aggravating factor that the victim has a special status, such as law enforcement, elderly, or minor. Should those type of assaults qualify as “aggravated assault”? In particular, the Commission seeks comment on whether the definition of “aggravated assault” should include, as a possible alternative element, attempting to cause, or purposefully, knowingly, or recklessly causing, bodily injury to a person classified as a special victim under the statute of conviction (including public servants, minors, the elderly, pregnant women, and any other similar group).*
- (D) *The proposed definition of “forcible sex offense” incorporates the definitions of “sexual act” and “sexual contact” in 18 U.S.C. § 2246. Are there types of sex offenses that would be included in the definition of “forcible sex offense” set forth in the proposed amendment that should not be considered “crimes of violence”? Are there types of sex offenses that would not be included under this definition, but should be? Should statutory rape be expressly included? Should it be expressly excluded?*
- (E) *The proposed amendment defines “robbery” as the misappropriation of property under circumstances involving immediate danger to the person of another. The Commission seeks comment on whether this definition is adequately clear and on whether it is appropriate in scope. Are there types of offenses that would be included in the definition set forth in the proposed amendment that should not be considered “crimes of violence”? Are there types of offenses that would not be included under this definition, but should be? For example, in some jurisdictions the elements of robbery may be established by a taking of property from a person or person’s presence by fear (rather than, for example, by force or by injury). If the defendant was convicted of such a taking by fear, would it qualify as “robbery” as defined by the proposed amendment? In the alternative, would it qualify as “extortion” as defined by the proposed amendment? Should such a robbery (i.e., the taking of property from a person or person’s presence by fear) qualify as a crime of violence?*
- (F) *The Supreme Court has determined that burglary under section 924(e) includes structures other than dwellings, but the Commission has included only burglaries of dwellings under the current definition of “crime of violence” at §4B1.2. The Commission seeks comment on whether burglaries of buildings and other structures that are not dwellings should be included as “crimes of violence.”*
- (G) *Many states define “arson” to include burning of personal property. The proposed amendment does not include that type of arson in its definition of arson. The Commission seeks comment on whether the exclusion of such type of arson is appropriate. In those states that punish burning of personal property under arson statutes, what type of conduct is covered? Is it conduct that should be considered a crime of violence? Does it typically pose a risk of injury to a person?*
- (H) *Extortion has been defined in case law as including non-violent threats, such as a threat to reveal embarrassing personal information. The definition of “extortion” in the proposed amendment requires the threat to be a “threat of physical injury” against the person. Similarly, extortion has been defined in case law as including fear, and the definition of “extortion” in the proposed amendment requires the fear to be a “fear of physical injury.”*

*The Commission seeks comment on whether including these limitations in the “extortion” definition is appropriate.*

5. *Some commentators have suggested that the definition of “crime of violence” should not provide a list of enumerated offenses (e.g., murder, voluntary manslaughter, aggravated assault), but should contain only an elements clause (i.e., the use, attempted use, or threatened use of physical force against the person [or property] of another). The Commission seeks comment on whether such a single-prong approach would provide a sufficient and appropriate definition of “crime of violence.” If so, what should the “elements clause” provide?*
6. *The Commentary to §4B1.2 states that “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. The Commission seeks comment on whether the definitions of “crime of violence” and “controlled substance offense” should include attempts, conspiracies, and aiding and abetting. If so, should any limitations apply?*
7. *Part B of the proposed amendment would amend §4B1.2 to revise the definition of “felony.” The Commission seeks comment on the advantages and disadvantages of using different definitions of “felony” in the guidelines. Should the Commission adopt a single definition of “felony” throughout the guidelines?*
8. *The revisions made by Part B would add a requirement that the offense have been classified as a felony under the laws of the jurisdiction in which the defendant was convicted. The Commission seeks comment on how this principle should apply to states that do not classify offenses as felonies, and to states (such as California) in which some offenses may be classified as either a felony or a misdemeanor at initial sentencing and the classification may change based on later events (such as a revocation of probation). The proposed amendment includes the parenthetical phrase “(or comparable classification)” and the bracketed phrase “[at the time the defendant was initially sentenced]” to address these situations. Do these phrases adequately address these situations? If not, how, if at all, should the Commission address these situations?*
9. *Part C of the proposed amendment would adopt for the illegal reentry guideline the same definition of “crime of violence” used in the career offender guideline. The Commission seeks comment on the advantages and disadvantages of using different definitions for these guidelines. Should the Commission have separate definitions for “crime of violence” in these guidelines?*
10. *The Commission seeks comment on whether any other guidelines that involve terms such as “crime of violence,” “controlled substance offense,” and “drug trafficking offense” should be revised to conform to the definitions used in the career offender guideline or the illegal reentry guideline (as revised by the proposed amendment). For example, what changes, if any, should be made to the firearms and explosives guidelines, §§2K2.1 and 2K1.3, to conform to the revisions made by the proposed amendment? What changes, if any, should be made to guidelines that use the term “crime of violence” but do not define it by reference to §4B1.2 (such as guidelines that define it by reference to 18 U.S.C. § 16)? Should the Commission revise those guidelines to promote a single definition of “crime of violence” (and terms such as “controlled substance offense”) throughout the guidelines?*