Testimony of Hon. Irene M. Keeley Presented to the United States Sentencing Commission on November 5, 2015, on Proposed Changes to Definitions of "Crime of Violence" and Related Issues

Judge Saris and members of the Sentencing Commission,

On behalf of the Criminal Law Committee of the Judicial Conference of the United States, I thank the Sentencing Commission for providing us the opportunity to comment on proposed changes to the sentencing guidelines definitions of "crime of violence" and related issues. The topic of today's hearing is important to the Judicial Conference and judges throughout the nation. We applaud the Commission for undertaking its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction and the impact of such definitions on the relevant statutory and guideline provisions. We also thank the Commission for considering whether to promulgate these guideline amendments to address questions that have been or may be raised by the Supreme Court's recent opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The Judicial Conference has authorized the Criminal Law Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the guidelines.[1] The Judicial Conference has also resolved "that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2]

As I discuss below, the Criminal Law Committee is generally in favor of the Commission's proposed amendments, particularly those intended to address or anticipate questions raised by *Johnson*. As you know, the definition of the term "crime of violence" for

[1] JCUS-SEP 90, p.69

[2] JCUS-MAR 05, p. 15.

purposes of the career offender guideline has been the subject of substantial litigation in the federal courts. We support any efforts to resolve ambiguity and simplify the legal approaches required by Supreme Court jurisprudence. Additionally, our Committee has repeatedly urged the Commission to resolve circuit conflicts in order to avoid unnecessary litigation and to eliminate unwarranted disparity in application of the guidelines.[3] The Commission's proposed amendment would reduce uncertainty raised by the opinion while making the guidelines more clear and workable.

With regard to the proposed guideline amendments concerning issues unrelated to *Johnson*, the Committee generally supports or defers to the Commission's recommendations. The Committee opposes amending, however, the current definition of "felony" in the career offender guideline. Finally, the Committee supports revising other guidelines to conform to the definitions used in the career offender guideline to reduce complexity and make the guidelines system more simple and workable.

Elimination of "Crime of Violence" Residual Clause and
Related Revisions to Definition of "Crime of Violence"

In *Johnson*, the Supreme Court held that an increased sentence under the "residual clause" of the statutory definition of "violent felony" in 18 U.S.C. § 924(e) violates due process

[3] *See, e.g.*, Public Hearing on Federal Child Pornography Offenses before U.S. Sentencing Commission, Feb. 15, 2012 (statement of Judge M. Casey Rodgers, member, Committee on Criminal Law, Judicial Conference of the United States); Letter from Judge William W. Wilkins, Jr., Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission (June 16, 2000); Letter from Judge William W. Wilkins, Jr., Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Diane E. Murphy, Chair, U.S. Sentencing Commission (March 10, 2000); Letter from Judge George P. Kazen, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Richard P. Conaboy, Chair, U.S. Sentencing Commission (Sept. 22, 1997); Letter from Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Richard P. Conaboy, Chair, U.S. Sentencing Commission (Feb. 15, 1995).

because the clause is unconstitutionally vague.[4] As the Commission has explained in its notice of proposed amendment in the *Federal Register*, the guidelines definition of "crime of violence" in section 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 section 4B1.1, and is also used in certain other guidelines. While the statutory definition of "violent felony" in section 924(e) and the guidelines definition of "crime of violence" in section 4B1.2 are not identical in all respects, their residual clauses are identical.

The Criminal Law Committee strongly supports the proposed amendment to delete the residual clause from the guideline definition of "crime of violence." There is now a circuit conflict regarding whether the residual clause in the sentencing guidelines is unconstitutionally vague in light of *Johnson*. The 11th Circuit has found that the vagueness doctrine does not apply to the sentencing guidelines,[5] while the 10th circuit has held that the residual clause in the sentencing guidelines is unconstitutionally vague.[6] Another circuit (the 8th Circuit) has remanded a case to the district court with instructions to consider the defendant's claim that the guidelines definition of crime of violence is vague and violates due process.[7] Deleting the residual clause while maintaining the "elements" and "enumerated" clauses would reduce confusion and complexity by providing a definition of "crime of violence" that conforms closely to the

[4] 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).

[5] *United States v. Matchett*, __ F.3d __, No. 14–10396, 2015 WL 5515439, at *1 (11th Cir. Sept.21, 2015) (rejecting the argument that the definition of "crime of violence" in the sentencing guidelines is unconstitutionally vague in light of *Johnson* and reasoning that the vagueness doctrine "applies only to laws that prohibit conduct and fix punishments, not advisory guidelines").

[6] *United States v. Madrid*, __ F.3d __, No. 14-2159, 2015 WL 6647060, at *4 (10th Cir. Nov. 2, 2015) ("The concerns about judicial inconsistency that motivated the Court in *Johnson* lead us to conclude that the residual clause of the Guidelines is also unconstitutionally vague. If one iteration of the clause is unconstitutionally vague, so too is the other. . . . That the Guidelines are advisory, and not statutory, does not change our analysis.").

[7] *United States v. Taylor*, __ F.3d __, No. 14-2635, 2015 WL 5918562 (8th Cir. Oct 9, 2015).

statutory definition. It is noteworthy that in 1988, a Sentencing Commission working group similarly recommended that the career offender guideline definition of "crime of violence" should closely match the statutory definition of "violent felony" in section 924(e).[8] It reasoned: "The group's general feeling is that because the penalties imposed by this guideline are so severe, linking the definitions of predicate crimes to those already approved, defined and joined together by Congress for the heavy sanction of 924(e) would facilitate both the acceptance of the guideline and its proper application."[9] In 1991, another Commission working group noted that "[c]onfusion may result if a crime is considered a crime of violence under title 18 . . . but not under sentencing guidelines."[10] Because of the similarities between the statutory and guideline definitions, courts have also frequently treated cases dealing with these provisions interchangeably.[11]

Elimination of the residual clause and close conformity with the definition of "violent felony" in section 924(e) would also be consistent with efforts to simplify the sentencing guidelines. Since 2014, the Commission has identified simplification of the guidelines structure as a policy priority.[12] The Committee has long supported attempts to simplify the operation of

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[8] Memorandum from Gary Peters to Commissioners (March 25, 1988). The working group consisted of Phyllis Newton, Donna Triptow, Ronald Weich, and Gary Peters.

[9] *Id*. at 24.

[10] Criminal History Working Group Report, United States Sentencing Commission 21 (October 17, 1991). The working group consisted of David Debold, Jeanneine Gabriel, Michael Green, Susan Katzenelson, and Vince Ventimiglia. The Commissioner Advisor was Judge Julie E. Carnes.

[11] *See, e.g.*, *United States v. Harbin*, 610 Fed.Appx. 562, 563 (6th Cir. 2015) ("We have interpreted both residual clauses identically."); *United States v.* Willis, 795 F.3d 986, 996 (9th Cir. 2015) ("We make no distinction between 'violent felony' in ACCA and 'crime of violence' in §4B1.2(a)(2) for purposes of interpreting the residual clause."); *United States v. Herrera-Alvarez*, 753 F.3d 132, 136 (5th Cir. 2014) (noting that because of the similarities between §§2L1.2(b)(1)(A), 4B1.2(a), 4B1.4(a), and 18 U.S.C. § 924(e), the court often treats cases dealing with these provisions "interchangeably"); *Gilbert v. United States*, 640 F.3d 1293, 1309 n. 16 (11th Cir. 2011) (en banc) (noting that the court has held that the term "violent felony" is "virtually identical" to the term "crime of violence" in § 4B1.1, so that decisions about one apply to the other).

[12] *See* 79 Fed. Reg. 49378 (Aug. 20, 2014); 80 Fed. Reg. 48957 (Aug. 14, 2015).

the guidelines including the harmonization of the language used in specific offense characteristics shared across guidelines.[13] The Commission's current examination of guideline simplification provides an opportunity to resolve differences in language across guidelines and statutes, and eliminating the residual clause would be consistent with this goal.

In addition to deleting the residual clause, the Commission proposes amending section 4B1.2 to revise the list of enumerated offenses, moving all enumerated offenses to the guideline, and providing definitions for the enumerated offenses in the commentary. The Committee supports moving all enumerated offenses to the guideline to make application more simple and clear. Additionally, the Committee supports the proposal to include burglaries only of dwellings in the list of enumerated offenses. To be sure, some of the burglaries of non-dwellings excluded by this definition involve serious offenses by defendants that may pose a danger to the community. Courts may account for these situations, however, through the "elements" clause of section 4B1.2 or by departing or varying when the criminal history category under-represents the danger posed by the defendant. Moreover, while we generally support close conformity between the statutory definition of "violent felony" in section 924(e) and the guideline definition of "crime of violence," the balance of considerations by Congress when enacting penalties for armed career criminals under section 924(e) may have been different when it included all burglaries in the statutory definition of "violent felony."

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[13] *See, e.g.*, Letter from Judge William W. Wilkins, Jr., Chair, Committee on Criminal Law, Judicial Conference of the United States, to members of U.S. Sentencing Commission (November 9, 2000); Letter from Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Richard P. Conaboy, Chair, U.S. Sentencing Commission (Dec. 6, 1995); Letter from Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Edward F. Reilly, Commissioner, U.S. Sentencing Commission (July 10, 1995).

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.[14] To implement the requirement that the offense be a "felony," the definitions in section 4B1.2 specify that the offense must have been an offense under federal or state law, punishable by imprisonment for a term exceeding one year. The Commission proposes adding an additional requirement: the offense must also have been classified as a felony or comparable classification under the laws of the jurisdiction in which the defendant was convicted.

The Committee opposes adding an additional requirement that the offense must also have been classified as a felony or comparable classification under the laws of the jurisdiction in which the defendant was convicted. It supports retaining the current definition of a "felony" because it is clear, concise, and uniform. The current definition of felony in the career offender guideline also conforms to definitions in other guideline sections, which is consistent with efforts to simplify the guidelines.[15]

In 1991, a Sentencing Commission working group noted that the Commission has considered and rejected a proposal to include only those felonies so designated by the state.[16] It reasoned: "The Commission thrashed this issue out when it originally promulgated the guidelines

[14] *See* §§4B1.1(a) and 4B1.2.

[15] *See*, U.S.S.G. §§ 2B2.3, 2K1.3, 2K2.1, 2K2.6, 2L1.2, 4A1.2(o).

[16] *See supra* note 8.

and apparently decided that use of State labels could create disparity among offenders with similar criminal histories. That is, state definitions of felonies vary widely, with some states considering serious offenses to be only misdemeanors, even though the statutory maximum maybe as high as 5 years and the conduct involved may be quite serious."[17] In 2000, the Seventh Circuit noted that the current definition "makes considerable sense" because "[b]y ignoring how crimes in different jurisdictions are classified and looking instead to what punishment is authorized, a court can avoid the vagaries of sentencing defendants on the basis of idiosyncratic or unusual felony/misdemeanor classifications."[18] According to the court, "[i]t seems likely . . . that the punishment chosen for a crime will more accurately and equitably reflect, for cross-jurisdictional purposes, the seriousness of that crime than will the crime's felony/misdemeanor classification."[19] Therefore, the court concluded, "looking to the punishment authorized is more consistent with the goal of the Sentencing Guidelines to treat similarly situated defendants similarly."[20]

In cases when the current definition of "felony" do not adequately represent the defendant's criminal history, the court may of course depart or vary from the criminal history category of the guidelines to account for the circumstances in the individual case. As the Committee has stressed in the past, departures provide the flexibility needed to assure adequate consideration of circumstances that the guidelines cannot adequately capture and provide judges

[17] *Supra* note 8, at 34.

[18] *United States v. Jones*, 235 F.3d 342, 346 (7th Cir.2000).

[19] *Id.*

[20] *Id.*

the ability to exercise individualized judgment.[21] Over the years, the Judicial Conference and the Committee have also advocated criminal history departures to account specifically for dangerousness of defendants. In 1990, the Judicial Conference approved submission by the Committee to the Commission of a proposal to promulgate a two-part policy statement in section 4A1.3 to clarify that departures due to the inadequacy of the criminal history score may be based on either degree of risk or type of risk.[22]

The first part of the proposal focused on the degrees of risk (i.e., over - or under-representation of the likelihood that the defendant will commit further crimes). The second part would focused on the type of risk (i.e., if the defendant does re-offend, what type of crime s/he is likely to commit). The proposal regarding type of risk was that if reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct, the court may consider imposing a sentence departing from the otherwise applicable guideline range.[23] Such information includes the nature of the criminal conduct underlying a defendant's prior convictions, and prior similar adult criminal conduct not resulting in a criminal conviction, that establishes a pattern of particularly harmful or very minor criminal behavior.[24]

Under the proposal, an upward departure may be warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history.

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[21] *See, e.g.*, Public Hearing on Federal Sentencing Options After *Booker* before U.S. Sentencing Commission, February 16, 2012 (statement of Judge Paul J. Barbadoro on behalf of the Committee on Criminal Law of the Judicial Conference of the United States); Public Hearing before U.S. Sentencing Commission, August 19, 2003 (statement of Judge David Hamilton on behalf of the Committee on Criminal Law, Judicial Conference of the United States).

[22] JCUS-SEP 90, p. 70

[23] *Id*. at Appendix A.

[24] *Id*.

Examples might include offenders with a history of repetitive assaultive behavior, of repetitive sophisticated criminal behavior (e.g., a series of sophisticated frauds), and those with unusually extensive and serious prior records. A downward departure may be warranted when the criminal history category significantly over-represents the seriousness of the defendant's criminal history. Examples might include offenders whose points result from unusually harsh sentencing for misdemeanors or from a string of convictions for relatively minor offenses.[25] In 1995, the Criminal Law Committee supported the Commission's proposal to add a departure under section 4A1.3 for prior convictions involving death, serious bodily injury (or attempts to inflict either), as well as sexual offenses which are similar to the instant offense, if not otherwise accounted for by the career offender or armed career offender guidelines.[26]

If the Commission believes that the current guidelines definition of "felony" does not adequately represent the defendant's criminal history in all circumstances, the Committee recommends that the Commission account for these circumstances, not by changing the definition of "felony," but by providing guidance for how and when departures from the criminal history category may address these circumstances.

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

Section 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 section 4B1.2. The proposed amendment would revise the definitions of "crime of

[25] *Id.*

[26] Letter from Judge Maryanne Trump Barry, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Richard P. Conaboy, Chair, U.S. Sentencing Commission (Dec. 6, 1995).

violence" and "drug trafficking offense" in section 2L1.2 to bring them more into parallel with the definitions in section 4B1.2. Under the proposed amendment, the definitions in section 2L1.2 would generally follow the proposed amended definitions in section 4B1.2, as described above. The Committee supports revising other guidelines to conform to the definitions used in the career offender guideline to reduce complexity and make the guidelines system more simple and workable.

Retroactivity

In addition to the issues for comment discussed above, the Commission requests public comment regarding whether the proposed amendments should be applied retroactively to previously sentenced defendants. In recent years, the federal judiciary has effectively managed several rounds of retroactivity stemming from guideline amendments to the Drug Quantity Table. On each of those occasions, the Committee, on behalf of the Judicial Conference, expressed support for retroactivity, while also recommending that retroactivity be implemented in ways that minimize the burdens on the courts and maximize the effective reentry of inmates.[27] In supporting retroactivity, the Committee was influenced by the fact that the Commission was able to identify eligible inmates and supply those names to each court. The Committee also considered the relative ease in applying the new guidelines based on the available record. Probation officers working with staff from the federal public defenders offices and the U.S. attorneys' offices were able to recalculate the guidelines efficiently and without the need for any extensive re-investigation.

[27] For example, in November 2007, the Criminal Law Committee recommended that amendments to the Drug Quantity Table that lowered the guideline ranges in crack cocaine offenses should be applied retroactively. Last year, the Sentencing Commission considered making another guideline amendment retroactive–Guideline Amendment 782, which reduced by two levels the base offense levels for all drug types on the drug quantity tables. The Committee supported making the amendment retroactive with a delay in the effective date to help the courts and probation offices manage the surge in workload.

Based on the available data, we recognize that it will be difficult to produce accurate estimates of the number of cases that would be impacted if these amendments are made retroactive, but gauging the workload impact on the courts would be an important consideration for the Committee. Furthermore, regardless of the number of cases that might be involved, we expect that retroactively applying the proposed amendments would be considerably more complex than the recent amendments to the Drug Quantity Table and would require much more effort and resources. Accordingly, the Committee would prefer to defer any recommendations about retroactivity until we have additional data from the Commission and can better assess the potential impact on the courts.

Conclusion

Once again, the Criminal Law Committee thanks the Sentencing Commission for providing us the opportunity to comment on proposed changes to the sentencing guidelines definitions of "crime of violence" and related issues. As we have in the past, the members of the Criminal Law Committee look forward to working with the Commission to ensure that our sentencing system avoids unnecessary complication, hearings, or litigation and is consistent with the central tenets of the Sentencing Reform Act.