TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

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PRACTITIONERS ADVISORY GROUP

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Good morning, my name is Angela Campbell. I am a managing partner at a small law firm in Des Moines, Iowa, where the majority of my practice is criminal defense and postconviction work. I am currently the Criminal Justice Act representative for the Southern District of Iowa. I am also a former assistant federal public defender for the Southern District of Iowa and an adjunct professor for Drake Law School where I teach Federal Criminal Law.

On behalf of the Practitioners Advisory Group, I want to thank you for the opportunity to address the Commission with respect to its attempts to clarify and redefine various guideline definitions related to a defendant's prior convictions. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. So we are especially appreciative of the Commission's willingness to listen to us and consider our thoughts on these important issues for comment.

I. PROPOSED AMENDMENT "CRIME OF VIOLENCE" AND RELATED ISSUES.

Issue 1(A): "Crime of Violence" in §4B1.2

The PAG agrees that the Commission should eliminate the residual clauses within §4B1.2 and associated guidelines to conform with *Johnson* while the Commission awaits further instruction from Congress on how Congress is going to deal with *Johnson*. We believe, however, that at this point the Commission should simply delete the residual clause in §4B1.2(a)(2), and then commence a more thorough study into whether, and how, to enumerate additional offenses under this guideline.

If given the choice, albeit in our opinion a premature choice at this point, between enumerating the crimes which can qualify as a felony crime of violence versus adding a general application elements approach like the one used in the current paragraph of §4B1.2(a)(1), we think enumerating crimes, with required elements for these crimes, is the most responsible way proceed. With time and study, an enumerated list could encompass the types of crimes the Commission wants included, while giving the Commission time to make specific, informed decisions about crimes that should not be included. This does not mean that we think enumerating crimes with definitions is the easiest, or most effective way, to address the Commission's main objective of punishing violent recidivists more harshly than non-violent offenders. Indeed, we believe that writing entirely new definitions for offenses that vary across fifty states should be done with caution, and with the benefit of extensive study. We do, however, think that a combination of enumerating offenses while simultaneously utilizing a required element approach as applied to these narrowly defined enumerated offenses could, in the long run, lessen the amount of uncertainty and litigation that a new guideline like this one will necessarily generate and promote uniformity of application. In addition, enumerating offenses, rather than using a general application of elements to all offenses approach would limit unintended application of these enhancements to unanticipated state offenses.[1] It is the unknown

[1] The Commission has not asked for comments specifically regarding the current definition under §4B1.2(a)(1). However, it is the vagueness and potential overbreadth of this type of general elements approach that the Commission should avoid in future revisions of this

consequence of an additional general element clause that most concerns the PAG – indeed the continued use of §4B1.2(a)(1) continues to concern me personally as it is broad in application, and encompasses crimes that I personally do not believe should count as crimes of violence under this guideline. Adding a second, broadly applicable general element provision would only increase the possibility of unintentionally including offenses that are not truly violent.

If the Commission does intend to pursue enumerated offenses, the PAG thinks several changes are necessary to the Commission's proposed language defining the specific offenses. These changes should be done carefully with the benefit of further study as to a particular definition's impact on state statutes. First, we think the Commission should look to specific areas of federal law where enumerated offenses have already been defined, so as to provide a pre-existing body of law that has already been developed regarding these definitions. Also, with any enumerated offense that is added, we think it is critical to make it clear that the elements set forth under the definitions of each enumerated offense in the Application Notes have to be pled to or found by a jury, not simply alleged in a charging document. This would hopefully help limit the inevitable confusion and litigation that is going to result from this amendment and whether or not the categorical approaches prevalent after *Taylor v. United States*, 495 U.S. 575 (1990) and *Shephard v. United States*, 544 U.S. 13 (2005) are to continue to apply to this Guideline. The PAG would also suggest that the Commission be explicit that the Courts are not to look to charging documents, but only to pleas or verdicts, to determine if the enumerated elements were met for each particular enumerated offense, and should set forth the exact method that is acceptable in reaching these conclusions.

In addition, the PAG suggests the Commission do a nationwide study to see what elements are traditionally included in these types of offenses, compare the elements to the federal statutes that have already defined these offenses, and choose very specific elements that should be required from these statutes to be included, and potentially specifically excluded, from these definitions. This will necessarily take some time, but, in our opinion, would be necessary if the Commission is going to start down the path of defining necessary elements for offenses. The current state of the Commission's definitions are both confusing and troublesome, both from a practitioner's perspective where an individual practitioner does not have a developed body of law to rely upon in interpreting these definitions, and also because some of the specific offenses are excluding what the PAG considers to be mandatory elements for these types of offenses. To the extent possible, cross references to existing statutes should be used, rather than new definitions that must be litigated in the years to come.

The PAG would also suggest the Commission be very clear that it is working towards an element-only approach, by enumerated offense, rather than using definitions that could require

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statute. In my opinion this subparagraph should eventually be deleted and replaced with narrowly defined enumerated offenses with required elements. I do think that in the interim, the Commission could leave this subparagraph while it considers a more drastic revision to the Guidelines, with some certainty that many violent offenses will still be captured by this definition.

factual inquiries into underlying conduct. And finally, the PAG thinks it is worth considering what elements encompass actual "violence" rather than the residual "possibility of harm" that created the problems that resulted in *Johnson*, and conform these elements to address actual harm, and intent, rather than potential harm and recklessness.

The Commission also specifically asked for commentary about whether "crimes of violence" should be crimes against a person. In my opinion, a "crime of violence" should in almost every circumstance involve, at a bare minimum, an element of force actually employed against a victim, an element of a direct threat of violence to an identifiable victim, or an element of actual physical injury to a person. Upon appropriate study and reflection, many of the enumerated offenses suggested by the Commission will turn out to be the types of offenses that already include these principles. Arson and use of explosive devices are notable exceptions, however, and as I personally consider those crimes to be the type that the Commission should want to include on this list, I do not therefore necessarily think that "every" enumerated offense should be a crime against a person.

With these considerations in mind, and with the caveat that the PAG thinks it is premature to define these offenses without further study and commentary, we have the following specific comments regarding the definitions as currently listed by the Commission.

- **Murder and Voluntary Manslaughter**.

I include these two crimes together because it seems to me that the Commission's inclusion of both a definition with "malice aforethought" and a definition without "malice aforethought" means that the Commission wants to punish intentional killings of other individuals, regardless of the level of premeditation that came along with that killing. In addition, the alternative definition of voluntary manslaughter proposed by the Commission, "causing the death of a human being through actions intended to cause serious physical injury to another human being," would be covered under any conceivable definition of Aggravated Assault that would be promulgated. Thus, the Commission is making the definitions unnecessarily complicated and should make it clear that the convictions they are targeting are those with elements that are intentional killings of human beings.

The current proposed definition also includes a sort of reference to felony murder, but without the actual elements included in most felony murder statutes. Felony murder is a vastly complicated area of the law, ever changing and evolving in the states. Many felony murder statutes involve the transfer of the "malice aforethought" element, or some call it "transferred intent" from the underlying felony. Many felony murder statutes also enumerate specific inherently dangerous felonies, or otherwise limit the application of the felony murder penalties to certain types of egregious conduct. The Commission's proposed felony murder definition removes all *mens rea* and does not enumerate specific underlying felony offenses, resulting in a definition that could be overly broad in application.

The current definition would encompass many involuntary manslaughter convictions, some of which were truly accidental killings, without the use of any sort of intentional violence. If the Commission believes felony murder should be included, perhaps a definition should be

discussed, researched, and then assigned directly to felony murder, with elements, rather than a one sentence, overly-broad alternative to traditional murder.

- **Kidnapping**.

The main problem with this definition is that the elements are vague and do not explicitly cross reference any current kidnapping definitions with a developed body of law. As it currently reads, there is an element of restraining, removing, or confining, with an aggravated factor that is "substantially interfered with the victim's liberty." This seems to be the same element repeated twice with different language. In addition, the Commission's definition eliminates the traditional elements of "force" or "threat." At a bare minimum, a kidnapping definition should include the elements of force or threat, and the Commission may want to consider an element of actual injury, actual sexual assault, or actual involuntary servitude.

Kidnapping is often charged in various states when a non-custodial parent does not return a child to a custodial parent in a custody dispute. Any definition that is adopted should be studied, and commented upon, to be sure that these types of convictions do not count as "crimes of violence" under the proposed definition.

- **Aggravated Assault.**

Assault has many different definitions throughout the states, and, at least in Iowa, is one of the most commonly prosecuted state crimes. While currently assaults are often included as prior crimes of violence under the residual clause of §4B1.2(a)(2), I imagine that many assaults, at least under Iowa definitions, could still be counted after the residual clause is deleted, they will just be considered under §4B1.2(a)(1). The PAG believes we could see increased litigation over what "attempted" or "threatened" use of physical force entails. If the Commission leaves §4B1.2(a)(1) intact, there is no need to include "Aggravated Assault" as an enumerated offense because most egregious assaults will already be covered under section (1). It is the PAG's opinion that the Commission should delete section (1), however, in which case perhaps inclusion of an enumerated offense of Aggravated Assault would be appropriate in its place.

"Assaults" at the state level range from throwing a photo at a lover who has been unfaithful, to spitting on someone, to fist fights between friends where both people were charged and convicted of assault, to individuals who target helpless victims and seriously injure them. Currently all of these crimes count under §4B1.2(a)(2), and could be determined to still count under §4B1.2(a)(1) to drastically increase a defendant's sentence.[2] The Commission should

[2] For example, my law firm represented an individual, S. S was enhanced as a career offender because he had two prior state convictions which counted as "crimes of violence" which were "punishable by more than 1 year in prison." One of S's conviction's included a plea colloquy that set forth the facts of the offense, "I did assault [the victim] while she was driving a car. I threw a milk bottle at the car and hit the car with a shovel. I share a minor child with [the victim]." There was no injury, no touching, and no intent to cause any injury, as none of these are required for an assault conviction in Iowa. This conviction was an "aggravated

therefore be careful in crafting its definition of assault so as to exclude some of these types of crimes.

Assault is also one of those types of crimes where the Commission should be focused on what harm exactly it intends to punish more severely with a drastic sentencing enhancement. As such, assault seems like one where "attempt" can so easily be mischaracterized, litigated, and misapplied, including circumstances that are not truly violent. As such, in our opinion, to be "aggravated" assault, there should be bodily contact, intent and injury. If the Commission does continue to include "attempts" or "conspiracies" in its definitions, we would suggest specifically excluding attempts and conspiracies in the assault context.

The Commission has included use of a "deadly weapon" in the Aggravated Assault as an aggravating factor, with a lesser type of bodily injury required. However, these departures from the requirement that there be a "serious injury" use phrases which are wildly inconsistent throughout the states and it is unclear in the Commission's proposed definitions whether the phrases are to be defined by §1B1.1, or the state of conviction's definition of the phrase. The two ambiguities together create a potential problem in uniformity of application, as well as could encompass crimes the Commission does not intend to include. The PAG agrees that the Commission should continue to use "deadly weapon" rather than "dangerous weapon" because of the misapplication of the Commission's definitions of "dangerous weapon" by the circuits to include such things as a shod foot, *see, e.g., United States v. Steele*, 550 F.3d 693, 699 (8th Cir. 2008). But, if the Commission allows the phrase "deadly weapon" to be defined by the states, a kick from a shod foot could still count. *See, e.g., Com. v. Charles*, 57 Mass.App.Ct. 595, 599 (App. Ct. Mass. 2003)(shod foot is deadly weapon for assault and battery by means of a dangerous weapon).

It is unclear from the proposed language whether the judges applying these definition are to use the state's definition, or some other definition of "dangerous weapon."[3] What is the court

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misdemeanor" in Iowa – aggravated from its otherwise 30 day maximum jail penalty because of S's prior convictions. As such, S was eligible for a 2 year prison sentence in Iowa. S's sentencing range for distribution of drugs in federal court increased from 110-137 months to 262-327 months, all because of this conviction for throwing a milk bottle at the car. This conviction would likely still satisfy the definition under §4B1.2(a)(1) for "attempted" or "threatened" physical force. If the Commission includes special victim status in its new definitions, this same conviction with these same facts could still enhance defendants like S by more than 12 years. It is this type of result that the Commission should address.

[3] My firm also represented an individual charged with "domestic assault causing injury" who had the possibility of being enhanced to "with a weapon" in Iowa state court for throwing a bag of Cheetos at his dad. Presumably the Commission would not want this to count as a "domestic assault with a dangerous weapon causing injury" for purposes of a career offender enhancement. Yet, it still could count under §4B1.2(a)(1), and if the Commission enumerated an Aggravated Assault definition that took into account special relationships, or allowed the states to define a "weapon" then this charge would certainly also count under the new definitions. In

to do if the State only has a definition of "dangerous weapon" and does not have a "deadly weapon" definition? The Commission should define the phrase specifically or make it clear that the definition must meet the definitions in §1B1.1 of the Guidelines, not state law.

In addition, "bodily injury" also varies by state. For example, in Iowa, redness, bruising, and "pain" is a bodily injury, as is "mental distress." Yet, "bodily injury" in the Guidelines means a "significant injury," one that is "painful and obvious, or is of a type for which medical attention ordinarily would be sought." §1B1.1, App. N. 1(B). The Commission should be clear whether the judge is to compare the injury requirement under state law to see if it comports with the Commission's definitions, or if the judge can simply look to see if the words "bodily injury" were used, regardless of definition.

It seems as though use of a gun, which causes injury, is of concern to the Commission. It is PAG's opinion that this is unnecessary for the Commission to be concerned with these offenses being "left out" if the Commission is leaving §4B1.2(a)(1) intact because certainly shooting someone with a gun is the "use, attempted use, or threatened use of physical force against the person of another." Indeed, it could be argued that flashing a gun, showing a knife, or even just saying that someone has a weapon of any kind would meet this definition.

If, however, the Commission is considering replacing §4B1.2(a)(1) with enumerated offenses, then the PAG would suggest the Commission research, and then define, deadly weapon very specifically, and perhaps include a separate offense outside of the assault context to encompass these crimes before lowering the threshold of injury for those that use a weapon.

Finally, the Commission asked for comment regarding whether there should be an alternative for special victims. In PAG's opinion, there should not. An aggravated assault is aggravated more by the injury than by the status of the victim, especially when the Commission would not otherwise be considering the status of the defendant. For example, an assault of a police officer may seem less violent when it is a drunk college female slapping campus security who breaks up a party than a felon who drives his car trying to hit a police officer to try to escape arrest. Yet, using the status of the victim as the enhancement would necessarily encompass both acts. Similarly, an assault of a 17 year old minor by an 18 year old during a fight at a high school may seem less violent than a 40 year old man punching a 7 year old child in the face, yet the status of the minor victim would necessarily encompass both acts. As such, I would recommend the Commission avoid lowering or eliminating the injury requirement to encompass more crimes because of the status of the victim. Crimes against these special status victims will still sometimes be counted within the definitions already proposed, and if there is a particularly egregious conviction that escapes all of the definitions, the judge may still vary upwards from the Guidelines.

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my opinion it is not the type of crime the Commission should use to so drastically enhance sentences by decades.

- **Forcible Sex Offense.**

PAG believes that that the definition of "forcible sex offense" is too broad. Sex crime legislation has exploded in the past few years and several states have started to criminalize sexual conduct that is not a criminal act at all in other states. For example, in Iowa, we have a statute that criminalizes consensual sex between two adults if one of the adults "provides or purports to provide" counseling for any problem. Thus consensual sex between a pastor and a parishioner has been criminalized, as has consensual sex between an acupuncturist and a client, a lawyer and anyone he has given any advice to regardless if the person became a client, and a number of other relationships. The definition is not restricted to certain professions as it includes the phrase "any other person." I personally am litigating whether or not consensual sex between an Alcoholics Anonymous sponsor and a former AA attendee qualifies under this statute. These offenses, in my opinion, should not be encompassed within the definition of "crime of violence," yet the Commission's proposed definition would count them. Similar statutes abound in other states. The Commission would be well served in detailed research regarding the current status of state sex offenses, and which of these could qualify under any definition promulgated by the Commission.

The PAG suggests that the Commission should be very narrow in defining what specific offenses are "forcible sex offenses" and not leave it open for application to unknown state offenses. For that reason, I personally believe an element of no consent, as well as specific sex acts, as defined in 18 USC § 2246, should be required. I do not believe that including "sexual contact" from that subsection would be appropriate without further study. Otherwise, a person who touches the clothed inner thigh of a consenting adult, but who was in a state that criminalized certain types of sexual contact, could fall into the definition the Commission has promulgated.

The PAG also suggests that the Commission further study if statutory rape should ever be included within this definition of "crime of violence." Intent, in our opinion, is a very important element in defining crimes of violence and statutory rape often does not include an intent element.

- **Robbery.**

The Commission's definition of robbery does not encompass the traditional elements of robbery and is confusing. The Commission's definition ignores the traditional elements of taking and carrying away of property from the person of another, by force or threat of force, and intending to permanently deprive the person of that property.

The current definition has many pitfalls we can foresee. "Misappropriation" does not literally include taking the property from the person of someone – a defendant could "misappropriate" property by fraud without ever seeing the victim. If that is the case, then it still might be a "crime of violence," but would be more appropriately classified as extortion. In addition, under this definition, stealing something like a glucose monitor, or an epi-pen, would be "robbery" under the Commission's definition because it creates a "danger" to the victim, but is not the type of danger that we think the Commission is trying to encompass.

- **Burglary**

It is the PAG's opinion that the proposed burglary definition is too broad and encompasses too many relatively minor crimes. We would either delete burglary entirely from the enumerated offenses, or add elements to the definition to ensure that the Commission is capturing only those burglaries which are truly "violent."

We specifically think that the Commission's suggestion that perhaps burglary could be defined as entering a structure to commit any crime, not just a felony, is not a good idea. First, that would include graffiti artists who spray paint parking garages, which is not the category of people we want to subject to severe enhancements. It would also include those who enter a building to commit the crime of trespass, essentially turning the burglary definition into a "trespass into a building" definition. The PAG would strongly encourage the Commission to require an intent to commit a felony.

The current proposed definition of non-dwellings would encompass such offenses like walking into an unoccupied farm building to steal a hammer, or coming into an unlocked "employees only" entrance after a convenience store is closed, unarmed, and taking a soda and a bag of chips.

Burglary is a widely used state crime with varying degrees and definitions, even within a particular state. There is a developed body of law defining the current phrase "burglary of a dwelling." Without compelling reasons to change this body of law, it seems prudent to leave the burglary enhancements to those who break into houses.

- **Arson**

The PAG agrees with the Commission's proposal to generally eliminate property offenses from this definition, including the elimination of the burning of personal property as a crime of violence.

Arson is one of the proposed enumerated offenses where there is not an element of a crime against a person. However, in our opinion, an arson could still traditionally be considered "violent" because of the inherent danger in burning, or exploding, a building or car. As such, we are of the opinion that despite the general thought that crimes of violence should be against a person, arson could be one of the exceptions to that general principle. This decision should not be made without research and comment, however, as there may be certain arson crimes in the states that the Commission will want to exclude from the definitions.

- **Extortion.**

Like burglary, extortion already has a body of law developed from its inclusion in the original list of enumerated crimes. Without a compelling reason to change this body of law, it seems prudent to leave the body of law intact, with perhaps some research to be certain that the Circuits are applying this offense uniformly.

Other General Comments

We also think the Commission should consider adding a more explicit requirement that these prior convictions be "discreet criminal episodes" to count as separate offenses for career offender purposes, or some language similar to the language used in the federal three strikes provisions that the conduct of each crime has to be separated by an intervening arrest or conviction. This is especially important if the Commission is considering including burglaries of non-dwellings, or assaults without a serious injury, to its list of enumerated offenses. Most burglaries of non-dwellings that I have personally seen are of multiple structures (like multiple farm buildings, looking for farm equipment), and most assaults are fights between more than one person where there could have been one fight, but two injured parties, resulting in two charges. The enhancements under §4B1.2 are severe, and the Commission should strive to punish those who repeatedly commit distinct acts of violence on different days, rather than severely punishing those who happen to have drawn a prosecutor who filed a multiple count state charge for one fight.

Issue 1(B): Requirement that Offense Be Classified as a Felony Under State Law

The PAG believes that the Commission should use one definition of felony throughout the Guidelines, and that the definition should mirror Congress's definitions of felony. As such, the Commission's proposed change does comport with Congress's intent in how "felony" should be defined when dealing with State convictions, but does not exactly mirror Congress's language. Second, while the change fixes absurd results that can and do result from the current definition of felony in the Guidelines, having a slightly different definition of felony from Congress could create more absurd results in the future.

The definition of "felony" in the guidelines may upon first blush seem to mirror Congress's definition of "felony" in its prohibition of "felons" possessing firearms in 18 U.S.C. § 922(g)(1).

> **(g)** It shall be unlawful for any person--
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> > **(1)** who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> >
> > **…**
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> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §922(g). But upon further review of Congress's intent in defining felony offenses, Congress itself recognized the need to further refine the seemingly clear phrase, "a crime punishable by imprisonment for a term exceeding one year." In 18 U.S.C. § 921, Congress defined this phrase to exclude the same types of convictions the Commission is now proposing, only it used different language:

> **(20)** The term "crime punishable by imprisonment for a term exceeding one year" does not include--
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> **…**

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

As such, the PAG suggests that the Commission consider modeling its definition of "crime punishable by imprisonment for a term exceeding one year" after the definition that Congress used in 18 U.S.C. §922(g)(20). Therefore if a felon is barred from possessing a firearm, the felon is also a felon for purposes of sentencing enhancements within the felon in possession of a firearm guideline.

Issue 1(C): Corresponding Revisions to §2L1.2

In the PAG's opinion, the Commission should use the same definition of "felony" in §4B1.2 as it does in all sections of the Guidelines, including §2L1.2. To do otherwise raises the question of "why" the Commission would have different definitions for defendants under §2L1.2 than for defendants whose conduct falls into other areas of the guidelines. For example, if the Commission does not change the definition of "felony" in §2L1.2 while it changes elsewhere, more crimes would be considered felonies under §2L1.2 than elsewhere. Section 2L1.2 almost universally applies only to immigrants, and with a few exceptions, also usually applies to minorities. As such, any revision to the definition of "felony" in §4B1.2 should be mirrored throughout §2L1.2 so as to avoid unwarranted disparities in the guidelines. Similarly any change to "felony crime of violence" in §4B1.2 should be mirrored in §2L1.2(a).

The PAG does think that the Commission should adopt an elements approach to "misdemeanor crime of violence" within §2L1.2 if it does so in the felony context. Perhaps the Commission could do studies as to the types of misdemeanor offenses being used in this subsection of §2L1.2 to see if those offenses are of the type and severity that the Commission intended this subsection to apply to, and then formulate a more detailed and well-informed list of offenses that the Commission intended this subsection to apply to.

General Uniformity Concerns

Finally, it is the PAG's opinion that the Commission should define "crime of violence," "felony," and "controlled substance offense" uniformly throughout the entire Guidelines. One of the Commission's goals is to promote uniformity. Uniformity is best achieved when judges can rely upon one definition that is defined the same for every guideline, and interpreted the same throughout the country. One of the Commission's other goals is deterrence. Deterrence is best achieved when a lawyer can tell a client what offenses do, and do not, count as crimes of violence and controlled substance offenses, which may guide any future conduct. Uncertainty

eliminates that ability to inform clients of the results of any future criminal activity, and eliminates the best type of deterrence, which is clarity and certainty.

When I teach my Federal Criminal Law class, I show the law students a letter I once sent when I was an assistant federal public defender to a client who was charged in a routine drug indictment. I use this letter to demonstrate how complicated something as simple as an options letter can be in federal court. I have been using this letter for eight years now. In the six page letter I spend less than one page explaining the client's trial rights and less than one page explaining the statutes and penalties that are associated in his case. The remainder of the letter, indeed over 4 pages, sets forth the potential guideline range, including the possibility of him being a Career Offender under the Guidelines. I use the words "possibly," "probably" and "might" in reference to Career Offender seven different times. Indeed in discussing one offense I said "this issue is currently up on appeal in a different case" to explain why I could not tell him what his potential sentence would be. In the end, I could not advise him if he would be a Career Offender or not. Indeed, I couldn't even give him a sentencing range that he was looking at that wasn't a span of over 100 months. He ended up being labelled a Career Offender because of a misdemeanor without any threat of harm to a person, and an assault that did not have any injuries associated with it. Today, he would not have been a Career Offender as one of those crimes was later ruled by the Eighth Circuit to not be a qualifying offense under the Career Offender guideline, post *Begay v. United States*, 553 U.S. 137 (2008). I guarantee this client has absolutely no idea what offenses in the future would qualify as prior crimes of violence. And if he called me, I probably couldn't give him the answer, still, today. The Commission should strive to fix this problem.

The phrases "maybe," "might" and "depends on your judge" that we defense lawyers use daily in advising our clients of the consequences of their current, and future, criminal activity are unnecessary. When I advise people in state court whether their prior offenses will enhance future offenses, it is an easy and well-defined task. Indeed in our state courts, judges advise the defendants of what happens if they engage in future conduct because it is clear that the instant offense will, or will not, count to enhance future sentences. The Commission should strive to make it so that judges could do the same in federal court. A drastic overhaul of the definitions used for "felony crime of violence" in the Guidelines would be a step in the right direction.

Let me end by thanking you again, on behalf of the PAG, for providing us with this opportunity to provide input on amending these guidelines. We look forward to continuing to work with the Commission and the Staff.

Sincerely,

Angela L. Campbell