U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 27, 2023

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

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts,* 88 Fed. Reg. 7180 (Feb. 2, 2023).

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5. Career Offender

In its annual report, the Department encouraged the Commission to address the use of the "categorical approach," in the Guidelines, including as used for the career offender guideline. As the Department explained in that letter, "especially long sentences should be reserved for violent offenders and aggravated repeat offenders," but the Guidelines' current approach had led to odd and widely disparate Guidelines ranges for defendants depending on both the jurisdiction of their prior convictions and the jurisdiction in which the Guidelines are being calculated.

The Department therefore greatly appreciates and supports the Commission's efforts to address the definitions of "crime of violence" and "controlled substance offense" in the Guidelines. In particular, we support the Commission's proposals in Parts B-D (and in Part B of the proposals regarding Circuit Conflicts) to update specific aspects of those definitions. We are also grateful for the Commission's efforts to address the categorical approach. We have significant concerns, however, that the Listed Guidelines proposal—which would require courts

to engage in a largely novel mode of analysis—will generate an enormous amount of litigation and disparate outcomes.

The Department has long maintained that the best way to address the categorical approach is to retain the current definitions (as amended in Parts B-D and in Part B regarding Circuit Conflicts) but permit courts to consider actual conduct. Alternatively, the Commission could retain the current definitions (again, as amended), but adopt the part of the Listed Guidelines approach that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." Both options would be preferable to the proposed Listed Guidelines approach. If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options, including a conduct-based approach, including through hearings with testimony from judges and other stakeholders. If the Commission nonetheless proceeds with the Listed Guidelines approach, we offer some suggestions below for reducing the likely litigation burden on courts.

Finally, the Department recognizes the legitimate concerns about severity levels associated with many recidivist provisions, including in the Guidelines. As notions of fairness in federal sentencing have evolved over the last three decades, many stakeholders now recognize that some of the lengthy sentences previously called for by the Guidelines are not necessary or appropriate. The career offender guideline, in particular, has been the subject of considerable criticism for producing overly long sentences. Decades of research show that the career offender guideline produces a clear racial disparity in application.[42] District judges, recognizing that the resulting career offender guideline sentences are unjustifiably long, have routinely imposed below-guideline sentences in these cases—often at the government's request.[43] Likewise, the Sentencing Commission, as recently as 2016, urged Congress to amend the career offender directive to focus on the most dangerous and culpable defendants.[44] More recently, the Attorney General encouraged line prosecutors to recommend variances in certain career offender cases, acknowledging the increasing rate of below-guideline sentences in these cases. While the Commission's proposal today would not directly address those concerns, the Department, as it wrote in its annual report, would welcome the opportunity to work with the Commission to analyze severity levels for various recidivism provisions to determine which ought to be reformed, either by amending the Guidelines provisions directly or by recommending legislative changes to Congress.

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[42] *See*, U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (2004).

[43] In FY 2021, fewer than 20% of all defendants designated as career offenders received a sentence within guideline. Conversely, 54.8% of career offenders received a variance, almost all of them receiving a downward variance. The government, too, has increasingly asked courts to impose sentences below the Guidelines range: The rate of government sponsored below-range sentences has increased from 5.6% in FY 2005 to 21.0% in FY 2014. *See* U.S. Sentencing Commission, *Report to Congress: Career Offender Sentencing Enhancements* 22 (2016).

[44] *Id.* at 3.

A. Part A—Categorical Approach

Part A of the proposed amendments regarding the career offender guideline aims to eliminate application of the categorical approach by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. The Department appreciates this effort, as it is now widely recognized that the categorical approach generates extensive litigation, consumes vast amounts of court resources, and produces disparate sentencing outcomes. The Department has concerns, however, about the Commission's proposed amendment.

1. The Department's Concerns About the Categorical Approach

The categorical approach to determining what qualifies as a prior aggravating conviction focuses on the elements of an offense rather than on the defendant's culpable conduct. To wit, courts applying the categorical approach "identify the *least* culpable conduct" criminalized by the statute and compare that conduct against the relevant statutory definition.[45] Thus, many offenders who committed prototypically violent crimes are no longer held accountable for those offenses under the career offender provision (and various guidelines that incorporate the definitions from that provision). Some of the most violent crimes—murder, carjacking, rape, and more—no longer qualify as "crimes of violence."[46]

Moreover, sentencing outcomes based on the categorical approach vary widely across jurisdictions. For instance, while robbery remains a "crime of violence" under many state statutes, it no longer does in many others.[47] Thus, two defendants who committed the same forceful robbery in different states may well be treated very differently under the Guidelines. The problem has spilled into the definition of "controlled substance offense" as well. As addressed earlier, some courts employing the categorical approach have held that state offenses involving cocaine and heroin are not "controlled substances offenses." *See supra* at 20-22.

Likewise, courts and litigants must travel an arduous road to resolve these questions. To determine whether a prior offense is a categorical match to an enumerated offense, for example, courts must first determine the generic definition, "rely[ing] on various sources, such as state and federal statutes, state and federal common law, the Model Penal Code, criminal law treatises, the United States Code of Military Justice, and dictionaries." *United States v. Hernandez-Montes*, 831 F.3d 284, 292 (5th Cir. 2016). Courts must then engage in an "exhaustive review of state law

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[45] *United States v. Harris*, 844 F.3d 1260, 1268 n.9 (10th Cir. 2017) (emphasis added); *see also United States v. Torrez*, 869 F.3d 291, 319 (4th Cir. 2017) (noting that the "categorical approach . . . focuses on the least culpable act proscribed by statute rather than the particular culpability of a defendant"); *United States v. Verwiebe*, 874 F.3d 258, 260–61 (6th Cir. 2017); United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016); *United States v. Rodriguez-Negrete*, 772 F.3d 221, 225 (5th Cir. 2014).

[46] *See, e.g.*, *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder); *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (California carjacking); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape).

[47] *See, e.g.*, *United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018) (California); *United States v. Fluker*, 891 F.3d 541 (4th Cir. 2018) (Georgia); *United States v. Edling*, 895 F.3d 1153, 1156-58 (9th Cir. 2018) (Nevada); *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (Ohio); *United States v. Peterson*, 902 F.3d 1016 (9th Cir. 2018) (Washington); *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018) (Wisconsin).

as courts search for a non-violent needle in a haystack or conjure up some hypothetical situation to demonstrate that the predicate state crime just might conceivably reach some presumably less culpable behavior outside the federal generic." *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring). And if the state crime is potentially overbroad, courts must pour through state law once more to determine whether the offense is "divisible," such that the "modified categorical approach" may apply.

Judicial criticism of these corollaries of the categorical approach, for the reasons stated here, has been sharp.[48] This mode of analysis is particularly anomalous with regard to application of the Sentencing Guidelines. The constitutional concern that first animated the categorical approach—that judges cannot make factual findings that increase the applicable statutory penalties—is not present when applying the advisory Guidelines. Thus, the Guidelines have never expressly required a categorical approach, and sentencing courts are permitted—indeed, required—to make all manner of factual conclusions regarding a defendant's biographical history so long as they turn on reliable evidence.

The Department has long maintained that the best approach to identifying qualifying state predicate offenses under the Guidelines is to retain the current "crime of violence" and "controlled substance offense" definitions (with the changes listed in Parts B-D, and in Part B regarding Circuit Conflicts, addressing the definition of "controlled substance offense"), but to allow courts to consider actual conduct if necessary to understand the specific basis of the conviction.[49] Such an approach would permit courts to rely on the extensive body of caselaw already interpreting those definitions. The only analytical difference would be that courts could look to reliable evidence to determine what conduct the defendant's prior offense involved—an assessment that sentencing courts are already required to perform, as they assess the conduct and characteristics of a defendant that go well beyond the elements of the offense of conviction. This approach also has the significant advantage of making sense to courts, litigants, and the public.

Alternatively, the Commission could retain the current definitions (again, with the Part B-D and Circuit Conflicts Part B changes we support), but adopt the part of the Listed Guidelines approach that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." Under this approach, courts would no longer need to consider whether an offense is divisible to rely on the information about the offense in the *Shepard* documents.

Both options would be preferable to the proposed Listed Guidelines approach, as each would both dramatically reduce the burden on courts and litigants. If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options.

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[48] *See, e.g.*, *Mathis v. United States*, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring) ("Congress . . . could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149–50 (9th Cir. 2020) (Graber, J., concurring) ("I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach.").

[49] *See* Department of Justice Letter to the Commission (October 30, 2015); Department of Justice Letter to the Commission 2-6 (February 19, 2019).

2. The Listed Guidelines Approach for State Offenses.

While we appreciate the intention behind the Commission's Listed Guidelines, the Department has concerns that this approach to state offenses will generate significant litigation, as courts must determine whether particular state offenses are analogous to those federal crimes addressed in the specified guidelines. The Listed Guidelines proposal includes dozens of different federal guidelines, which cover conduct addressed by thousands of state criminal provisions, with significant variations among the states in addressing the same types of crimes. And the language used in the proposal—calling for comparison to the guideline "that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted"—could cause considerable confusion. District courts and courts of appeals are thus likely to disagree on the mode of analysis required by the Listed Guidelines approach, the scope of the dozens of federal guidelines, the scope of the thousands of state statutes, and the comparison of all those state statues to the federal guidelines. The result will, once again, be different treatment of similarly situated defendants across jurisdictions.

If the Commission proceeds with the Listed Guidelines approach, the Department has several suggestions to help ameliorate these problems. First, as to the mode of analysis, the Commission should expressly state—as the Department understands to be the intent—that its "most appropriate guideline" proposal calls for an assessment similar to that under §2X5.1, which requires courts to determine the "most analogous guideline" when sentencing a defendant for an offense "for which no guideline expressly has been promulgated," such as convictions under state law pursuant to the Assimilative Crimes Act. The "most analogous guideline" assessment does not require a "perfect match of elements." *United States v. Jackson*, 862 F.3d 365, 376 (3d Cir. 2017). Rather, it requires only an assessment of whether the guideline in question "covers the 'type of criminal behavior' of which the defendant was convicted." *United States v. Calbat*, 266 F.3d 358, 363 (5th Cir. 2001).

Even with such clarification, however, courts and litigants must still engage in the difficult job of comparing each and every potentially relevant state offense to the Listed Guidelines to determine which guideline is "most analogous." Courts will inevitably disagree, resulting in disparate treatment of similarly situated defendants across jurisdictions. This problem extends not only to application of the "crime of violence" provision, but to the "controlled substance offense" provision as well, as courts will be compelled to address long-settled questions about the inclusion of scores of state statutes in order to compare those provisions anew to the relevant federal guidelines.

To help address these concerns, the Commission could retain the force clause from the current Guidelines that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." In other words, an offense would qualify if it satisfied either the Listed Guidelines approach, or the force clause as determined by means, elements, and conduct cited in the count of conviction. Such an approach would at least permit litigants and courts to avoid relitigating the modest number of statutes that courts have

previously found to be crimes of violence under the categorical approach, or that would have been crimes of violence if the relevant statute had been deemed divisible.[50]

There are also ways to improve the process for determining whether an offense satisfies the Listed Guidelines approach—in particular, to focus on actual conduct, not statutory provisions alone, when determining whether a listed analogous guideline applies. The Commission's proposal anticipates this problem and this solution, first by providing that "[t]he fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines listed in subsection (a)(2) or (b)(2) is not determinative," and second by inviting courts to consider "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means."

While we laud these provisions, we are concerned that the body of information that courts may rely upon to determine "the offense conduct" may be too narrow to avoid the pitfalls inherent in the categorical approach. In particular, it is not necessary to limit courts to the documents identified in *Shepard v. United States*, 544 U.S. 13, 16 (2005). That case involved the application of a statutory penalty enhancement, and thus implicated constitutional concerns under current Supreme Court caselaw addressing the Sixth Amendment. *See id.* at 24-26. Those concerns are inapposite with respect to the advisory Sentencing Guidelines. Indeed, as stated above, courts routinely and necessarily resolve disputed facts at sentencing, including facts about a defendant's past conduct and history, using any reliable information. This authority should not extend to identifying career offender predicates as well.

For these reasons, the Department suggests that the Listed Guidelines approach should be based on consideration of the actual conduct underlying a prior conviction, as established by any reliable information, including judicial documents. This proposal is faithful to the purposes of sentencing to assess the individual offender before the court, and to the core goal of the Guidelines to treat similarly situated offenders alike based on their actual conduct. Most notably, allowing consideration of actual past criminal conduct is consistent with the manner in which courts assess all information about the offender's conduct and history, by consideration of "any information that has sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3. Pursuant to *Booker*, courts are permitted to determine pertinent sentencing facts by a preponderance of the evidence, and the determination of a defendant's criminal history should be treated the same as any other relevant fact about the defendant's conduct.

3. The Listed Guidelines Approach for Federal Offenses.

Although the Department continues to believe a conduct-based approach best resolves the problems associated with the categorical approach, the Listed Guidelines approach is a better fit for federal offenses than it is for state offenses. The Department believes that the best alternative to the conduct-based approach for prior conviction involving a federal crime is to simply list the federal crimes that qualify; for instance, with respect to a "crime of violence," there is no need to

[50] As noted below, the Department suggests one slight modification to the force clause, to refer to the use of force against the person "or property" of another. This modification would bring the provision in line with the clauses that appear in 18 U.S.C. § 16(a) and 18 U.S.C. § 924(c).

expend resources debating whether Hobbs Act robbery, carjacking, or a host of other obviously violent crimes qualify. This may be accomplished by listing federal statutes, and we would be pleased to provide a suggested list at the Commission's request. The Commission's current proposal, in defining "crime of violence" and "controlled substance offense" in relation to specific guideline provisions, largely accomplishes the same purpose, particularly if adopted with the alterations we suggest.

The list of "crime of violence" guidelines in the proposed version of §4B1.2(a)(2) seems largely appropriate for this task. The Department suggests adding these additional guidelines to address additional violent crimes that are not currently included:

- §2B2.2 (burglary)
- §2E2.1 (collecting an extension of credit by extortionate means)
- §2G1.1(a)(1)(a) (commercial sex acts in violation of 18 USC 1591(b)(1): sex trafficking using force)
- §2L1.1 (illegal alien smuggling, with a limitation to if a firearm was used or the offense involved the intentional risk of death or severe bodily injury)
- §2M1.1 (treason)
- §2P1.1, 2, and 3 (escape from prison—with the limitation to using force, firearm possession in prison, and inciting prison riots)

The Department agrees that the list of "controlled substance offense" guidelines in §4B1.2(b)(2) should include §§2D1.1, 2D1.9, and 2D1.11. The Commission has also proposed the option of adding to the list: §§2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Certain Individuals); 2D1.6 (Use of Communication Facility in Committing Drug Offense), if the appropriate guideline for the underlying offense is also listed in this paragraph; 2D1.8 (Renting or Managing Drug Establishments); 2D1.10 (Life Endangerment While Manufacturing Drugs); 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Items).

The Department supports adding §2D1.2, which exclusively applies to drug trafficking offenses. But the other provisions that are referenced in this possible addition—§§2D1.6, 2D1.8, 2D1.10, and 2D1.12—address offenses that fall outside the definition of "controlled substance offense" used by the Sentencing Commission for the past several decades. Thus, if the Commission proceeds—despite the Department's concerns—with the Listed Guidelines Proposal, the Department would have no objection to excluding specific references to §§2D1.6, 2D1.8, 2D1.10, and 2D1.12.

4. Recklessness.

If the Commission adopts the Listed Guidelines approach, it should not provide for a blanket exclusion of any offense that involves a finding of recklessness. Such a provision would exclude from the definition of "crime of violence" many robberies, aggravated assaults, and possibly even murders that involve bodily injury or death. Indeed, more than a third of the states permit conviction for aggravated assault based on ordinary recklessness. *See United States v. Schneider*, 905 F.3d 1088, 1094-95 (8th Cir. 2018) (citing statutes). Several states have robbery-

by-injury statutes, which prohibit robbery accomplished by the reckless causation of injury. *See e.g.*, Haw. Rev. Stat. § 708-841(c); Me. Rev. Stat. tit. 17-A, § 651(1)(A); *State v. Wright*, 608 S.W.3d 790, 796 (Mo. Ct. App. 2020). And many murder statutes permit conviction upon a finding of extreme recklessness, known as "depraved heart" murder. In order to establish that a defendant committed reckless serious bodily injury assault, the government must prove that the defendant knew that there was a risk that his actions would cause serious bodily injury, consciously disregarded that risk, and in fact caused that injury. Such a defendant has committed a crime of violence.

Moreover, excluding reckless crimes would cause anomalous results, as defendants who attempt or threaten to commit violent crimes would face longer Guidelines ranges than defendants who in fact complete those crimes. As but one example, an assault conviction in Tennessee for threatening a victim with a deadly weapon would constitute a crime of violence, *see* Tenn. Code § 39-13-101(a)(2), 39-13-102(a)(1)(B), but a conviction for recklessly causing serious bodily injury would not, *see* Tenn. Code § 39-13-101(a)(2), § 39-13-102(a)(1)(B). Likewise, an attempted assault would (presumably) still qualify as a crime of violence, as it would require a specific intent to injure or threaten, but a completed assault might not. Similarly, robbery by threat of bodily injury would be a violent felony, while robbery by causation of bodily injury would not. These distinctions defy common sense.

The inclusion of a recklessness exception also exacerbates the problems that result from limiting courts to the *Shepard* documents. As noted above, countless statutes prohibiting violent conduct include recklessness as a possible *mens rea*. Charging documents, however, often parrot the statutory language and list every possible *mens rea* element, even where the offense was in fact based on knowing or intentional conduct. In such states, the limited *Shepard* documents often will be insufficient to establish whether the defendant's assault or robbery offense qualifies. In addition, many statutory provisions require a different *mens rea* for different elements. For instance, a statute may require that the defendant act intentionally in the use of force but permit recklessness with regard to the extent of the resulting injury. The Commission's suggested language may wrongfully eliminate such violent crimes from qualifying.

If the Commission nonetheless adopts an exclusion for offenses that were committed recklessly, the Department recommends two changes. First, it should place the burden on the defense to show that the conviction was based on entirely reckless conduct. Second, it should make clear that offenses that are committed with a *mens rea* of "extreme recklessness" still qualify. In *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court concluded that crimes that can be committed recklessly do not satisfy ACCA's force clause, but expressly stated that its holding did not apply to offenses involving "extreme recklessness." *Id.* at 1825 n.4. Every appellate court to address the issue agrees that such crimes still qualify as predicate offenses under ACCA.[51] Indeed, a contrary conclusion would jeopardize application of not only the majority of state aggravated assault provisions as predicates, but also most federal and state statutes addressing the most serious of crimes, murder.

[51] *See United States v. Baez-Martinez*, 950 F.3d 119, 127 (1st Cir. 2020); *United States v. Begay*, 33 F.4th 1081, 1096 (9th Cir. 2022) (en banc); *United States v. Manley*, 52 F.4th 143, 150-51 (4th Cir. 2022); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1344-45 (11th Cir. 2022).

5. Suggested Language

For all the reasons stated above, the Department continues to support retaining the current definitions (with the changes in Parts B-D below regarding the Career Offender guideline, and the changes in Part B of Circuit Conflicts regarding the definition of "controlled substance offense"), while permitting courts to consider actual conduct, or (as a less favored alternative) the elements, means, and conduct established by the *Shepard* documents. If the Commission adopts the Listed Guidelines approach, the Department suggests the revisions as discussed above. If the Commission does not agree with these suggested revisions, we request that the Commission make only the changes in Parts B-D, and in Circuit Conflicts Part B, and postpone any proposals to address the categorical approach until the next amendment cycle.

In an Issue for Comment, the Commission also asks whether the definitions of "crime of violence" and "controlled substance offense" in § 2L1.2 should be amended to mirror any new definition in §4B1.2. The Department believes that the same definitions of these terms should apply throughout the Guidelines, for ease of application and to promote consistent results.

6. Departures or Variances

Finally, regardless of the approach that it takes, we encourage the Commission to add an application note explaining when variances should be considered for the career offender guidelines. On December 16, 2022, the Attorney General issued guidance to all federal prosecutors explaining that requests for departures or variances "may be particularly justified" for "[c]ertain cases in which the career offender guidelines range does not adequately reflect the defendant's crime and culpability." In particular, the Attorney General advised prosecutors to consider supporting a downward variance for certain nonviolent, low-level drug defendants, where the defendant's status as a career offender is predicated only on the current and previous commission of nonviolent controlled substance offenses.[52] Conversely, the Attorney General stated that "if the defendant's prior convictions involved the actual or threatened use of violence, but the crimes do not qualify as career offender predicates under the 'categorical approach,' if appropriate, prosecutors may consider advocating for an upward variance, including toward the career offender range."

The Commission should consider adopting similar guidance here. The Commission added a similar note in 2016, when it removed burglary as an enumerated offense; at that time, it added the current Application Note 4, suggesting the possibility of an upward variance where a burglary involved violence. Judges have recognized the propriety of variances in this situation.[53]

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[52] Indeed, the Commission itself has documented the increasing frequency of sentencing variances below a career offender range, particularly for those whose career offender status rested on drug offenses rather than violent crimes. By fiscal year 2014, judges imposed a sentence below the career offender range in roughly 75% of drug-based career offender cases, frequently choosing a sentence close to the non-career offender drug guideline. United States Sentencing Commission, Report to the Congress: Career Offender Enhancements 35 (2016).

[53] *See United States v. Carter*, 961 F.3d 953, 954 (7th Cir. 2020) ("As the Sentencing Commission itself has recognized since the Sentencing Guidelines were first adopted, district judges may and should use their sound discretion to sentence under 18 U.S.C. § 3553(a) on the basis of reliable information about the defendant's criminal history even where strict categorical classification of a prior conviction might produce a different guideline sentencing range.").

The Commission should thus remind courts that such variances are appropriate. More broadly, and as explained in its annual report, the Department has concerns about the severity levels associated with recidivist provisions, and we believe that certain of these levels are not optimally set. The Department encourages the Commission to consider this issue in a future amendment cycle, and the Department would welcome the opportunity to assist the Commission in this work.

B. Part B: Career Offender—Robbery

Part B of the proposed Career Offender amendments would define the enumerated offense of robbery consistent with the Hobbs Act, 18 U.S.C. § 1951. This proposal would be unnecessary if the Commission adopts the Listed Guidelines approach for federal offenses, as addressed above. If the reference to "robbery" remains in §4B1.2, the Department supports the proposal in Part B.

As the Commission notes, many recent appellate decisions hold that Hobbs Act robbery—the foremost federal statute addressing a quintessential violent crime—does not qualify as a "crime of violence" under the Guidelines.[54] Before a recent amendment, courts consistently treated Hobbs Act robbery as a §4B1.2 crime of violence, as it satisfied a combination of the enumerated offenses of robbery and extortion, which itself could rest on threats of force against property. *See, e.g.*, *United States v. Becerril-Lopez*, 541 F.3d 881, 892 (9th Cir. 2008). In 2016, however, the Commission narrowed the enumerated definition of "extortion" by limiting the offense to those having an element of force or an element of fear or threats "of physical injury," as opposed to nonviolent threats such as injury to reputation. USSG, Suppl. to Appx. C, Amendment 798 (Nov. 1, 2016). Many courts, however, have determined that "physical injury" refers only to injury to a person, thus excluding from the definition of "extortion" crimes, such as Hobbs Act robbery, which may rest on force against property as well as a person. *See, e.g.*, *United States v. Scott*, 14 F.4th 190, 197 (3d Cir. 2021). It plainly was not the Commission's goal to delete Hobbs Act robbery as a "crime of violence." The government therefore supports the proposed amendment, which sensibly corrects this mistake by importing the language of the Hobbs Act into the §4B1.2 definition of "robbery."

Indeed, the Department suggests that the Commission go further to correct the unintended consequence of Amendment 798. By defining the enumerated offense of "extortion" to concern only the use of force or threats against a person, not property, the Commission may have also inadvertently eliminated nearly every extortion crime as well, as extortion has historically encompassed threats and damage to property as well as people. Indeed, federal law enforcement has long focused on extortionate threats against property as violent and dangerous crimes. Targeting extortion—defined as "the obtaining of money or property from another with his consent, induced by the wrongful use of force or fear . . . induced by oral or written threats to do an unlawful injury to the *property* of the threatened person . . ."—was a central focus of the Senate's "Copeland Committee," which proposed what became the Anti-Racketeering Act of

[54] *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 490 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176, 179-83 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793, 799-802 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

1934. *See* Crime and Criminal Practices," Report of the Senate Committee on Commerce, S. Rep. No. 1189, 75th Cong., 1st Sess. (1937). The adoption of the Hobbs Act in 1946, ch. 537, 60 Stat. 420, left the key provisions of the Anti-Racketeering Act unaltered, continuing to target violence directed against property as well as persons. *See Scheidler v. Nat'l Org. for Women, Inc*., 547 U.S. 9, 18-20 (2006) (discussing the legislative focus on physical violence through robbery and extortion). Congress has thus long recognized, and has never wavered in its conclusion, that extortion includes violent threats to property as well as persons. We doubt that the Commission in 2016 intended to alter, *sub silentio*, the long-accepted definition and narrow the meaning of extortion. If the term "extortion" remains in §4B1.2, the Commission therefore should issue a statement that "physical injury," as it appears in the application note, refers to injury to property as well as persons.

Finally, the Commission inquires whether it should adopt the definition of the level of force required for robbery stated in *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019) ("The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance."). That is a sensible proposal for purposes of completeness.

C. Part C: Career Offender—Inchoate Offenses

The Department supports Option 1 of the Part C proposal to define the terms "crime of violence" and "controlled substance offense" to include inchoate offenses in the textual definition of the terms, rather than through an application note. Option 1 would be unnecessary if the Listed Guidelines proposal in Part A were adopted; but if not, Option 1 would confirm the Commission's long-held position that the terms "crime of violence" and "controlled substance offense" include conspiracies to commit, attempts to commit, and aiding and abetting any qualifying substantive crime. In the wake of the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), some courts of appeals have disregarded the Guidelines commentary defining "crimes of violence" and "controlled substance offenses" to include inchoate offenses. The Department agrees with the courts of appeals that have followed the Guidelines' commentary, but moving the long-settled application note into the Guidelines text would resolve the matter.

Option 1 (like the Part A proposal) also appropriately provides that a conspiracy offense qualifies whether or not proof of an overt act is required. There are numerous conspiracy statutes that do not require proof of an overt act, including the principal federal drug conspiracy statute, 21 U.S.C. § 846. There is no rational basis for excluding these crimes from §4B1.2.

D. Part D: Career Offender—Offer to Sell

The Department supports Part D of the proposed amendments to the Career Offender guideline, which provides that an offense involving an "offer to sell" qualifies as a "controlled substance offense." Again, this proposed amendment is immaterial if the Commission adopts a Listed Guidelines approach in its entirety. But otherwise, the Commission should adopt this proposal. An "offer to sell" fits comfortably within the traditional definition of a drug trafficking crime. This amendment would also bring §4B1.2(b) explicitly into line with the definition of "drug trafficking offense" in the illegal reentry Guideline at § 2L1.2 cmt. n.2. There is no sensible reason that the definitions should differ.

Moreover, because of the categorical approach, many state offenses that involve actual trafficking of controlled substances do not constitute "controlled substance offenses" because they also cover an "offer to sell." *See, e.g.*, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); *United States v. Madkins*, 866 F.3d 1136, 1143-48 (10th Cir. 2017). This results in disparate treatment of defendants, depending on the breadth of the state statute under which they were prosecuted. These problems are eliminated by a sensible provision that a "controlled substance offense" includes an offer to sell.

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[55] Proposed Amendment on Criminal History (citing United States Sentencing Commission, Revisiting Status Points (2022), *available at* https://www.ussc.gov/research/research-reports/revisiting-status-points).

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

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