



Proposed Amendment to the Sentencing Guidelines

August 12, 2015

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendment can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.

Written public comment should be received by the Commission not later than **November 12, 2015**, and should be sent to the Commission by electronic mail or regular mail. The email address for public comment is **Public_Comment@ussc.gov**. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs. For further information, see the full contents of the official notice published in the Federal Register (available at www.ussc.gov).

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SUPPLEMENTARY INFORMATION

The proposed amendment as presented in this notice contains bracketed text to indicate a heightened interest on the Commission’s part in comment and suggestions regarding alternative policy choices and on whether the proposed provision is appropriate. The Commission has also highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In addition to the issues for comment set forth in the proposed amendment, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), the proposed amendment published in this document should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

Publication of a proposed amendment requires the affirmative vote of at least three voting members and is deemed to be a request for public comment on the proposed amendment. *See* Rules 2.2 and 4.4 of the Commission’s Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See* Rule 2.2; 28 U.S.C. § 994(p).

Additional information pertaining to the proposed amendment described in this notice may be accessed through the Commission’s website at www.ussc.gov.

PROPOSED AMENDMENT: “CRIME OF VIOLENCE” AND RELATED ISSUES

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

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

Procedure

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

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

Parts of the Proposed Amendment

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Amendment:

(A) “Crime of Violence” in §4B1.2

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

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

Commentary

Application Notes:

1. For purposes of this guideline—

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

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

“Crime of violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense

~~of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.~~

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

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

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

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

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

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

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

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

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

(B) “Voluntary manslaughter” is (i) the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion; or (ii) causing the death of a human being through actions intended to cause serious physical injury to another human being.

- (C) “Kidnapping” is an offense that includes at least (i) an act of restraining, removing, or confining another; (ii) an unlawful means of accomplishing that act; and (iii) at least one or more of the following aggravating factors: (I) the offense was committed for a nefarious purpose; (II) the offense substantially interfered with the victim’s liberty; or (III) the offense exposed the victim to a substantial risk of bodily injury, sexual assault, or involuntary servitude.
- (D) “Aggravated assault” is (i) attempting to cause serious or substantial bodily injury to another, or causing such injury purposefully, knowingly, or recklessly; or (ii) attempting to cause, or purposefully, knowingly, or recklessly causing, bodily injury to another through use of a deadly weapon.
- (E) A “forcible sex offense” is any offense requiring a sexual act or sexual contact to which consent to the actor’s conduct (i) is not given, or (ii) is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The terms “sexual act” and “sexual contact” have the meaning given in 18 U.S.C. § 2246.
- (F) “Robbery” is the misappropriation of property under circumstances involving immediate danger to the person of another.
- (G) [“Burglary of a dwelling” is an unlawful or unprivileged entry into or remaining in a dwelling with intent to commit a [crime][felony].] [“Burglary” is an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a [crime][felony].]
- (H) “Arson” is the intentional damaging, by fire or the use of explosives, of any building, vehicle, or other real property.
- (I) “Extortion” is obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

23. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.
34. The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

* * *

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

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

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year and classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted, that—

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

* * *

Commentary

Application Notes:

- 1. For purposes of this guideline—

* * *

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

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(C) Corresponding Revisions to §2L1.2

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
 - (1) Apply the Greatest:

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

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

Commentary

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

Application Notes:

1. Application of Subsection (b)(1).—

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

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

- (i) “Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).
- (ii) “Child pornography offense” means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
- (iii) “Crime of violence” has the meaning given that term in §4B1.2(a). However, for purposes of subsection (b)(1)(E), which applies to misdemeanor crimes of violence, the requirements in §4B1.2(a) that the offense be a felony (i.e., punishable by a term more than one year and classified as a felony) do not apply. ~~means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.~~
- (iv) “Drug trafficking offense” means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (v) “Firearms offense” means any of the following:
 - (I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).
 - (II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).
 - (III) A violation of 18 U.S.C. § 844(h).
 - (IV) A violation of 18 U.S.C. § 924(c).
 - (V) A violation of 18 U.S.C. § 929(a).
 - (VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
- (vi) “Human trafficking offense” means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under

any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

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

* * *

Issues for Comment:

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

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

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

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

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

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

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

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

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

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

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

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