UNITED STATES SENTENCING COMMISSION

+ + + + +

PUBLIC HEARING ON PROPOSED AMENDMENTS TO 
THE FEDERAL SENTENCING GUIDELINES

+ + + + +

THURSDAY
NOVEMBER 5, 2015

+ + + + +

The Public Hearing commenced in the Thurgood Marshall Building, Room 2-500, One Columbus Circle NE, Washington, D.C., at 9:00 a.m., Patti B. Saris, Chair, presiding.

COMMISSIONERS PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RACHEL E. BARKOW
DABNEY L. FRIEDRICH
WILLIAM H. PRYOR, JR.

EX OFFICIO COMMISSIONERS PRESENT

JONATHAN WROBLEWSKI, Department of Justice
PANEL I: VIEWS FROM THE JUDICIARY

HON. IRENE M. KEELEY, Chair, Committee on Criminal Law of the Judicial Conference of the United States
HON. KATHLEEN CARDONE, United States District Court, Western District of Texas

PANEL II: VIEWS FROM THE EXECUTIVE BRANCH


PANEL III: VIEWS FROM THE PRACTITIONERS

MOLLY ROTH, Assistant Federal Public Defender, Western District of Texas
ANGELA CAMPBELL, Eighth Circuit Representative, Practitioners Advisory Group

ZACHARY MARGULIS-OHNUMA, National Association of Criminal Defense Lawyers

PANEL IV: VIEWS FROM THE FIELD

RICHARD BOHLKEN, Chair, Probation Officers Advisory Group
T. MICHAEL ANDREWS, Chair, Victims Advisory Group
C-O-N-T-E-N-T-S

Opening remarks and Introductions

The Honorable Patti B. Saris ............ 4

Opening Comments

Jonathan Wroblewski .................... 11

Panel I: Views from the Judiciary

The Honorable Irene M. Keeley ........... 16
The Honorable Kathleen Cardone ........ 31

Panel II: Views from the Executive Branch

Robert Zauzmer.......................... 63

Panel III: Views from the Practitioners

Molly Roth.................................. 105
Angela Campbell............................ 115
Zachary Margulis-Ohnuma ............... 121

Panel IV: Views from the Field

T. Michael Andrews .................... 167
(9:05 a.m.)

CHAIR SARIS: Well good morning to everyone. As you know, I am Patti Saris and I am Chair of the Sentencing Commission and I want to welcome everyone this morning to the public hearing.

We will hear testimony about a proposed amendment that the Commission published in August seeking comment on proposed changes to Guideline definitions relating to the nature and impact of a defendant's prior conviction for a crime of violence.

I am very glad to see the members of the public join us here up in our cozy commission room, but I'd also say that there are lots of people I think watching us nationwide because we are webcasting this proceeding.

We are so tech savvy these days, so hopefully people are watching us across the country.
The proposed changes that are the topic of the hearing are primarily intended to comport the Sentencing Guideline provision applicable to certain career offenders to the recent Supreme Court case Johnson v. United States.

In Johnson, the Supreme Court struck down as unconstitutionally vague a portion of the statutory definition of violent felony used in a similar penalty in the Armed Career Criminal Act, which today I think many people refer to as ACCA.

While the Supreme Court in Johnson did not address sentencing guidelines, the statutory language the Court found unconstitutionally vague, often referred to as the residual clause, is identical to language contained in the Career Offender Sentencing Guideline.

For several years we have been studying the statutory and guideline definitions relating to the nature of an offender's prior convictions.
This has included a study of the definitions of crimes of violence in the Career Offender and other guidelines, as well as the difficulties associated with the categorical approach used in applying these definitions.

In the proposed amendment we attempt to address these difficulties by the inclusion of a list of enumerated offenses and possible definitions for those offenses.

We are very interested in hearing whether the list is over-inclusive or under-inclusive.

We are also interested in your views about whether the proposed definitions are workable and if they will achieve their intended purpose of simplifying the task of enumerating whether a particular predicate offense qualifies as an enumerated offense. Will these definitions make matters more confusing or less confusing?

Likewise, we have heard concerns over the fact in some jurisdictions misdemeanors are
punishable by more than one year in prison and therefore qualify as predicate offenses under the current definition of felony.

The proposed amendment considers this concern by requiring that a prior offense be classified as a felony under the laws of the jurisdiction in which the defendant was convicted.

We are interested in views about whether this proposed policy change will appropriately address the severity concerns or whether it will add an increased level of complexity to the career offender determination.

There is also an issue about when this determination about whether it's a felony should be made.

As those of you who regularly follow the Commission's work know this is really an unusual hearing for us because we typically consider amendments much later in our cycle.

But now we are publishing an amendment
for comment in August and having a public hearing in November. So why is that?

We began seeing litigation over the impact of Johnson on the Sentencing Guidelines almost immediately after the decision came down from the Supreme Court.

In light of resulting uncertainty we decided it would be prudent to begin considering whether as a matter of policy the guidelines should also eliminate the residual clause.

By statute the Commission may vote on a guideline amendment any time after the beginning of a regular session of Congress or in January, but not later than May 1st of any given year.

Although the Commission traditionally votes on amendments in April, you all know that, and delivers them to Congress by May 1st, we may vote on a proposal that is before us today as early as January.

This is a complicated topic and, you
know, it's one of the most intellectually
difficult ones I have seen since I have been
here.

It's a very important topic and we
look forward to hearing from all our witnesses
today as well as to considering public comments
further informing us. The public comment period
remains open at least through November 12, 2015.

So, of course, I am going to introduce
my fellow and sister commissioners, and I start
with my immediate right, is Judge Charles R.
Breyer.

He is a Senior District Judge for the
Northern District of California. Judge Breyer
has served as the United States District Judge
since 1998 and serves as a Vice Chair of the
Commission having joined the Commission in 2013.

Next to him is Rachel Barkow, who also
joined the Commission in 2013. She is the Segal
Family Professor of Regulatory Law and Policy at
NYU School of Law where she focuses her teaching
and research on criminal and administrative law. She also serves as the Faculty Director for the Center on the Administration of Criminal Law at the Law School.

Now turning to my left is Dabney Friedrich who has served on the Commission since 2006.

Immediately prior to her appointment on the Commission she served as an Associate Counsel at the White House and as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant U.S. Attorney for the Southern District of California and then for the Eastern District of Virginia.

Next to her is Judge William H. Pryor, who also joined the Commission in 2013. He is the United States Circuit Court Judge for the 11th Circuit Court of Appeals appointed in 2004.

Before his appointment to the federal bench Judge Pryor served as the Attorney General for the State of Alabama.
And way over to the right next to Commissioner Barkow is Jonathan Wroblewski. He is the designated ex officio member of the United States Sentencing Commission representing the Department of Justice.

Mr. Wroblewski serves as the Director of the Office of Policy and Legislation in the Department's criminal division.

Now before I get to introducing our first panel I wanted to ask whether anyone had any opening statements that they wanted to make.

COMMISSIONER WROBLEWSKI: I would.

CHAIR SARIS: Mr. Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you. Thank you very much, Judge Saris. It's a pleasure to be here and I am glad we are holding this hearing today.

You may know that last week the President spoke in Chicago at the Conference of the International Association of Chiefs of Police about criminal justice reform.
On Saturday the President's weekly address also addressed criminal justice reform and earlier this week he was in New Jersey visiting an offender reentry program.

These are just the latest manifestations of this Administration's commitment to criminal justice reform, which goes back to the very beginning of the Administration.

I had the great pleasure of working with Assistant Attorney General Lanny Breuer in the Spring of 2009 just a few weeks into the Administration in preparation for his testimony before the Senate Judiciary Committee on eliminating the crack-powder disparity.

And in the seven years since we have made tremendous strides, both with the Commission, with Congress, and an internal Department of Justice policy.

The Bureau of Prison population today is now below 200,000. In fact I just checked the website before I came out here, it's 198,953.
It's the first time since the first term of the George W. Bush Administration that the prison population has been below 200,000.

We believe that public safety can be achieved better by using prison resources more carefully and reinvesting the savings into more productive public safety investments.

However, all of these efforts and all we have already achieved are threatened if we don't collectively have the thoughtfulness, the wherewithal and the fortitude to develop a policy that consistently identifies the most dangerous offenders and provides substantial prison terms to incapacitate them.

There is a debate raging whether crime is going up across the country and to what extent it is going up across the country. Where is it going up? How much is it going up? What should be done about it?

Tom Edsall, a columnist in the New York Times, had an op-ed about the very
neighborhood in which we are sitting today. He described how violent crime is rising here on Capitol Hill and the raging discussion on the local LISTSERVs that have followed.

If we don't have a sensible policy that addresses violent offenders as quickly as you can say “crime of violence” the progress that we have made and are making will be reversed.

Now there are plenty of reasons, you know, plenty of excuses not to implement such a sensible policy. There are 50 state criminal codes.

Many definitions, for example, as Judge Cardone mentions kidnapping. There are imprecise categories. No matter how we try to define who are dangerous offenders those categories will not be perfect, they will not be precise.

And we have a history that has led us to use the categorical approach in the Guidelines, but the empirical data is clear and
we believe the solutions are out there to be had. A small number of offenders are the repeat violent ones. These offenders repeatedly offend and re-offend.

Violent offenders more often re-offend violently and there can be a consistently applied backup to the categorical approach that can rigorously and carefully identify these offenders relying on what judges do every day and in every sentencing hearing, and that's evaluating facts.

If we act responsibly we believe that we can keep the trends of lower violent crime and lower prison population going.

If we fail to do the unpleasant task of identifying and incapacitating those dangerous offenders we will likely see the trends change.

That's what we believe this hearing is all about and I am looking forward to all the testimony today. Thank you, Judge Saris.

CHAIR SARIS: Thank you. Anything
else?

        All right. So I have the pleasure of introducing our first panel. We are delighted to have Judge Keeley and Judge Cardone here today to provide us with a view from the judiciary.

        Judge Irene Keeley really needs no introduction. She's been here before as a friend. She is the Chair of the Criminal Law Committee of the Judicial Conference and, I should say long-term, but then I figured that might not be, so a long-term Judge in the United States District Court for the Northern District of West Virginia.

        Judge Kathleen Cardone, I've not known as long, but it's been a pleasure getting to know her. She is a United States District Judge for the Western District of Texas, the El Paso Division, appointed in 2003.

        She testified before the Commission at the 25th Anniversary hearing held in Austin in November 2010 and attended the Commission's
roundtable in 2014 discussing the problems with
the categorical approach and definitions of
crimes of violence.

So we begin with Judge Keeley. No
time limit, no lights, we're whatever, we're just
thrilled to hear from you, Judge Keeley.

HON. KEELEY: Thank you Judge Saris.

By the way in West Virginia it wouldn't be long-
term it would long in the tooth, so I really
appreciate what you said.

(Laughter.)

HON. KEELEY: Judge Saris and Members
of the Commission, on behalf of the Criminal Law
Committee of the Judicial Conference of the
United States I thank you for providing us the
opportunity to comment on proposed changes to the
Sentencing Guidelines definitions of crime of
violence and related issues.

The topic of today's hearing is
important to the Judicial Conference and judges
throughout the nation.
We applaud the Commission for undertaking its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction and the impact of such definitions on the relevant statutory and guideline provisions.

We also thank you for considering whether to promulgate these guideline amendments to address questions that had been or may be raised by the Supreme Court's recent decision in Johnson v. United States.

The Judicial Conference has authorized the Criminal Law Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the Sentencing Guidelines, including proposals that would increase the flexibility of the Guidelines.

In carrying out these duties the Committee relies on the conference commitment to a sentencing guideline system that is fair,
workable, transparent, predictable, and flexible.

The Criminal Law Committee is generally in favor of the Commission's proposed amendments, particularly those intended to address or anticipate questions raised by Johnson.

As you know, the definition of the term "crime of violence," for purposes of the Career Offender Guideline has been the subject of substantial litigation in the federal courts.

We support any efforts to resolve the ambiguity and simplify the legal approaches required by Supreme Court jurisprudence.

Additionally, as you know, our Committee has repeatedly urged the Commission to resolve circuit conflicts in order to avoid unnecessary litigation and to eliminate unwarranted disparity in application of the guidelines.

The Commission's proposed amendment
would reduce uncertainty raised by Johnson while making the guidelines more clear and workable.

In Johnson the Supreme Court held that an increased sentence under the residual clause of the ACCA's definition of violent felony violates due process because the clause is unconstitutionally vague.

As the Commission has explained in its Notice of Proposed Amendment in the Federal Register the Guidelines definition of crime of violence in Section 4B1.2 was modeled after the statutory definition of violent felony.

The Guidelines definition is used in determining whether a defendant is a career offender under 4B1.1 and is also used in certain other guidelines.

While the statutory definition of violent felony in the ACCA and the Guidelines definition of crime of violence in 4B1.2 are not identical in all respects as we all know the residual clauses are.
The Criminal Law Committee strongly supports the proposed amendment to delete the residual clause from the guideline definition of crime of violence.

As you know there is now a circuit conflict regarding whether the residual clause in the Sentencing Guidelines is unconstitutionally vague in light of Johnson.

The Eleventh Circuit has found that the vagueness doctrine does not apply to the Sentencing Guidelines while the Tenth Circuit has held that the residual clause in the Sentencing Guidelines is unconstitutionally vague.

Another circuit, the Eighth, has remanded a case to the District Court with instructions to consider the defendant's claim that the guidelines definition of crime of violence is vague and violates due process.

Deleting the residual clause while maintaining the elements and enumerated clauses would reduce confusion and complexity by
providing a definition of crime of violence that
conforms closely to the statutory definition.

Notably, in 1988 a Sentencing
Commission working group recommended that the
career offender guideline definition of crime of
violence should closely match the statutory
definition of violent felony in the ACCA.

Moreover, in 1991 another Commission
working group noted that, and I am quoting,
"confusion may result if a crime is considered a
crime of violence under Title 18 but not under
the Sentencing Guidelines."

Because of the similarities between
the statutory and guideline definitions, courts
have also frequently treated cases dealing with
these provisions interchangeably.

Elimination of the residual clause
and close conformity with the definition of
violent felony in the ACCA would also be
consistent with efforts to simplify the
Guidelines.
Since 2014, the Commission has identified simplification of the Guidelines structure as a public priority.

The Criminal Law Committee has long supported attempts to simplify the operation of the Guidelines, including harmonization of the language used in specific offense characteristics shared across the Guidelines.

The Commission's current examination of guideline simplification provides an opportunity, in our view, to resolve differences in language across guidelines and statutes and eliminating the residual clause would be consistent with this goal.

In addition to deleting the residual clause, the Commission proposes amending Section 4B1.2 to revise the list of enumerated offenses moving all to the Guidelines and providing definitions for the enumerated offenses in the commentary.

The Committee supports moving all
enumerated offenses to the Guideline to make application more simple and clear.

Additionally, the Committee supports the proposal to include burglaries only of dwellings in the list of enumerated offense. To be sure some of the burglaries of non-dwellings excluded by this definition involve serious offenses by defendants that may pose a danger to the community, and our Committee discussed this at length.

Courts, we believe, may account for these situations through the elements clause of Section 4B1.2 or by departing or varying when the facts within the criminal history category under-represent the danger posed by the defendant.

Moreover, while we generally support close conformity between the statutory definition of violent felony and the ACCA and the Guideline definition of crime of violence, the balance of considerations by Congress when enacting penalties for armed career criminals under the
ACCA may have been different when it included all burglaries in the statutory definition of violent felony.

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 first that the instant offense is a felony, that it is a crime of violence or a controlled substance offense, and, second, that the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

To implement the requirement that the offense be a felony, the definitions in 4B1.2 specify that the offense must have been an offense under federal or state law punishable by imprisonment for a term exceeding one year.

The Commission proposes adding an additional requirement, that the offense must
also have been classified as a felony or a comparable classification under the laws of the jurisdiction in which the defendant was convicted.

The Committee opposes adding an additional requirement that the offense must also have been classified as a felony or a comparable classification under the laws of the jurisdiction in which the defendant was convicted.

It supports retaining the current definition of a felony because it is clear, concise, and uniform.

The current definition of felony in the career offender guideline also conforms to definitions in other guideline sections which is consistent with efforts to simplify the guidelines.

In 1991, a Sentencing Commission working group noted that the Commission had considered a proposal to include only those felonies so designated by the state.
But then it rejected the proposal due to concerns that use of state labels could create disparity among offenders with similar criminal histories.

In 2000, the Seventh Circuit noted that the current definition "makes considerable sense" because "by ignoring how crimes in different jurisdictions are classified and looking instead to what punishment is authorized a court can avoid the vagaries of sentencing defendants on the basis of idiosyncratic or unusual felony misdemeanor classifications."

In cases where the current definition of felony does not adequately represent the defendant's criminal history, the Court may, of course, depart or vary from the criminal history category of the Guidelines to account for the circumstances of the individual case.

As this Committee has stressed in the past departures provide the flexibility needed to assure adequate consideration of circumstances
that the Guidelines cannot adequately capture and provide judges the ability to exercise individualized judgment based on the facts.

Over the years the Judicial Conference and the Committee have advocated criminal history departures to account for the dangerousness of defendants or to otherwise address the inadequacy of the criminal history score based on either degree of risk or type of risk.

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

Section 2L1.2 sets forth a definition of crime of violence that contains a somewhat
A different list of enumerated offenses and does not contain a residual clause.

It also sets forth the definition of drug trafficking offense that is somewhat different from the definition of controlled substance offense in 4B1.2.

The Commission's proposed amendment would revise the definitions of crime of violence and drug trafficking offense in Section 2L1.2 to make them more parallel with the definitions in 4B1.2.

Under the proposed amendment the definitions in 2L1.2 would generally follow the proposed amended definitions in 4B1.2.

The Committee supports revising other guidelines to conform to the definitions used in the career offender guideline to reduce complexity and make the guidelines system more simple and workable.

Turning to retroactivity, finally, the Commission's public notice of these proposed
amendments also requests comment regarding whether the proposed amendments should be applied retroactively to previously-sentenced defendants.

As we all know in recent years the Federal Judiciary has effectively managed several rounds of retroactivity stemming from guideline amendments to the Drug Quantity Table.

On each of these occasions the Committee, on behalf of the Judicial Conference, expressed support for retroactivity while also recommending that retroactivity be implemented in ways that minimize the burdens on the courts and maximize the effective re-entry of inmates.

In supporting retroactivity on these occasions the Committee was influenced by the fact that the Commission was able to identify eligible inmates and supply those names to each court.

The Committee also considered the relative ease in applying the new guidelines
based on the available record. Probation Officers working with staff from the Federal Public Defenders Offices and the U.S. Attorney's Offices were able to recalculate the guidelines efficiently and without the need for any extensive reinvestigation.

Based on currently available data we recognize that it would be difficult to produce accurate estimates of the number of cases that would be impacted if these amendments under consideration are made retroactive.

The gauging of the workload impact on the courts would be an important consideration for the Committee.

Furthermore, regardless of the number of cases that might be involved we expect that retroactively applying the proposed amendments would be considerably more complex than the recent amendments to the Drug Quantity Table and would require more effort and resources.

Accordingly, the Committee would
I prefer to defer any recommendations about retroactivity until we have additional data from the Commission and can better assess the potential impact on the courts.

In conclusion, on behalf of the Criminal Law Committee, I thank the Sentencing Commission for providing the opportunity for us to comment on proposed changes to the Sentencing Guidelines definitions of crime of violence and related issues.

As we have in the past, the members of the Criminal Law Committee look forward to working with the Commission to ensure that our sentencing system avoids unnecessary complication and is consistent with the central tenets of the Sentencing Reform Act. Thank you very much.

CHAIR SARIS: Thank you. Judge Cardone?

HON. CARDONE: Well I want to thank you for giving me the opportunity to be here
today. I also want to thank you for having me go second because really I hadn't -- I have nothing more to say.

But I am a Judge from the Western District of Texas. I have a big caseload so I tend to be a more practical person in looking at this and so as you saw from my statement I sort of focused on one area, which was the area of kidnapping.

Everything that Judge Keeley said, I don't disagree with anything. I like the changes. I think they help make it more clear, more uniform when you are applying it, especially when you have a big caseload and you are jumping from case to case and you are trying to figure out okay, is this under the Armed Career Criminal Act, is it a crime of violence as defined under the admissibility portion.

It becomes -- you are having to apply law all over the place. As you all well know the 5th Circuit, I have received a number of
decisions just on the issue of kidnapping, so when I saw the definition of kidnapping that raised a red flag with me.

As I explained to you in my statement the term "nefarious" I think is a very vague term. I think it's going to put us right back where we were under the residual clause with an attempt to try to define nefarious.

As I said in my statement my concern about nefarious is that I couldn't find it in Black's Law Dictionary and it's very rarely even referred to in statutes throughout the country.

So I feel that, and I recommended that, in order for consistency, in order to -- kidnapping is such an amorphous crime anyway as you go from state to state, so my recommendation was to the Committee to follow the Model Penal Code.

In my statement I asked what are we trying to gain here and if we are trying to gain consistency, if we are trying to look at a way
to encompass all of the states.

First of all, I just don't think you can, under kidnapping in particular, but I think it would go for all of the definitions.

I think the definitions are a huge help, but particularly when it comes to kidnapping, I'll give you an example, nefarious, as I state in my statement, means wicked, iniquitous, villainous, and despicable.

If we talk about things like parental abduction of children, in some states that's considered kidnapping and in other states they have a specific think called parental abduction.

To some people that would fall under the category of despicable or villainous. You know, I just really don't want to have to try to make those kinds of decisions, so I focused on kidnapping because I felt that was an area that I had a little bit of experience in.

I don't have a long statement because I prepared my written statement and I figured we
had a limited amount of time so I wanted to give
you the guys the opportunity to ask us whatever.

But in general as to all the other
portions of it I am in support. I agree with
Judge Keeley on her statements on behalf of the
Committee.

I think retroactivity is a concern,
especially when you have a huge caseload, and we
are talking about going back and looking at
definitions of these cases and all of the
different statutes in 50 states and so I really
would echo what she said about the concern about
retroactivity. I am here for any questions.

CHAIR SARIS: Great. Do you want to
ask questions?

VICE CHAIR BREYER: Well maybe make a
statement. First of all, Judge Cardone, I
appreciated your reference to nefarious. It's a
word that I rather enjoyed using when I was a
District Attorney 40 years ago, but it's a word
that just means very different things to
different people and I think that's an excellent example, the child abduction cases.

And, also, in California, as an example, kidnapping may be simply moving a person from one room to another. I think that it's extremely important and I know that the Commission is wrestling with this to try to establish some uniformity.

I mean that's really one of the basic purposes of the Sentencing Guidelines and to the extent that we can reduce ambiguities we are completely in favor of that and what you said today is very, very helpful.

Judge Keeley, I thought that that was also a very helpful presentation with the Criminal Law Committee.

The issue of retroactivity as far as I am concerned, speaking as one person, depends in large part on impact and I don't think we are at a point know where we can make a determination as to what would be the impact of any changes and
I for one want to take a look at the impact because I see with the two of you and with 846 of our colleagues dockets that if we decide that it should have a retroactivity impact it's got to be with such clarity that judges will find it relatively straightforward, as they did I think in the drugs minus two and the crack cocaine powder disparity, a relatively direct way to implement changes if that's what we are going to do.

Otherwise, it's a nightmare. Not only is it a nightmare but it creates a further disparity, a further disparity among the treatment of defendants and I think that that's, we should avoid that if we can.

So I found both statements very helpful, thank you.

CHAIR SARIS: I'll jump in then Commissioner Barkow. So one of the things we struggle with is if you knocked out the residual clause do you just leave the enumerated offenses
as they are and let all the circuit precedence
that flowed into construing them before govern
or should we try to come up with a Model Penal
Code, a statutory, some combination of those
approaches to come up with a standard generic
definition.

So I'd like that -- You would
certainly want to go with the Model Penal Code,
right, or another possibility would be going with
the statutory definition in the U.S. Code, and I
just, and the Criminal Law Committee didn't weigh
in so much on how you would define them, all the
different crimes.

HON. CARDONE: Oh, and let me -- Can
I just clarify before Judge Keeley?

CHAIR SARIS: Yes.

HON. CARDONE: I looked at all the
definitions of murder and arson and in general I
think that those are well thought out and I don't
say, I'm not a proponent of going to the Model
Penal Code for all of those.
I agree with Judge Keeley that I think they are very workable under the case law that we have today. I primarily focused on kidnapping because I just was, frankly I was taken aback, I am reading along and I go oh, my God, this is --

So the only reason that I focused on the Model Penal Code as to kidnapping was I find it to be the most workable because of the kind of statute that kidnapping is.

CHAIR SARIS: Let's say we went with the Model Penal Code for all predicates.

HON. CARDONE: Okay.

CHAIR SARIS: What would your life be like under the immigration law? Would it change a lot what's happening in the 5th Circuit? In other words, would you have to redo everything in terms of what's a predicate or not?

HON. CARDONE: I don't think so, but it does concern me a little bit because of the so many state statutes out there that are so varied when you are talking about some of the
other offenses.

I like sort of the flexibility of your definitions because I think it helps to encompass, I mean I don't want to be varying all over the place when I look at statutes and what's happened in different states and I liked the definitions that you had for most of the other offenses.

CHAIR SARIS: Judge Keeley, what do you think, well at least from your practice, if not across the country, if we came up with a definition whether it's statutory, out of other parts of the Federal Code, or the Model Penal Code or the hybrid that actually staff put together, tried to do the best of the case law kind of thing, would that be good because it reduces disparity across the nation or would it make life very hard for a trial judge to start all over?

HON. KEELEY: Probably no trial judge thinks starting all over is a good thing in terms
of the vast development of the case law that we've had over the years under the Guidelines.

What we would like to see, what I personally would like to see is congruency between, or the harmonization of the statute to our language and the Guidelines to make things as simple and as clear as they can be.

To the extent that that can occur, as I had commented in my prepared remarks, then we're looking at varying and departures under the Guidelines which are available to us.

But I don't think incorporating a whole new set of ideas for the definitions is necessarily a best practice here in these circumstances.

CHAIR SARIS: So you would rather have us just cut out the clause, enumerate the -

HON. KEELEY: Right.

CHAIR SARIS: -- and then the circuit case law would be where it is?
HON. KEELEY: Right. I think so.

COMMISSIONER BARKOW: So I have a question for each of you, the first one follows up on the kidnapping, and I was just curious, Judge Cardone, the Department of Justice recommended to us that we use the Federal standards and definitions for things and so I just was hoping I could read you the kidnapping one to see if you have a quick take on it, whether or not it would be better, worse, equivalent, to the Model Penal Code.

HON. CARDONE: Okay.

COMMISSIONER BARKOW: So they have kidnapping means "seizing, confining, inveigling, decoying, kidnapping, abducting, or carrying away and holding for ransom or reward or otherwise any person expect in the case of a minor by the parent thereof."

HON. CARDONE: Well I guess my concern is that as I stated in my statement I think that as I go out to analyze there are
certain terms in there and one of them, I don't have it in front of me, but you said "or otherwise," I am not exactly sure how "or otherwise" is going to relate to the different terms of art, inveigling, decoying, et cetera, and so I would have a concern there.

And I think that when we are talking about a statewide interpretation we are trying to encompass as many issues as we can, parental kidnapping is one, but there is a lot of others.

I mean let's take the line between false imprisonment and kidnapping is so fine, I mean as Judge Breyer said, you know, moving a person from one room to another, I just think that the Model Penal Code for me at least tended to be very specific and yet gave enough flexibility to be able to encompass what really are crimes of violence.

I mean one of the things I said here is what are we trying to do here and we are trying to focus on crimes of violence and in looking at
all of the different definitions I just kind of felt that that was one that would encompass most of the things that I would see.

COMMISSIONER BARKOW: That's really helpful, thank you. And if I could just ask a question to Judge Keeley which is on this question of classifying things as a felony for purposes of state law.

We've got another set of comments that had this idea that we use the same definition of felons that's in 18 U.S.C. 922(g)(1), the felon in possession of a firearm.

The way that statutory structure is they talk about a felony but then they say the crime punishable by imprisonment for a term exceeding one year just doesn't include any state offense by the laws of that state that is classified as a misdemeanor and punishable by a term of imprisonment of two years or less.

So it's kind of, it keeps the one year or more definition of felony, but just as for
purposes of that definition we're not going to include anything classified by the state as a misdemeanor that has a punishment of two years or less.

And I just didn't know if that would take care of the uniformity problems because we'd be borrowing from another federal provision and maybe could even do it across the board if it worked, I don't know.

Or if your concerns are that even doing that would create that kind of variation that you are worried about.

HON. KEELEY: I think our Committee is concerned about variation in that regard. Obviously, this is within the Commission's discretion, but the theme you heard from me this morning is simple, concise, and to keep these as close to federal statutory language as possible, and that's not always possible, I am aware of that.

But I think there is a disparity
aspect, too, incorporating state definitions and changing the one year provision. That would be somewhat problematic and as a District Judge, I think Judge Cardone would agree with this, trying to sift through various state laws, not your own, but those of the defendant and where the defendant was convicted, can become, or is challenging and often arduous.

So the attraction retaining the one year definition and not enlarging it to look at other, or at state definitions, was exactly that, keeping it as simple and as concise as possible.

COMMISSIONER FRIEDRICH: Judge Keeley, you've emphasized the importance of making the definitions between ACCA and the Guidelines, having them conform and the importance of that, and yet with respect to burglary --

HON. KEELEY: Yes.

COMMISSIONER FRIEDRICH: -- you are supporting the decisions restricted to burglary
of a dwelling.

HON. KEELEY: Yes.

COMMISSIONER FRIEDRICH: And this is an issue the Commission struggled with mightily a few years ago in trying to resolve a circuit conflict and part of the problem was that --

CHAIR SARIS: A Commission conflict, okay.

COMMISSIONER FRIEDRICH: Yes.

CHAIR SARIS: We couldn't --

COMMISSIONER FRIEDRICH: Right. So the Supreme Court has interpreted ACCA to include all burglaries and you in your testimony said that Congress's considerations may have been different.

So I'm just interested in your thought process there. This was an issue we struggled with a lot on the Commission in large part because of the Supreme Court's interpretation of ACCA.

HON. KEELEY: Yes. Well we share your struggle on the Committee and I realize that
my comments there might not have been as enlighteningly helpful as you might have wished.

But after a lot of discussion we concluded that burglaries only of dwellings on the list of enumerated offenses was simple and clear and that, as I commented, using variances and departures to take up the questions of the violence and other circumstances was adequate to handle the issue and the judges do that every day.

So we were -- that's where we came out on that.

COMMISSIONER PRYOR: I want to follow up to Commissioner Barkow's question. So the definition of felony, what she proposed was basically keeping the same definition of felony but tying it to, one, that's already in federal law --

HON. KEELEY: Yes.

COMMISSIONER PRYOR: -- which as I understand you said is something you would
support, and the exception for a state misdemeanor that's punishable by a term of imprisonment of two years or less is in federal law.

HON. KEELEY: Yes.

COMMISSIONER PRYOR: And it would seem to me that would be a pretty mechanical thing to apply, not difficult. What is there about that that you find problematic?

HON. KEELEY: I agree it's applicable. You could apply it, Judge Pryor. Our Committee's view was more simple, more straightforward the definition the better for everyone.

I am aware that there are other definitions. It was our preference to keep it that way.

COMMISSIONER PRYOR: I mean because it seemed to me that the concern about disparity that you raised could go both ways.

HON. KEELEY: Yes.
COMMISSIONER PRYOR: Because it could just as easily be said that when you are including prior convictions that are, that fall within the federal definition of felony, you are over-inclusive when you are bringing in state crimes that some states classify as a misdemeanor that are punishable up to two years but in many cases do not result in terms of imprisonment anywhere near there.

HON. KEELEY: Yes, I am aware.

CHAIR SARIS: Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you, Judge. Judge Cardone, Judge Keeler, thank you both for your testimony. I read through them carefully, I found them both very, very helpful.

Judge Cardone, I was intrigued by your testimony on the discussion of kidnapping and I went back and I read the three 5th Circuit cases on kidnapping and as I understand it they were evaluating kidnapping convictions in Tennessee, Oklahoma, and California, and they came to a
split decision that one was a crime of violence and two were not a crime of violence.

   And then the discussion we were having here about the definition, it strikes me that as long as we use the categorical approach that regardless of how we and the Commission define kidnapping you are going to continue to have this kind of haphazard decision making.

   Some states will include kidnapping of a minor by a parent, others will not, and so the exact same conduct that might be committed in Oklahoma, California, and Tennessee that might result in precisely the same conviction for kidnapping will nonetheless be treated very differently as long as we use the categorical approach, and that's the concern that we have about the categorical approach.

   It's less about the concern about the definition. I think reasonable minds can differ about whether it should include this or include that, but regardless of what we settle on as long
as we use the categorical approach you are going
to have tremendous inconsistency.

Number one, do you agree with that,
and then second, for both of you, you both talked
about the need for a fact-finding backup in your
testimony.

You said, Judge Cardone, that the
sentencing courts should be able to and can,
using departures, correct for the oddities of the
categorical approach, and, Judge Keeley, you said
that in your testimony and you said it here.

Do either of you have any concerns
about the ability of district court judges to
evaluate the facts and whether they are
appropriate, whether it's for a departure or for
application, of these prior convictions?

Are there practical concerns about
evaluating them or any kind of legal concerns?
So those are the two questions.

HON. CARDONE: Well I definitely have
a concern about evaluating the facts because I
think it goes both ways.

As you know when you are in the courtroom and you have these defendants in front of you and when you are doing the categorical approach and you are looking at the crime and being very sort of what is this crime and does it fall within this category is very different than knowing the facts and when you get a PSR you have all the facts.

So if it's very heinous but somehow the categorical approach doesn't take you --

CHAIR SARIS: Nefarious?

HON. CARDONE: Very nefarious, exactly. But somehow the categorical approach doesn't get you there. You know, as a judge it's very difficult to sort of wipe out of your mind the facts, but that's what it calls for.

So, yes, of course, I have a concern, but I think, I don't know what's better than the categorical approach.

I just don't know any other way when
you are talking about 50 states and the variety
of statutes in the 50 states I don't know what
other way we can do, what other thing we can do
to try to make it uniform for every defendant
when we are looking at it other than to say okay,
is this that kind of crime of violence as defined
by the Sentencing Commission and, you know, use
the tools that we have to get there.

I just think -- I don't know any other
way to get there, but I do have my concerns. I
just think that we have to take each defendant
as we see them and do the best we can to figure
out if this is the kind of sentence that's going
to deal with that person.

HON. KEELEY: So every day of the week
a defendant comes before either Judge Cardone or
me or all of my colleagues here who may have a
criminal history category that looks rather
benign, a one or a two.

But you look at what the charges were,
you look at what the plea was, and maybe make a
determination that that criminal history category under-represents the seriousness of the offenses and the potential for violence on the part of the defendant that you are sentencing and you consider a departure on that ground or you may look at a group of other factors, including criminal history, and determine whether a variance is in order because the criminal history category may over-represent the seriousness of the defendant's actual criminal history and particularly history for violence.

Now you asked about the practical concerns of evaluating the facts. How many of us has had a case in front of us where you can't find the criminal history from the state conviction?

You don't know what occurred at the state level and all you have in front of you is what the crime was and what the ultimate conviction was and you are looking at the categorical approach, the modified categorical
approach, and you have to look at those elements.

That's certainly a guidance for us and it gives us the basis upon which to consider the case. It's often difficult to find not only the facts of the conviction, which the categorical approach would tell us not to look at, but the convictions themselves.

Now this is very interesting. You can have someone in front of you who should be, just by virtue of where the, what their incarceration history has been, a four or five, somewhere there.

But because the probation officer can't obtain any information from the state they're a one or maybe a two. This is a serious issue because you are looking at what's the possible impact on the community if this person is sentenced that way.

There is so many factors that come in to play when you are evaluating those facts and I believe that most sentencing, judges who
sentence believe that simplicity is not necessarily naiveté.

Simplicity gives us very good guidelines and then we have the flexibility to confront the case that's in front of us and go from there with the tools we have for sentencing.

That's the point that I am trying to make here because we don't always get the perfect box of facts and criminal history. The probation officers cast wide nets but they often come back with very few fish.

CHAIR SARIS: So I just -- In the 2L in the immigration area if we switched it to the ACCA definition of just a burglary rather than burglary of a dwelling, which is currently in the Guidelines, in your experience what affect would that have in the immigration area?

HON. CARDONE: I am not sure I -- I am not exactly sure I understand the question as it pertains to the, why it would make that big of a difference or --
CHAIR SARIS: Well could we get a lot more people -- Do you see a lot of burglaries that are not burglaries of dwellings where you'd get a plus 16?

HON. CARDONE: No, no. No, I don't. I see a lot -- If it's anything it's burglary of dwellings. I don't see a lot of other burglaries.

CHAIR SARIS: That's interesting.

COMMISSIONER PRYOR: What if it were burglary of an occupied dwelling?

HON. CARDONE: Of an unoccupied?

COMMISSIONER PRYOR: No, occupied. What if we limited the definition to an occupied dwelling?

HON. CARDONE: Well my understanding of the reason that it's dwelling is because when you go into a dwelling you just never know if it's going to be occupied or not. And so I think it's trying to say what kind of a person is this that's going into a
dwelling where, you know, you never know, you might find young children, whatever.

So I'm not so sure I take comfort in the idea that it's an unoccupied versus occupied.

COMMISSIONER WROBLEWSKI: How many of the cases that you've evaluated involving state burglary statutes, do you recall many or any that defined burglary with respect to occupation, whether the dwelling is occupied or not?

And, again, under the categorical approach it would be required because if it's not in the statute then it wouldn't count.

HON. CARDONE: Honestly, I don't recall a lot of the states, you know, this is just off the top of my head, but I don't recall a lot of states sort of drawing that line between occupied versus unoccupied.

I just don't make that -- I just don't see a huge difference between the two. I tend to think it's just defined as a, you know,
VICE CHAIR BREYER: In the, in your District where you have a high number of illegal entry cases do you have any sense of whether the criminal history of those individuals reflects the fact that, one, they may be homeless, two, that they go into a house or into an area essentially as a trespass, as a place to stay or stop and so forth, yet they are charged with a burglary, do you have a sense of that, is that a large number or is that really an insignificant number?

HON. CARDONE: It's an insignificant number. Most of the people, obviously, that we see, I mean a lot of them are, you know, family reunification issues where they are trying to get back to wherever their family is in the United States or they, you know, are coming here to work.

It's very rare I see somebody who is homeless.
CHAIR SARIS: One more thing on the definition of felony. I come from one of the states where the misdemeanor is punishable by up to 2-1/2 years, so I hear such strong complaints from judges who say I got a guy who is convicted of two misdemeanors, never did any jail time and suddenly he is a career offender.

So we are struggling with what to do with it, over-inclusive, under-inclusive, that kind of thing, and I think The Defender says there were eight such states, so it's not just limited to my state.

But the other issue that we have struggled with is the fact that states start reclassifying things from, how does it go, from felony to misdemeanor and from misdemeanor to felony, and it goes both ways.

And so I guess, I had never heard this term till I heard Judge Breyer speak, there's something called a wobbler in California, we call them birds who sing a certain way, but I guess
there are crimes that are called wobblers in California.

VICE CHAIR BREYER: These are wobblers not warblers or --

(Laughter.)

CHAIR SARIS: So I suppose that is it becomes, what, it's a misdemeanor and then it becomes a felony and --

VICE CHAIR BREYER: Well you have the case in California, you have a number of crimes in California that depending on the sentence that's given will be either a misdemeanor or a felony and you have assault cases, you have certain types of cases that are wobblers, go either way, then you have questions of how they are characterized at the time of sentencing and the time that they are plead.

You also have issues as to what happens on a revocation and does a revocation or X then re-characterize the initial offense and if it does re-characterize the initial offense
What does that mean because after all the sentencing judge of the original offense said I think you ought to do 30 days, 60 days, 90 days. Anyway, those are issues that we have.

CHAIR SARIS: And the other was we were at the National Conference, I mean Denise was with me in Alaska and we were all out there and we heard about all these states that were starting to reclassify downwards.

In other words, things that used to be felonies are now becoming misdemeanors. So as we think about this it's an issue of when do you make the decision or whether you just stick with the date of the sentencing and then allow it as a departure issue.

It's simplicity, you don't want to make it too complicated. On the other hand it is troubling and I didn't know if you had thoughts on that.

HON. KEELEY: Well, you know, you
just have to go back to experience, what experience teaches us on the bench and I can only speak personally here, but becoming an expert on the law, felony and misdemeanor law of Michigan, California, North Carolina, the 4th Circuit jurisprudence of the last five years is, there is a plethora of discussion about North Carolina law and the modified categorical approach.

This complicates matters so tremendously and delayed sentencing often times for quite long periods of time while you are trying to find out just what is the law, what's going on, what actually happened, and at the end you can't because the information is not available.

My experience was shared across the Committee, this is why we came with the recommendation that we've made.

CHAIR SARIS: Thank you. Does anybody else have any other questions?

I want to thank you very much for
coming in, difficult question, and we always want to hear from the Courts. Thank you.

HON. CARDONE: Thank you for inviting us.

HON. KEELEY: Thank you for inviting us.

CHAIR SARIS: All by yourself up here.

VICE CHAIR BREYER: Wow, that's brave.

MR. ZAUZMER: Intimidating, Your Honor.

CHAIR SARIS: You're all set?

MR. ZAUZMER: All set, Your Honor.

CHAIR SARIS: All right, well welcome. Next we'll hear from the Executive Branch and the witness is Robert Zauzmer who has become a regular testifier before the Commission on behalf of the Department of Justice.

He is the Appellate Chief in the United States Attorney's Office for the Eastern
District of Pennsylvania. So welcome back. I want to -- We have about 30 minutes, and not for your statement, for the whole thing.

So I think at this point, do we have the little lights go off? Yes, okay, there we go. Thank you.

MR. ZAUZMER: Thank you very much, Your Honor. Members of the Commission, it's an honor, of course, to appear again before you and I appreciate the opportunity speak on behalf of the Department regarding this very important issue.

My initial statement, please cut me off when you are ready to ask questions, it may be a bit longer than five minutes, but I am an appellate advocate, I'll work in the answers and what I want to say at some point, but we have some important points to address.

Obviously what we are all here for is very clear, which is we want to target the appropriate people, the people who are the
violent recidivists, but we don't want to over
target and we want to make sure that these very
significant penalties are reserved for the people
who do tend to be recidivists and do tend to be
violent recidivists.

And we want to make sure that the
definitions are clear enough and applicable
enough so that they can readily be applied across
the country based on the statutes of all 50 states
and make the work doable by all the judges and
prosecutors and defense attorneys and probation
officers.

The current system has not worked well
and what I would mainly like to talk about this
morning, and I am really happy to have the
opportunity to do it, is the categorical
approach.

The root of the problems in our view
is not so much the definitions, but the
application of this very inflexible, very odd
approach, that is not good sentencing policy.
With respect to the many questions the Commission has asked we have set forth our positions in our letter. We support the idea of eliminating the residual clause and making the Guidelines consistent with what the Supreme Court has determined with respect to ACCA.

We agree with the suggestion of defining enumerated offenses so that we have more uniformity across the country in what this Commission believes should be the predicate crimes of violence.

For similar reasons we agree that all definitions in the Guidelines should be consistent for ease of application, between 2L and 4B and the other places the crime of violence definitions appear in the Guidelines.

We do not agree with the suggestion regarding the definition of a felony to look to the State's designation because that, and I can explain more if you have questions about it, that's an invitation to disparity where similarly
situating people who committed the same crimes would be treated differently.

But most importantly, like I said, I want to talk about the categorical approach because that's what creates such inconsistent and even bizarre results.

We can spend all the time in the world coming up with the best definition of what a crime of violence is and we will still have these very strange results once we go out and try to apply it to the different laws in all 50 states.

Judge Cardone, for example, spoke very eloquently and has written eloquently about the kidnapping problem. Well there are very brilliant minds on this Commission and on the staff of this Commission who can come up with the right definition of kidnapping.

But when we go then -- If we are limited to the categorical approach we are going to have a different result in Tennessee and Oklahoma and California and an untold number of
other states because their statutes will not match up to that perfect definition we came up with.

It will be over-broad, it will be under-inclusive, it will be wrong, and that's the reason that we keep coming up with these odd outcomes.

In our letter we cite the example of robbery in my home state of Pennsylvania. As common a crime as we see in the records of violent recidivists, and this happens regularly, even weekly, where people come to me with cases in which we have committed armed serial robbers who have repeatedly been convicted of robbery under Pennsylvania law and in many instances it's now the case where it's determined they are not career offenders and they are not violent criminals under ACCA.

Why is that? It's simply because Pennsylvania has a robbery statute that has six subsections of which only a couple clearly apply
to what you would call robbery.

But because of the practice of state
District Attorneys in just listing every
subsection and the practice of clerks in not
specifying any further in the judgment what was
the nature of the conviction, we have to concede
in court that people who we know beyond any doubt
are violent criminals are not simply because of
the categorical approach and the various rules
that apply to it.

This is wrong as a matter of
sentencing policy. It was foisted on us because
of ACCA and the Supreme Court's interpretation
of ACCA.

But the Supreme Court was acting in a
very different context with focusing on statutory
and mandatory, maximum sentences, and it
explained that one of the reasons it did this was
because of the constitutional concerns that would
apply that no longer apply to the advisory
guidelines.
Importantly, this Commission itself never expressly adopted the categorical approach. If you go back, and I know you have, and you look at the original Commission’s work in 1987 and 1988 it spoke of the conduct charged in the previous offense and that language is still there in the commentary to 4B1.2.

But after the Supreme Court decided in Taylor in 1990 the courts pretty much in lockstep decided we’re going to apply the same categorical approach to the guidelines that apply to ACCA, this Commission never acted differently, and what we are left time after time is having to say that somebody who we know committed a violent crime did not.

What I am talking about are not isolated examples, this is something that happens consistently in state after state based on the vagaries of how the laws are created and the vagaries of what records are kept and how specific those records are.
Judge Cardone moments ago asked, you know, what's the better way? We think there is a better way. The better way is let judges do what judges always do, which is evaluate the facts.

When we look at any other part of application of the Guideline manual we don't limit judges in these very odd specific ways to look at the particular elements of statutes.

We don't say, for example, in the loss calculation you should only use some verified, certified financial statement and if it's not there you can't find the loss number.

We let judges do what they do, which is consider all relevant evidence and make factual findings.

VICE CHAIR BREYER: Can I ask a question?

MR. ZAUZMER: Yes, sir.

VICE CHAIR BREYER: Because you used two different terms there, one is look at the
facts and look at the elements and it's, obviously judges all the time look at the elements, I mean that's a legal issue and that's easy.

Looking at the facts can be easy, or not, depending on what facts a judge can look at. Are you suggesting that really we should go beyond what the charging documents are, and we're now looking at a crime that didn't occur in front of us, right?

MR. ZAUZMER: Right.

VICE CHAIR BREYER: We're now looking at something in the history and I thought that we are confined or constrained as to what documents we can look at.

An example would be we couldn't look at a police report or we have difficulty with police reports. Are you suggesting -- And in the police report will probably be at least one person's version of what the facts are.

So how do we do that? How do we just
look at those facts--

MR. ZAUZMER: Well let me--

VICE CHAIR BREYER: -- if you can't

look at a police report?

MR. ZAUZMER: Sure, if I may explain.
First of all, we're not suggesting eliminating
the categorical approach entirely. There is a
place for it in those instances where the
elements of a state offense happen to line up
with the definitions that you define and that can
be the end of the matter.

So it will not be a tremendous number
of cases in which what we have called the conduct-
based backup would come up. When it does what
we are proposing, Your Honor, is that the
evidence should be any reliable evidence.

The same that is considered, not just
the police report, which probably wouldn't be
sufficient to meet the government's burden, but
whether there are witnesses or other things the
government could produce, the government would
have the burden by a preponderance of the evidence.

The reason -- When Your Honor says the premise that you have stated is we are limited in what we can look at it. The reason we are limited now is because of the Shepard decision.

But the Shepard decision, again, is based on ACCA and when we read Shepard we see that the reason the Supreme Court limited Courts to specific documents, specific judicial records, is because it worried that going further than that would offend Apprendi, but if we went further --

COMMISSIONER PRYOR: Well let's talk about that.

MR. ZAUZMER: Sure.

COMMISSIONER PRYOR: Okay. Because the Department's position for years, and one with which I have a lot of sympathy, is that we need to be simplifying the Guidelines, that we need to be moving toward a different model than this
530-page monstrosity, okay.

I don't see how we do that with your approach. It seems to me that if we're going to simplify the Guidelines, if we're going to move toward a different model, we need to be concerned about the Apprendi implications of these prior conviction enhancements.

MR. ZAUZMER: Well, Your Honor, we believe we do have to simplify the Guidelines and the place for simplification with respect to crime of violence is in these definitions of enumerated offenses.

COMMISSIONER PRYOR: Aren't we going to have to say though with respect to all prior convictions that we have to be compliant with Apprendi?

MR. ZAUZMER: We don't, nor do we do that in any other aspect of the Guidelines. We --

COMMISSIONER PRYOR: You're talking about doing this by a preponderance of the
evidence and you are talking about doing it with a fact-based inquiry, that's not going to be Apprendi compliant.

MR. ZAUZMER: It's not, but, again, Your Honor, nothing in the Guideline application currently is. Currently judges --

COMMISSIONER PRYOR: Current, yes, I know, I'm talking about something for the future.

COMMISSIONER FRIEDRICH: A presumptive system, for those of who are interested in that, would your proposal not run --

COMMISSIONER PRYOR: But the Department, that's what the Department was interested in.

MR. ZAUZMER: The Department has looked at number of things. I don't believe the Department has ever taken the position that Apprendi should apply to the Sentencing Guidelines.

In fact, that was the opposite of our
position in the Booker litigation. Our position since Booker was decided, which has been affirmed by every Appellate Court, is that Guideline facts are found by a preponderance of the evidence based on reliable evidence that's submitted at sentencing.

Our view is still that that should be the correct approach at sentencing. But Apprendi, we abide by Booker, Apprendi does not apply to the Sentencing Guidelines so long as they are advisory and the court has the ability to vary within the statutory maximum sentence.

So what we are proposing with respect to crime of violence is the same, and the categorical approach, is the same as what courts are doing every single day with regard to every single other issue in this book.

COMMISSIONER BARKOW: Except for mandatory minimums. Can I just ask you a question?

MR. ZAUZMER: Sure.
COMMISSIONER BARKOW: So you said we should let judges do what they do, this is their freedom to do it, they are very good at it, but it seems inconsistent with the Department's position that we need mandatory minimums in some cases because that obviously constrains the ability of judges.

I see it as kind of the flipside of this and so I am just a little curious why the Department has one view with respect with mandatory minimums and another with this one?

MR. ZAUZMER: Again, Commissioner, I don't know that we do. The mandatory minimums come up in a narrow set of areas. They exist and they are important but they don't govern any more than a fraction of sentencings that happen, and that's a matter of course for Congress.

COMMISSIONER BARKOW: But you said this would be a fraction, too, because you said in most cases we'd be able to use the categorical approach and it would just be the smaller subset
that we do your conduct based.

MR. ZAUZMER: Right.

COMMISSIONER BARKOW: So, you know, I
don't know we'd have to look at data to see how
many, but it just seems as a theoretical matter
there is a, we use categories of things in
different places.

You know, when it's used in mandatory
minimum context we know that's it's going to be
over-broad but the Department has kind of weighed
the pluses and minuses and come out and said
look, we still want them.

And here, again, the categorical
rule, it has its problems, it has its benefits,
pluses and minuses, and I guess the logic of just
let judges do what they do I have a little bit
of a problem with the Department saying that when
it does seem inconsistent with the way the
Department views the mandatory minimum landscape
where however many cases it's used the Department
is still very much in favor of having them.
MR. ZAUZMER: Well, Your Honor, there are very few areas, but they are important, where there are mandatory minimums. They come in the drug area based on quantity, 924(c), child pornography, those are the prominent ones.

The Department has stated that it, and they are an issue for Congress, of course, and what the Department has stated under this Administration in recent years is that we want to work with Congress to make sure that those mandatories are applied correctly and only in the areas in which they serve important purposes.

We have stated our position that we are willing to, we want to talk to Congress about lowering some of the mandatories where that may be appropriate, that's an issue for Congress.

In general though our view absolutely is not, and I hope I am not misunderstood on this, our view is not mandatory sentencing, that we want some code that lists a mandatory sentence for every offense and take away judicial
discretion, that absolutely is not our position when you look at the broad landscape of federal sentencing.

COMMISSIONER BARKOW: Can I ask you one other question though. I guess I was, you know, it is worrying to hear Judge Keeley describe that you can't even get the state records that you need to do this, right, and it does seem like a big part of this is just that the records aren't there and I'm just -- Has the Department made any efforts to try to get Congress to redress that particular issue, you know, maybe with the way we use congressional grants or state funding as a condition of that that states do a better job with their recordkeeping? Because it does seem to me no matter what we do, whatever rule we have, if we can't get information from the states about even the offenses of conviction the idea that we could go even further and get these facts, right, it's
just going to lead us down that same path. And so I am just -- In the bigger picture is the Department doing anything to try to improve that kind of record gathering?

MR. ZAUZMER: I personally don't know the answer to that. I think that's an outstanding idea and it's something I will definitely take back because I think it's a great idea.

Though realize that in looking at the near future, the next five, ten, 15 years, we are still dealing with the ramifications of what came before.

Where I have the problems every day is I have defendants who started their criminal career in 1990 and I am looking at records from that date forward and when I am getting beyond ten, 15, 20 years, the burden is on the government and it's the government that then fails to be able to prove what those convictions were because the recordkeeping is so poor.
VICE CHAIR BREYER: I'd like to go back if I can to Judge Pryor's observation because it does, I am not quite sure I clearly -- I understand your position.

You say look, let the judges look at the facts, this is what they do all the time. And, again, I come back to -- In those cases where it's not clear from the Shepard documents that we can ascertain the facts what do you want us to do?

Is it your position well, look, we can look beyond it because we can look at police reports, we can look at statements that are made outside of court and so forth. Do you think we can for this approach?

MR. ZAUZMER: Yes, and I also think we could call witnesses. I think what we are asking is that the government be given the opportunity to prove by a preponderance of the evidence that someone committed a violent offense.
CHAIR SARIS: But, you know, that's where -- If I can just jump in. It is different from what we do every day in a sentencing. I have been sentencing for 20 years.

When you make facts on how much drug quantity is or whether or not the financial fraud involved $X$, those are hard enough, but they are at least the instant offense that's in front of you I find it --

You know, I've been doing this for years and you go back to a domestic abuse situation and he said/she said and you're trying to untangle exactly what happened and then the probation office is flipping out because they can't find the records, it is different.

I mean it's hard to capture the full case without actually taking testimony or at least having major proffers from the police officers themselves rather than just a police report, it would expand.

MR. ZAUZMER: There would be cases in
which it would expand it, but, Your Honor, what I see are cases that are not difficult and those are the cases in which the government would elect to try to show its burden.

What I see are the cases in which people are doing shootings and gunpoint robberies and assaults in which it is readily obvious from all of the records and all of the known facts.

So if I could just say one thing. There is no question that this would be a new area and new work, but what we are balancing here is we are balancing this against the unfairness that comes when similarly situated people are treated differently.

When that person who unquestionably committed a kidnapping in Tennessee gets a totally different sentence.

COMMISSIONER PRYOR: Yes, but they're -- But with the paucity of evidence that's going to exist in lots of cases then you are going to have the same, you're going to have disparity.
You're going to have cases where there were offenders who were in that position but you just can't prove it, too.

MR. ZAUZMER: Absolutely, but we want the opportunity because we know --

COMMISSIONER PRYOR: But there is disparity either way.

MR. ZAUZMER: Well there is disparity, Your Honor, I think with all respect in the enforcement of criminal law in what we can prove and what we can't prove and this would be another example of that.

But we want the opportunity because we have seen so many cases, and, again, this is not anecdotal, this is something that's happening in every district where because of the categorical approach, and it's happening even more now in the wake of Johnson.

I am working now on a petition where now we don't have the residual clause we basically only have the elements clause for ACCA,
so now someone has presented to me a very strong argument that third-degree murder under Pennsylvania law, which is basically any murder other than premeditated, is not a crime of violence because of how Pennsylvania has interpreted it and how courts have interpreted the elements clause.

When we see an argument like that, one that I can't commit right now, but that the government may have to concede, that's where we know this enterprise has gone off the rails and so we are balancing one problem against another.

COMMISSIONER FRIEDRICH: In the District Court Judge Keeley suggested that right now District Court judges in say the robbery cases that you talked about in Pennsylvania where you can prove these were armed robberies and yet they didn't qualify, is the government getting those documents and making arguments like you are talking about for purposes of departures or variances, is that happening now?
MR. ZAUZMER: It happens but I can
tell you that it's very inconsistent as to when
judges will depart or not. Most judges, in my
District I can speak of and I know in many others,
do not give upward departures or variances and
certainly nothing approaching the Career Offender
Guideline that would apply, so when we talk about
disparity there is enormous disparity in how that
plays out.

We don't secure upward variances that
often on those grounds.

COMMISSIONER FRIEDRICH: Back to the
Apprendi point, would you agree that for those
of who would support a simplified and presumptive
system that your approach would run afoul
Apprendi if the guidelines were no longer
advisory?

MR. ZAUZMER: Oh, certainly. If the
guidelines were not advisory it would run afoul
of that and so would every other application.

You know, we would have jury findings regarding
everything in the Guidelines if Apprendi applied
given the --

COMMISSIONER PRYOR: Not prior
convictions you wouldn't.

MR. ZAUZMER: Not prior convictions,
that's --

COMMISSIONER PRYOR: As long as you
were compliant with --

MR. ZAUZMER: That's true. No, the-

- 

COMMISSIONER PRYOR: -- the
categorical approach, right?

MR. ZAUZMER: Absolutely. And what I
am suggesting is --

COMMISSIONER PRYOR: Which is what we
are here talking about.

MR. ZAUZMER: Right. I am suggesting
that if Apprendi applied to the Guidelines we'd
have much bigger problems than what we are
talking about today.

If the first majority opinion of
Booker controlled --

COMMISSIONER PRYOR: That's what we're talking about, a very different manual.

MR. ZAUZMER: No, I understand, sir.

Now one question that did come up is regarding the elements clause. My friends from the defenders I know have suggested that the elements clause takes care of this and we don't even need any enumerated offenses.

And I would invite you to look at the litigation that is happening around the country right now after Johnson in which defense lawyers, as they should, are now attacking all sorts of crimes that are indisputably violent crimes but saying that they don't satisfy the elements clause.

The most prominent one that the defenders are briefing I can tell you in every District is Hobbs Act robbery.

Hobbs Act robbery, the most commonly charged federal robbery offense, it's being
argued is not a crime of violence under ACCA because it can be committed through a threat against property as well as a threat against the person and then you use the categorical approach, you go back and look at the charging documents and the judgment and you don't see that any distinction was made, if it's even a divisible statute to begin with.

COMMISSIONER PRYOR: Well that's a problem for Congress not for us.

MR. ZAUZMER: No, correct, but should this body adopt only an elements approach --

CHAIR SARIS: Can you just -- The Hobbs Act robbery is a federal offense?

MR. ZAUZMER: It is, it is. So if you have a defendant with a prior Hobbs Act --

CHAIR SARIS: A federal offense?

MR. ZAUZMER: Correct.

CHAIR SARIS: Well couldn't you get the modified Shepard documents to figure that out? In other words you're not, you don't have
to plea colloquy the, generally, right, the prosecutor states all, everything, and then you say to the defendant is this true and the person says yes then you consider that, right?

VICE CHAIR BREYER: It isn't the real problem, not that, isn't the real problem, the state offense is, because the state offenses, and I will, well from my experience and I'm sure my colleagues would agree, I get the police reports in 20 percent of the cases.

I mean 80 percent of the cases you -- Now we can't describe the, it says in the presentence report we can't describe the offense because we don't have a police report or we don't have enough information about it.

Now that's the majority of cases that we look at in terms of what happened, what happened. So if you don't have the categorical approach what are you left with?

And as I understand your solution to that is I'll tell you what we're left with, we're
left with a hearing and at the hearing the United States Attorney has the option of trying to produce evidence which would satisfy the court. Maybe that's the answer.

MR. ZAUZMER: Well the other part of the answer is we still do have the categorical approach. As I said there are many offenses in which the elements will match up to the definitions that you adopt and we think it's a very good idea for this Commission just for that reason to define these enumerated offenses as you have endeavored so far and informed by all the comment that you are getting.

So we are not eliminating the categorical approach, but we want the option of a hearing for these cases that really result in inconsistent results.

CHAIR SARIS: Yes, yesterday, I'm not up on it, I'm sure you are far more up on it then I am, the Supreme Court argument on the word "as described in."
MR. ZAUZMER: Yes.

CHAIR SARIS: I don't pretend to be an expert on it. So you had a very interesting suggestion, which is don't make up a new definition, just use the existing federal statutes and eliminate the interstate commerce nexus requirement "as described in."

Should we be waiting on doing that till we hear from the Supreme Court on what they think about that language?

MR. ZAUZMER: I don't think so. I don't have the exact words in front of me, but in preparing our suggestion and our submission we had that case in mind and we drafted the phrase in a manner that we believe satisfies any concern about that.

And now we are only suggesting federal definitions for consistency where they exist. There are still about half of the enumerated offenses that the Commission has proposed, that we have proposed, where there isn't a comparable
federal definition and you would need your own definition.

But where we are using the federal definition we propose language and, of course, I'm sure you can improve it, that would just make clear this is the definition, we are not using the federal jurisdictional hooks, we're not using the other things that might appear in the statute.

CHAIR SARIS: So what if we adopted the federal statute for the, and then with the ones that don't have a federal statute just leave the existing case law where it is?

MR. ZAUZMER: You could certainly do that but I think that there are ways to improve on the case law and there are circuit conflicts out there that haven't been addressed regarding what the "generic" meaning of this Commission's enumerated offenses were.

CHAIR SARIS: And so those are the ones you would say fix?
MR. ZAUZMER: Well I think if we are doing this once and for all to do it. I understand, I heard Your Honor's, you know, thoughtful question before to the previous panel about well if the judges have done all this work why don't we keep that.

But I think if we take the long view of sentencing, not just in the next couple of years, but for the next ten, 20 years and beyond, it's a helpful exercise to do this and do this right and not so much rely on the existing case law that we have where we know there are conflicts, we know there is uncertainty, we know there is some disparate results.

COMMISSIONER BARKOW: Can I ask you, with the using of the, I mean I wasn't -- In just trying to figure out which if you were going to have a uniform set of definitions trying to think about, you know, Model Penal Code versus federal versus something we make up on our own, what's the thinking behind using the federal definitions
for things?

Because my initial reaction was the states don't really use the Federal Code as a model for anything. They are way more likely to have turned to the Model Penal Code.

And so we were just kind of anticipating where we are more likely to get overlap. I would have predicted it would have been the Model Penal Code, but I mean you must have a reason that you think the federal one would be the better uniform standard and I just kind of wanted to hear a little bit more about why.

MR. ZAUZMER: Sure. Well we suggested the federal definitions because they have been approved by Congress and because they have been litigated, there is case law regarding those areas as opposed to coming up with new definitions.

When we then go to the next step and say let's compare it to the all of the state
statutes that are out there, that as opposed to
the Model Penal Code, as opposed to other
treatises, really there is no overlap at all
among any of them. The statutes out there are
just so different.

You know, Judge Breyer mentioned
kidnapping of moving somebody from one room to
another, that's what we are dealing with here,
where you could take any single one of these
crimes and then wade out into the state statutes
and we just don't find any consistency.

So we think it's important to get the
definitions right and I hope I am not heard to
say that if the categorical approach stays around
well who cares about the definitions.

We have to get the definitions right
and then do the best we can in applying it. But
we're going to be frustrated if we have these
excellent new definitions that the Commission
adopts and we then have to apply it categorically
to state statutes.
COMMISSIONER BARKOW: Can I ask you one other question? On the communication of threats proposal that you had why, what's the Department's thinking including threats to injure somebody's reputation as a crime of violence?

MR. ZAUZMER: Well the predicate that we have in that definition is that it has to be you are threatening violence in order to threaten reputation, so there always -- Violence has to be involved in all that.

COMMISSIONER BARKOW: Okay. So you would read that's how this is interpreted?

MR. ZAUZMER: Correct.

COMMISSIONER BARKOW: It's always a threat of violence to --

VICE CHAIR BREYER: So extortion has to be limited.

COMMISSIONER BARKOW: Yes.

VICE CHAIR BREYER: Because in California the definition of extortion, and I am sure as in other states as well, is the threat
to take, you want to take property in exchange for not exposing a secret that would cause some, you know, discomfort to the victim.

COMMISSIONER BARKOW: Right.

MR. ZAUZMER: Right. Threatening reputation should not be a crime of violence if I say I am going to give some unpleasant fact about somebody.

VICE CHAIR BREYER: Right.

MR. ZAUZMER: Extortion though, yes.

VICE CHAIR BREYER: Otherwise you are outlawing all politics.

MR. ZAUZMER: Right, yes, and court argument, too, perhaps.

COMMISSIONER BARKOW: And that's clear from this? Because I didn't read this this way. This wasn't a, it's not an intuitive reading to say any threat of use of violence to threaten, like so you are threatening to threaten.

MR. ZAUZMER: Sorry, it probably
could be worded better but I want to make clear that we think a threat of violence has to be involved.

COMMISSIONER BARKOW: Okay.

MR. ZAUZMER: But extortion, another great example of the inconsistency in state statutes that makes this such a frustrating exercise no matter what definition you have, starting with the federal definition, you know, which we limit in our proposal because it expands beyond violent conduct to other things.

CHAIR SARIS: And just going back to this whole issue of trying to get the most dangerous of the dangerous, and I think everyone would agree with that one, you know, making sure that career offenders get the appropriate punishment.

But the question that I have is in these states you said you were against reclassifying felonies, so take the eight states where misdemeanors go very high and you've got
two people who were, you know, if somebody is convicted of two predicates of misdemeanors, no jail time, maybe a barroom brawl or that kind of thing, and then suddenly they are career offenders, I'm trying to figure out how you would handle that.

In fact, in our District many of the prosecutors request a variance or a downward departure because it's so disproportionate and I notice in the immigration area they have a sentence imposed requirements so that you actually have to have gone to jail for a certain period of time.

How would you deal with it, to go back to Commissioner Wroblewski's comment, we really want to make sure that the truly violent people are the ones who get this?

MR. ZAUZMER: Well a variance is the right way to do it but I can tell you that in Pennsylvania where I live it's another one of those states and what Pennsylvania classifies as
a misdemeanor are actually serious offenses and serious controlled substance offenses, and that's the problem with looking to state definitions.

So what happens is, for example, a controlled substance offense in Pennsylvania can be up to a five year mandatory, misdemeanors, not mandatory, misdemeanor, goes up to five years in Pennsylvania.

And so you can have somebody selling drugs in Scranton, Pennsylvania, and a few miles away in Binghamton, New York, it's a felony by any definition.

So the state in deciding to call something a misdemeanor they weren't thinking about our crime of violence definition here, they were just thinking about classifying for whatever reasons they had, but it will result in disparate treatment. We favor the current approach because it's consistent. Was the crime punishable by more than a year? That's a definition of seriousness that works from state
to state so that you won't have somebody in one
state say I did the same thing as him but that
his state calls it a felony and mine doesn't.

CHAIR SARIS: But if we went back to
the statutory definition in 922 -- (g)(1),
whatever it is.

VICE CHAIR BREYER: Right, 2-year
cap.

CHAIR SARIS: Which is the two years,
maybe we're not wedded to two, maybe it should
be three, maybe 2-1/2, I don't know what the
right number is, but basically follow the
statutory scheme that's already set up.

Obviously Congress was worried about
that before and that would just be another way
of doing it, or do the sentence imposed approach
of the Immigration Act.

MR. ZAUZMER: So a couple of things
there. It's in Section 921, is where the
definition applies.

And it applies to the whole --
CHAIR SARIS: I don't know where my code --

MR. ZAUZMER: Yes, I didn't have my code book either.

And it applies to the whole chapter so it's an important definition. That definitely is the second best option to what we have proposed because it's consistent, it's fair.

Time imposed we have suggested is not a good option and the reason is we talk about the difficulty of getting court records.

VICE CHAIR BREYER: Right.

MR. ZAUZMER: It is even more difficult to prove how long somebody actually served. We would actually be subpoenaing witnesses for that in some cases. And so --

CHAIR SARIS: So it's hard to --

MR. ZAUZMER: Exactly. And so this definition we think that -- We have always suggested that for crime of violence punishable by more than a year is sufficient to identify the
right people, but if you like the Congressional definition we would favor that simply because it gives us the same important consistency that we need.

CHAIR SARIS: All right, thank you. Does anyone else have anything else?

Thank you very much.

MR. ZAUZMER: Thank you.

CHAIR SARIS: We'll take a 15-minute morning break. Thank you.

(Whereupon, the above-entitled matter went off the record at 10:37 a.m. and resumed at 10:54 a.m.)

CHAIR SARIS: So our next panel -- Do we have, yes. Our next panel presents a view from the practitioners.

We're very pleased to have with us Molly Roth who is an assistant federal public defender for the Western District of Texas in San Antonio.

In 2008 and 2009, Ms. Roth worked in
Washington, D.C., and as an attorney advisor to the Defender Services Office and as a visiting assistant federal public defender at the United States Sentencing Commission. Do you recognize the room?

MS. ROTH: I do.

(Laughter.)

CHAIR SARIS: Also joining us today is Angela Campbell who is the co-founder of Dickey & Campbell Law Firm, PLC. Ms. Campbell is currently a voting member of the Practitioners Advisory Group to the United States Sentencing Commission. Thank you for all the work you do on that as well.

And the final member of this panel is Zachary Margulis-Ohnuma. Did I say that right?

MR. MARGULIS-OHNUMA: Yes.

CHAIR SARIS: Okay, who currently practices in federal and state court proceedings in the New York metropolitan area, including serving as member of the Criminal Justice Act
panels for the Southern and Eastern District of New York. He is the current vice chair of the sentencing committee for the National Association of Criminal Defense Lawyers.

Welcome to all three of you. Ms. Roth, you may proceed.

MS. ROTH: Thank you. Judge Saris, Commissioners, thank you very much for giving us this opportunity and we join everyone who has spoken so far in applauding your proposal to remove the residual clause language. Thank you for that proposal.

We also strongly support the Commission's proposal to limit the consideration of prior convictions for offense level enhancements to felonies that are also classified as felonies under state law.

While we believe there might be more to be done in order to ensure that the Commission narrowly capture the most serious prior convictions, we sincerely appreciate the
Commission's attentiveness to this issue and support the current proposal as a significant and positive step.

Double counting prior convictions, using them for both criminal history purposes and also instant offense seriousness purposes, is unduly complicated, often recognized as unjust by courts across the country, and does not serve the purposes of sentencing.

We know that it's often recognized as unjust by courts across the country because of your own data, and I just point to two, highlight two situations.

One is the career offender guideline in which the 2014 Commission data shows us that 71.5 percent of folks facing the career offender enhancement were sentenced below the guidelines and 72.5 percent of individuals facing the 16-level guideline enhancement in illegal reentry cases were sentenced below the guidelines during this same time period.
Double counting complicates the guidelines. There are currently several definitions of crime of violence in the guidelines applied to offense level increases in a variety of ways.

Our concern with the Commission's proposed list of enumerated offenses and their definitions is that we believe that they would add to, rather than subtract from, the complication and the confusion.

It would introduce new definitions not previously used in the guidelines or anywhere else and would spawn years of intense litigation, and you know that we will be intensely litigating on behalf of our clients, especially when the sentences for these enhancements so dramatically increase.

We have talked some today about efficiency, but we're interested in our clients' liberty and when their liberty is so threatened by extreme enhancements you know that we're going
to be litigating, as is our duty in zealous advocacy.

The Commission's proposed definitions are also unduly broad and would not operate to better identify the serious offenses, but would instead sweep in even more of the less serious offenses.

This broad sweep could also raise ex post facto concerns in all of the situations where the new definitions include priors that did not previously count, for instance the California conviction of kidnapping.

Critical, in our opinion, is the human cost of double counting prior convictions and defining crime of violence too broadly, and we ask that you consider the situations of these clients.

I want to talk first about Jessie. Earlier this year he was convicted of illegal reentry after deportation after being pulled over for making an improper left turn.
Jessie was one of the backbone laborers of our nation's vibrant construction industry. He and his wife provide for three children, all of whom are in public schools in Texas and involved in after-school athletics and doing well.

He was sentenced to time served, which was five and a half months, but his properly scored guideline range was 41 to 51 months. His properly scored guideline range was 41 to 51 months based on a 17-year-old robbery conviction in Fort Bend County, Texas.

Jessie was sentenced to probation for this robbery, but in 2009 his probation was revoked for what the presentence report described as technical violations, failing to pay fines and things like that, and he was sentenced to four years.

Jessie's prior robbery conviction counted only because his original sentence was revoked 11 years after the crime occurred based
on technical violations.

Jessie's case is also an example of robbery not being what the name describes. Unlike the Model Penal Code, which focuses on serious bodily injury or fear of such injury in defining robbery, Texas robbery has a broad definition that covers intentionally, knowingly, or recklessly causing bodily injury to another or knowingly threatening or placing another in fear of imminent bodily injury in the course of committing a theft with intent to obtain entry into or control of the property.

The actual conduct underlying this conviction was a low-level shoplifting at Wal-Mart. Jessie became frightened after exiting the store and pepper sprayed a plain clothes officer. Perhaps that's why Texas decided to charge him with robbery instead of misdemeanor shoplifting or misdemeanor assault.

Whatever the reason, Jessie did not commit a common law robbery, yet he was convicted
of robbery in Texas, righteously under Texas statute. He would face the same 41- to 51-month range if we proceed with the Commission's proposed definition of robbery.

Andrew, on the other hand, is a client who would be more justly treated under the guidelines should the Commission amend its definition of felony.

He was convicted of possessing a firearm after sustaining a felony conviction. He had two prior possession with intent to distribute marijuana convictions, so his guidelines range was 92 to 115 months. However, these two prior convictions are misdemeanors in the convicting jurisdiction of Massachusetts.

For one, Andrew received a sentence of 314 days, which was deemed time served and ordered to run concurrently with another sentence.

Andrew was sentenced to probation for the second prior conviction but was sentenced to
one year of prison after his probation was revoked.

Andrew's federal sentencing judge assessed 41 months of prison after determining that the offense level called for by the guidelines overstated the seriousness of the instant offense.

We urge the Commission to exclude statutory rape from its list of enumerated offenses.

Edwin, who had a six-year-old California conviction for statutory rape when immigration officials found him walking along a street intersection in Uvalde, Texas, was sentenced to 41 months for illegal reentry after deportation.

The statutory rape conviction was his only prior conviction and it was for having sexual relations with his 14-year-old girlfriend when he was 19. The couple had maintained their common law marriage and created two children when
immigration arrested Edwin.

For statutory rape, he received a three-year probation sentence and a six-month jail term served through a work furlough. His sentence for illegal reentry after deportation was seven times that long.

Interestingly, the Tenth Circuit held Monday that Texas statutory rape is not a crime of violence under 4Bl.2. That's U.S. versus Madrid.

If the Commission were to adopt its present proposal of enumerated offenses and their definitions without excluding statutory rape, it would be at odds with that Tenth Circuit case and make consensual conduct between two people who intend to and later do marry a crime of violence.

You know that we're asking that you consider to completely remove burglary from the list of enumerated offenses. Let me give you an example.

Michael was convicted last year of
possession with intent to distribute 87.4 grams of methamphetamine. This placed him squarely at base offense level 26. Today it would place him squarely at base offense level 24. His role in this crime was to drive a bag of methamphetamine from one side of town to the other. However, the career offender enhancement elevated him to base offense level 34, moved his criminal history category from 4 to 6.

In 2007, Michael was convicted of unarmed burglary of a habitation in Texas. He was sentenced to eight years' probation but that was revoked and he was sentenced to five years' prison upon revocation.

This conviction, in combination with a stalking conviction, which involved texting another person and did not involve physical conduct, supported the career offender enhancement. His guidelines range was 188 to 235 properly scored over our objection.

The court, citing Michael's history
and characteristics and the nature of the instant federal offense, sentenced him instead to 96 months.

Double counting prior convictions is unjust. We have a criminal history calculation that fully accounts for prior convictions. We know that we may be alone in saying this, but we join the Commission in working toward simplified guidelines that are consistently applied, in seeking just sentences, and in striving to reduce mass incarceration.

To these ends, we urge that the Commission take thoughtful and critical steps to ensure that only the most narrow group of truly serious, violent crimes against people receive offense level enhancements. The easiest way to accomplish that is to use the elements clause. Thank you.

CHAIR SARIS: Thank you.

MS. CAMPBELL: Judge Saris and members of the committee, on behalf of the
Practitioners Advisory Group, we welcome the opportunity to comment on the proposed amendments.

We also agree that eliminating the residual clause is important and it appears that everyone is in agreement with that.

I do have some other comments, however, if the Commission is truly concerned about only punishing the most severe violent offenders.

We aren't talking about the right provision of the career offender guideline because we're still counting controlled substances offenses, and controlled substances offenses can still count as our priors and can still count in some states if they are misdemeanors.

The Commission's work in changing the definition of felony will resolve some of those problems but won't resolve all of them. It's still going to be a felony to sell marijuana in
many states and that is still going to count as a prior conviction under career offender guidelines purposes to put people in prison for a very long time.

And so I think that while some of the work is beneficial, I think there's more work that could be done in relation to making sure we're only targeting the violent offenders.

That being said, in Iowa we do have a, we're one of the states that has a misdemeanor that's punishable by two years and the Commission's proposed definition and also my proposed definition, which referenced the felon in possession statute that Congress has passed, would fix the problem in Iowa, at least for those aggravated misdemeanors. In Iowa it's punishable by up to two years in prison for that last category of misdemeanors.

The other problem that you have, though, is that you can still have things like simple assault where there's no injury where it's
a threat of harm or even a slapping or spitting or something that can become enhanced into a felony category because of the prior convictions within the state system or for other reasons that are not based on offense conduct.

What we as the Practitioners Advisory Group is urging is that the Commission take a more extensive study and more time in trying to decide whether or not certain offenses should be added to this guideline.

I think you'll notice that we didn't submit elements that we think should define the offenses and that's because you're writing a treatise. You're writing the Model Penal Code again and, frankly, it would take a long time to build consensus and to study what elements actually should be included in kidnapping, what elements should be included in robbery, what elements should be included in all of these offenses.

And in the meantime, while you're
conducting that study, if that's the way that you go, simply eliminating the residual clause would fix the instant problem and the Commission could undertake that extensive study.

That being said, I think also there are problems within the proposed definitions that have a deeper root than just whether or not they're going to capture certain state convictions or not, and that deeper root is are we capturing the people we want to capture and what harm is it that we're trying to encompass?

At least from my perspective, the harm that we should be trying to encompass is intentional actions to hurt another person.

A lot of the definitions and the discussion involve recklessness. It is the PAG's position that recklessness is not something that should be punished by such extreme penalty enhancements as the career offender.

In addition, you should have some sort of injury requirement or intent to cause injury
requirement for each of these offenses.

That would resolve many of these problems with whether or not you should count a burglary of a structure that's unoccupied. You're not trying to hurt somebody, you're not truly a violent person, you're not someone deserving of essentially a life sentence under the guidelines.

And so that's been the basis for our recommendations, that the Commission maybe take a step back, don't push through new definitions at least for the offenses, and take more time to reflect on what harm it is exactly that we're trying to prevent.

Currently, the career offender guideline will encompass most of these things. The current definition includes applying force to someone or threatening to have force against somebody.

That's going to encompass a large number of offenses and, in fact, will over-
encompass offenses. It's going to include assaults. It's going to include threats of assaults. It's going to include when there's actual intentional harm to anybody. It's always going to include those because you will have included the force element. And so we would recommend that when deciding what offenses to count that we take more time.

We do think though, however, it is an important and reasonable step to take now to change the definition of felony now and we've set forth a proposal that matches one of the definitions that Congress has used and we would support additional changes to that. I think that while it fixes Iowa's problem, it's not going to fix, say, Massachusetts' problems, so thank you.

CHAIR SARIS: Thank you.

MR. MARGULIS-OHNUMA: Chair Saris, members of the Commission, thank you for inviting the National Association of Criminal Defense Lawyers to this important public meeting.
We were founded in 1958 as a professional bar association. We represent something like 40,000 criminal defense lawyers across 90 state, provincial, and local affiliate organizations in 28 countries.

I myself am a life member of NACDL. I'm the vice chair of the NACDL's sentencing committee and I am in private practice in New York City. I sit on both the Eastern District and the Southern District of New York CJA panels.

And I, like all of our members, are at the front lines of interacting directly with the individuals who after they're out of the courtroom and even after they're out of prison are affected by the words that you all write.

Let me begin by stating the obvious. NACDL strongly supports the elimination of the residual clause from the guideline's definition of crime of violence.

We filed an amicus brief in the Johnson case because it had become clear by then
that the nine or ten words, "otherwise involves conduct that presents a serious potential risk of physical injury to another," were not capable of being understood or applied in any consistent or meaningful way.

The use of those words to dramatically increase criminal liability therefore violated the due process clause of the Fifth Amendment of the Constitution.

As defense lawyers, our members know that our clients' lives and those of their families have been irreparably damaged by those mysterious words.

And I think I sense in the room a consensus that it's time to excise those from the Sentencing Guidelines as the Supreme Court has done from the Armed Career Criminal Act.

What I want to focus my short time on is the question of retroactivity. NACDL believes that that's probably the most important of the open questions in the proposal before the
Commission and we strongly support retroactivity of the elimination of the residual clause in the definition.

Under the proposed amendments, I'm sorry, as the proposed amendment itself noted, the question of retroactivity raises three subsidiary questions in determining whether a new provision will be retroactive.

The Commission considers the purpose of the amendments, the magnitude of the change in the guideline range made by the amendments, and the difficulty of applying the amendment retroactively to determine an amended guideline range.

It's our view that each of these militates in favor of retroactivity of this change.

The retroactive application of the amendment is consistent with the purpose of the amendment, which is to ensure what ex officio Commissioner Wroblewski focused on, that the
people who are repeatedly violent have large enhancements in their sentences, but only people who are repeatedly violent have those enhancements in their sentences and that is done consistently with constitutional norms.

Retroactive application of the amendment is consistent with the current broad-based and bipartisan movement to address the problem of mass incarceration in the United States.

In particular, retroactive elimination of the clause would parallel President Obama's clemency initiative, which is limited to non-violent, low-level federal inmates whose sentences would be lowered today by operation of law or policy.

Retroactivity would grant judges discretion to provide similar relief to those sentenced under the residual clause but whose conduct or actual criminal history may not have warranted the very high sentences that the clause
triggers.

In that respect, I anticipate that if the amendment is made retroactive there will be a larger effect on people who were sentenced prior to Booker.

I don't have data to back that up but it seems to me before Booker there was no discretion for judges who may have been concerned that a crime of violence definition captured something that wasn't really a violent crime.

As my colleague noted, after Booker judges reluctantly apply the career offender enhancement. Seventy percent of the time they go underneath it, whereas before Booker they were far more constrained.

So those old sentences that are still being served and more than ten years old would get another look that's warranted if the amendment was made retroactive.

The magnitude of the effect on the guideline ranges will be substantial but
experience shows that the effect on the actual sentences imposed, at least for those post-Booker sentences, will be less dramatic since so many of them fall outside the guideline range.

We submit that it won't be so difficult to apply the new guideline range. If the probation report is clear that a person has been sentenced under the residual clause as opposed to another clause of the crime of violence definition, then it's a mechanical exercise, but it's also in recalculating the sentence because it's simply excised.

The advantage of the rubric of 1D1.10 that limits, it allows discretion for resentencing but it limits it to the new guideline, will give judges another look as they've had with the recent amendments to drugs to the individuals affected by the retroactive amendment in a way that will allow for individual assessments that I think has gone smoothly so far with those amendments, with the past amendments
and would happen here too.

I don't see this as fundamentally more difficult than the retroactive application of the 2007 Crack Cocaine Amendment or the 2010 amendment if we're going to take the Fair Sentencing Act or last year's drugs minus two amendment.

CHAIR SARIS: You need to start wrapping up.

MR. MARGULIS-OHNUMA: Okay. My last point on retroactivity and then I will wrap up is that the impact of retroactivity has been shown by the Commission's own reports to not increase recidivism, to not raise a public safety issue.

And the experience with the, I think we can anticipate in these cases where people have already served long sentences where judges will have another look at individuals, we can also expect that it would not increase recidivism to make the amendment retroactive.
I did have a word or two to say but I'll wait for questions about the government's proposal essentially doing away with the categorical approach, if the Commission wants to address that. It's not really on the agenda so I didn't include it in my prepared remarks.

CHAIR SARIS: Thank you. Questions?

VICE CHAIR BREYER: Well, I'd like to hear why not --

MR. MARGULIS-OHNUMA: Okay. Well, I think what they're saying, I mean, you've obviously picked up on the fact that their asking for basically three trials in one, right? We try the case and then we're going to try the two priors to see what, quote/unquote, "really happened," and they're asking to set aside the outcome of state convictions.

And those state conviction, I mean, that raises a comity issue I think because there should be respect for those state convictions and the meaning of those convictions, and those state
convictions, they're a negotiated outcome. It's a proxy for what really happened.

The fact is a judge can't sit in the courtroom and ever know what really happened. They know what witnesses say and what defendants might say to oppose those witnesses, but having some sort of paper trial undermines the value of those state convictions.

Some state convictions overstate what a person actually really did because he didn't want to litigate it. Others understate it.

VICE CHAIR BREYER: Well, we accept that. How is that observation not inconsistent with your position on retroactivity, because when you point to examples of drugs minus 2 or crack/powder disparity, I found it was a very simple thing.

First of all, what was said. What was said about it is the sentence is too long. Sentence is too long and, therefore, it's going to be adjusted downward. Okay.
And then the only reason that a judge might not go along with it is if any given case the judge didn't think it was too long. Well, that's a fairly straightforward, easy determination.

However, the determination that I think you're asking us to make in making it retroactive seems to me of a totally different exercise.

Now, after saying that, I would say, you know, there are certain issues as to retroactivity. By the way, the circuits are now debating that. It's right in front of the circuits so you're going to get all different decisions from all the different circuits.

And then you're going to run into a real problem of disparities, because what do you want us to do? You want us to admit -- Eleventh Circuit it's one thing and then Ninth Circuit, assuming they come out with a single decision, it's another thing.
You know, you're going to have wide disparities across the country. Is that appropriate to start to then apply retroactivity retroactively?

MR. MARGULIS-OHNUMA: I'm suggesting to you that especially those pre-Booker sentences, they're also too long, that they're too long, that we know when we freed up judges to depart and there were things that weren't listed as crime of violence, where there was some ambiguity, they imposed shorter sentences and this is giving them a chance to do that across the board, so I don't see a disparity problem there at all.

CHAIR SARIS: The other thing that's just really interesting, there's about 75 percent of them, the instant offense was drug trafficking and that most of the predicates that, even your examples were drug trafficking and we've heard that time and time again, that you have two little drug priors and then a third little drug case and
then it, but we haven't heard as much evidence
on the violent side of the ledger, if you will,
and we may get to the drug side next cycle.

Right now we're focusing on violent
crimes and I don't know what you're seeing out
there as to whether the injustices we've heard
of really apply as much in the violent side.

MS. CAMPBELL: I can give you a good
example. I had a gentleman that was convicted
and was sentenced as a career offender and he had
a prior conviction for eluding, which at the time
was pre-Begay and was in the Eighth Circuit and
he, that counted as a crime of violence.

CHAIR SARIS: What did you say?
Looting?

MS. CAMPBELL: Eluding, running from
the police. He didn't want to get caught.

CHAIR SARIS: I thought you were
looting, you know, like -- Okay, okay, okay.

MS. CAMPBELL: Running from the
police.
CHAIR SARIS: Yes.

MS. CAMPBELL: And the second was an assault that didn't have an injury. Both of them were aggravated misdemeanors, meaning they were punishable by up to two years.

And he didn't do two years on them. They weren't considered that serious in the state system, which is why he was out. They didn't think he was that much of a danger and he hasn't ever hurt anyone, but yet he's sentenced as a career offender because he was selling drugs.

So you have the situation where when you combine the two you actually can have someone that has a drug offense, you know, one prior drug offense, a current drug offense, and then one assault perhaps or a bar fight or a, you know, it can be a number of things that you, burglary of a unoccupied dwelling, for example, that will drastically enhance what was already a very long sentence under the drug guidelines and it's doubling it.
And so those are the kinds of things, I think it's the combination of the two. You're never going to, it's very rare you're going to have a violent offender that then has two violent offenses that is under the career offender. I think that's a small group.

MS. ROTH: All of our examples, except Andrew, involved what were deemed to be crimes of violence, but it's interesting. In Michael's case that was a --

CHAIR SARIS: I just don't remember their names.

MS. ROTH: I'm sorry.

CHAIR SARIS: He was the marijuana person?

MS. ROTH: No, he was the person who was facing the career offender enhancement after transporting a bag of methamphetamine from one side of town to the next.

So it was a drug trafficking instant offense, nonviolent, unarmed, and yet the crime
of violence determination is how he fell under the career offender.

CHAIR SARIS: Can I ask you if we were to go with a very helpful suggestion, which is to go back to the statute, the 921 and you exclude anything, where the state classifies as a misdemeanor, and it says in here up to two years, how many states does that help and how many does it not help? Because it helps Iowa. Doesn't help Pennsylvania or Massachusetts.

What would be the sweet spot number to capture what would be a fair -- Of those eight states, what are most of them doing?

MS. ROTH: I would need to spread out the statutes and classifications from the eight states to be able to answer that and I'm sure that we could do that for you quickly but I can't do that on the spot for you right now.

CHAIR SARIS: And do you know why Congress picked two years because, I mean, the impulse would be to, even hurts myself, but it
would be to go with what Congress said too. I mean, that's the intellectually consistent approach to do it.

MS. ROTH: But it wouldn't help states -- And you've mentioned upcoming litigation which is why we favor your language, your proposed language minus the bracketed area, because it's flexible enough to account for what you're talking about.

I mean, as soon as we start getting into the minutiae of exactly what every state needs, we start becoming more complicated and losing track of the real issue, which is how do we draw the circle of these enhancements which are so significant around the narrow, small number of people that really should be encompassed by it?

COMMISSIONER BARKOW: Do we have a sense, though, of what Congress had in mind when it passed the two years? I mean, do we know if Congress did this kind of spreading out of the
statutes and kind of looked or what the baseline was for where that exception came from? I don't know if you guys happen to know and if you don't that's obviously fine, but.

MS. CAMPBELL: I don't. I brought it up because I've had situations where people are sentenced under it where they're not felons for that statute but then they get the enhancement.

COMMISSIONER BARKOW: Can I ask another question?

CHAIR SARIS: Oh, sure.

COMMISSIONER BARKOW: So I wanted to ask you, Ms. Roth, why the defenders reject listing offenses with definitions. I just wanted to get a better sense of the rationale behind it.

I mean, is it kind of this path dependency idea that we have all this case law, we kind of have the existing structure of law there where we kind of know. Is it the specific ones we propose and so you'd really rather not have those because, you know, those aren't set
in stone one way or another? Is it something else?

I just want the reason that you don't want them listed. I just wanted to hear a little bit more what the rationale was.

MS. ROTH: We think that they add to complexity instead of simplicity. We do think they're vague.

Let me just take the kidnapping example for a minute. I imagine that a lot of work went into that and it's very possible that a 50-state survey was done in compiling this definition of kidnapping.

But the fact of the matter is that this definition is vague. The word nefarious we've already discussed this morning, over-inclusive and would draw in not only every kidnapping statute in the country, very possibly including ones that have been deemed to not be crimes of violence, but also false imprisonment and other like statutes that are not kidnapping
and so --

COMMISSIONER BARKOW: Let's say we went with a different, I guess, without kind of commenting on, are you just saying inevitably we will screw up no matter how much time we take and, therefore, we'll --

CHAIR SARIS: That's a legal term.

COMMISSIONER BARKOW: -- always have this example like a wobbler, or is it this -- That's what I was trying to get at. Is it kind of looking at this list and not liking the list, or is it that the exercise of ever trying to create any definition is something that, as a matter of principle or legal argument, you don't think we could get?

So, yes, we could do the DOJ's proposal and look at federal offenses or we could go to the Model Penal Code, and I'm just trying to figure out why a world without definitions is better than one with one, assuming we can get them crafted in the right way after getting
comment from people.

MS. ROTH: It is exceedingly difficult to come up with definitions that would be not vague and not over-inclusive, but certainly starting with 18 3550 9(c) minus the inchoate offenses, minus the 924® drug offenses, minus the residual clause is a good starting point because it is an already known definition that's part of our statute so that is an understandable way.

Remember, of course, that we're starting from the proposition that we shouldn't be doing this double counting in the first place.

COMMISSIONER BARKOW: But assuming that we think that Congress, you know, Congress has told us we need to double count. I mean, we have statutes that tell us Congress disagrees with that.

So assuming that we get, at least I'm speaking for me, you know, Congress says there are some people that fall into this bucket and
as we try to define the people for that bucket I'm just trying to get a handle on how we can best do that.

And I just wonder without giving the definitions, is it that they'll, the definitions, you know, in ACCA are already okay without specifying things? I'm just trying to get a sense of what the down sides are to defining it versus the plus sides of kind of keeping it away.

MS. ROTH: Well, certainly the list of enumerated offenses in ACCA in 924(e) is much shorter than this list or than any list that currently exists in the guidelines of enumerated offenses. We don't think that this many need to be counted. We think this draws too wide of a net and brings in too many people.

COMMISSIONER PRYOR: What about murder? Think murder ought to be on there?

MS. ROTH: First-degree, premeditated murder?

COMMISSIONER PRYOR: Well, what if
you murdered someone by poisoning? Do you consider that a violent offender?

MS. ROTH: I think the circuit courts are currently debating that.

COMMISSIONER PRYOR: That doesn't really answer the question for me.

MS. ROTH: Well, and I don't know how I --

COMMISSIONER PRYOR: I mean, you see my concern? I mean, I think reasonable people would agree murder ought to be in, murder. I mean, there's a bigger debate about burglary versus burglary of a dwelling, occupied dwelling. There's a bigger debate about what you do with forcible sex offenses versus statutory rape, but how about the rape that uses a date rape drug?

MS. ROTH: Well, we would submit that if we're trying to capture the most violent persons, then the definition would be intentional, knowing crimes that have
intentional, substantial injury or death to real
people. So, you know --

COMMISSIONER PRYOR: But you can see
how an enumerated offense list that's broader
than ACCA could make things easier for judges and
bring in offenses that belong there, that fit
that definition --

MS. ROTH: I can.

COMMISSIONER PRYOR: -- intentional
and that involve either serious injury or death.

MS. ROTH: I can but I can also see
the very wide net that is perhaps unintentionally
cast, and Jessie's example with a robbery
conviction in Texas is a very good one and not
an unusual one.

COMMISSIONER PRYOR: The one who
pepper sprayed the police officer?

MS. ROTH: Right.

VICE CHAIR BREYER: But wouldn't
there have been a better way to approach it which
would be, say, look, looking at the original
offense, the judge in that case gave the person, I forget what he gave Jessie, 30, 60, 90 days and maybe I'm thinking of the wrong person.

MS. ROTH: Five and a half months.

VICE CHAIR BREYER: What?

MS. ROTH: Five and a half months.

VICE CHAIR BREYER: Five and a half months, okay. He gave him five -- I saw exactly what you did, you pepper sprayed, you did this, you went into the store, you dah, dah, dah, dah, dah. I'm giving you five and a half months. That's what I think.

So later what happens to Jessie is that he doesn't complete his probation or whatever you want to call it successfully. You would characterize it as technical violations, but it could have been a drug sale. It could have been any number of things where we see what happens is you revoke probation and then you impose the sentence that you have under the law for the original offense. You haven't carried
it out, whatever that is, whether it be statutory
max.

So what if we go back and look at what
was the sentence that was imposed, some sentence
originally as distinct from subsequently as a
result of other conduct?

MS. ROTH: That would be better. He
would not have counted under 4(b) because it was
a probatory sentence so, and the PSR was the one
who described the violations as technical, Judge
Breyer, so.

But in any case, that would help, to
not include time imposed upon revocation but just
look at the original sentence.

VICE CHAIR BREYER: So that's sort of
different from the -- I know we've been talking
about definitions, what's a robbery, what's this,
what's that, can't we all agree, and maybe we
can't. Maybe we can't, burglary being a good
example.

But what we can all agree on is what
did the judge do. Because we know exactly what
the judge did. The judge imposed six months,
four months, three months, whatever it is, eight
months, so isn't that a way to approach this
problem?

MS. ROTH: Well, the interesting
thing is to notice that in the career offender
guideline 71-1/2 percent of judges sentenced
people below the guidelines.

And so it seems that if the guidelines
are our initial benchmark, we would not want that
to be necessary. We would want the career
offender enhancement, which is huge, to
appropriately limit the number of very serious
crimes that it includes.

CHAIR SARIS: Can I ask you on the
retroactivity piece, drugs minus two was easy.
It's an algorithm basically, unless somebody's a
crime risk and then you address that.

So in the First Circuit, for example,
the First Circuit frequently said we're not sure
whether this meets the elements clause test, but in any event, everyone can agree that it's a residual clause problem.

So let's say you knock out -- I don't know whether that's true across the circuits but that's how the -- so then you knock out the residual clause. You still have to go back and do the analysis with the elements.

And now let's assume you agree that because of the categorical approach you can't figure out whether it's an element. You still might, as a judge, might want to say, well, this arson, whatever it happens, you know, whatever it happens to be, in Massachusetts, say, assault and battery with a dangerous weapon may be reckless. So that's why it may not qualify, all right?

You still may want to think about that in terms of what kind of sentence you'd want to give, even if it doesn't qualify. It's just not as simple as the drugs.
MR. MARGULIS-OHNUMA: It's true that it may be hard to figure out which prong of the crime of violence was used but that's the vagueness we're trying to avoid by excising it, right? I mean, that's --

CHAIR SARIS: Right, but then you got to come back --

MR. MARGULIS-OHNUMA: If we're not even sure what he was sentenced under, I think it deserves another look, especially if it's pre-Booker.

CHAIR SARIS: I'm just saying on the manageable piece, it's just a, it may be worth it and because of the length of the sentences it may well be worth it. It's just more complicated.

MR. MARGULIS-OHNUMA: Right, and it's worth it also because there's far fewer, it affects far, far fewer defendants than the thousands of defendants who got resentenced during the drugs minus two.
I mean, these are much, much smaller numbers altogether, especially the pre-Booker ones. You know, a lot of them are still serving but there's not, I don't think you're going to see anything like the numbers for drugs.

CHAIR SARIS: So you would say, yes, it might be a lot tougher but the numbers are a lot smaller.

MR. MARGULIS-OHNUMA: The numbers are a lot smaller so the total burden is the same or less and the importance of it is even greater because the swings are so great.

CHAIR SARIS: That's interesting. Go ahead.

COMMISSIONER WROBLEWSKI: A couple of questions. First of all, are you certain the numbers are less, because I think there are a lot of, tens of thousands of career offenders who are in and so I think we need to look at those numbers.

CHAIR SARIS: We need to look at that,
yes.

MR. MARGULIS-OHNUMA: But they would have to be career offenders under the residual clause, so if it was one of the --

COMMISSIONER WROBLEWSKI: Other clauses.

MR. MARGULIS-OHNUMA: -- other clauses, not an issue.

COMMISSIONER WROBLEWSKI: I don't think we --

MR. MARGULIS-OHNUMA: I don't know. I'm not sure.

COMMISSIONER WROBLEWSKI: I don't think we know that number.

VICE CHAIR BREYER: How do you know that?

MR. MARGULIS-OHNUMA: Well, we know how many career offenders there were last year.

VICE CHAIR BREYER: Yes.

MR. MARGULIS-OHNUMA: So we know it's something less than, you know, 2,300 last year.
CHAIR SARIS: Convictions and sentencing.

MR. MARGULIS-OHNUMA: That's right.

CHAIR SARIS: Not people in prison.

MR. MARGULIS-OHNUMA: But the equivalent numbers I'm sure must be much higher for drugs last year. I don't know, but it's in the tens of thousands.

COMMISSIONER WROBLEWSKI: That's probably true. If I could just, one question for Ms. Roth but before I mention that Commissioner Barkow mentioned about the double counting.

What you call double counting is, I think, what I would call counting criminal history or letting criminal history drive the offense rather than making incremental changes we do normally under the sentencing table.

And I think if we took your position and eliminated that, we not only would go contrary to Congress but we would go contrary to
virtually every single state that has an habitual
offender statute.

But my question for you has to do with
Edwin, the statutory rape case. You mentioned
the case United States versus Jonathan Madrid
which was decided by the Tenth Circuit earlier
this week.

Mr. Madrid was convicted of a statute
in Texas. It was aggravated sexual assault and
it was aggravated sexual assault because his
victim was under the age of 14. His victim was
9 years old. He committed a forcible rape
against a 9-year-old.

The policy that we think is
appropriate is to count the case of Mr. Madrid
but not count the case of Edwin and we're trying
to find a sensible way to do it. And if you look
at our proposal in terms of the definition,
you'll see how we try to do it.

The problem is that there are many,
many states that say that there is no requirement
that the government prove force when the victim is under a certain age. In Texas it's under the age, I believe, of 14.

And so under the categorical approach, whether there is a rape of a 9-year-old, a 6-year-old, a 3-year-old, forcible, whatever, if we have the categorical approach, that case will always be considered a non-violent crime.

What we're trying to do is find a policy that counts Mr. Madrid but doesn't count Edwin. Do you think that's a sensible policy and I don't know if you've had a chance to look and see the approach that we've taken that Mr. Zauzmer talked about. Is that a way to achieve that sensible policy?

MS. ROTH: Well, first the Tenth Circuit called the conviction statutory rape in its opinion and the Texas statute is the only way that someone can be convicted. So it was a statutory rape. And so I don't know that there
would be a whole lot of difference between Mr. Madrid and Edwin.

COMMISSIONER WROBLEWSKI: And do you think it's sensible not to make that distinction between the two? I understand legally both are considered non-violent crimes because neither charge requires force to be proven by the government to get a conviction.

MS. ROTH: I don't know any good replacement for the categorical approach and we already, in federal court, spend so much time discussing someone's prior convictions that if we were to proceed with something like was suggested earlier, the back-up position I believe it's called, we would be having trials for prior convictions, in Jessie's case 17-year-old convictions, in federal court and I think that's unworkable and unfair.

And something that the government should know from its assistants is that when a plea agreement is reached in federal or state
court, it's negotiated by parties who are supposed to know the case better than anyone else.

And doing something else other than the categorical approach in attempts to invade and discern what was decided at the time, facts we don't know about at all -- When I was looking at Justice Alito's dissent in Johnson and he was giving an example about a gang member hiding a gun inside his coat and walking in the direction of a rival gang member and clearly that's violent, I just involuntarily started writing notes in the margin.

Really? What if he actually had that gun there because somebody else was after him and he had gotten word of that and it was for self-defense? He didn't intend to look for anybody at all.

What if the prosecutor in that case had a government informant witness to that mitigating fact and didn't want to say it because
he didn't want to reveal his informant?

So the defense attorney and the prosecutor agree on a resolution of that case that's a charge that's under what was originally brought. These are facts we could never discern and they're critical ones. I don't see something better than the categorical approach that would lead to justice.

COMMISSIONER WROBLEWSKI: And so the implication of that position is that in California, which defines burglary broadly, it doesn't define it with relation to a home, it doesn't even define it with relation to an unlawful entry, no matter what, that's always categorically going to be a non-violent crime. That's your position.

And in Texas, if you rape a child under the age of 14, it will always be a non-violent crime.

And in New York where you can commit a crime, a murder through something called
depraved indifference, which I think you would say is roughly the equivalent of recklessness because that's one of the ways you can commit it, then all murders would be categorically non-violent crimes. That's the policy that I hear you advocating. Am I right about that?

MS. ROTH: Saying something does not fit within the net of narrowly drawn, most heinous crimes that deserve severe enhancements does not make an activity right. It is not as though we are saying that because murder doesn't fit within this definition, murder is right.

We're talking here about the importance of narrowly drawing the definition so that only the most violent crimes are actually included.

VICE CHAIR BREYER: But, of course, that's -- The examples that Mr. Wroblewski gives are by any stretch very violent crimes so what he's saying is that -- and he knows you're not an advocate for violent crime or these crimes,
but I think his question is a fair one.

So what do you do about that type of case, because isn't it under your argument that that kind of case will not be counted? Isn't that correct?

And so the government comes back and says, okay, but we want the opportunity of at least demonstrating to the judge that the 9-year-old was raped or that the gun was used or this or that and so forth. We want that opportunity to demonstrate to the judge that it is, that the prior case was a violent case and nobody would disagree it wasn't. What about that? Is that so complicated?

MS. ROTH: I think it's very complicated to add a back-up approach. Right now, in a circumstance like that, the government can request an upward variance and ask the court to consider certain factors if there is reliable evidence.

COMMISSIONER BARKOW: Do you see that
often, any of you, in your practice? I mean, do you have examples where the government, because the government said it's pretty rare for that to occur and I'm just trying to get a sense of if we know how often when it is these cases, if it's California and it's burglary or it's Texas and it's the rape of a child, how often you see the judge go up. Do you have kind of a sense from your own practice experience?

MS. ROTH: Not often.

MS. CAMPBELL: It's not a question of going up. It's a question of whether or not they go down because the career offender guideline is so high.

COMMISSIONER BARKOW: But someone not in the career offender guideline because the categorical approach needs that -- The government is saying there are some people who aren't in the net who should be but they're not because we use a categorical approach.

And I'm just curious if you had people
like that where the conviction is not eligible under career offender guideline but the judge says, you know what, I didn't meet this definition but separate and apart from that I'm going to vary upward because they should be and the only reason I can't do it is because of the categorical approach but there's all this other reliable evidence under the usual preponderance of the evidence standard that we have in the manual.

MS. ROTH: Your statistics show us that that's not the case, that upward departures -- Let's just take the illegal reentry and the career offender guidelines. Tiny, tiny, tiny numbers in the upward departure range.

COMMISSIONER BARKOW: Why is that do you suppose? I mean, is it because the cases are --

MS. CAMPBELL: Because it's over-inclusive.

MS. ROTH: Your definition captures
everything already.

Commissioner Barkow: I mean, so maybe with the residual clause it wasn't necessary and so we don't know yet if they otherwise fall within it. Is it like we just won't know until, like now going forward we might have those examples.

Ms. Campbell: I can give you an example why this isn't going to work. If they're going to start trying to prove something that didn't count counts, we're going to start subpoenaing victims again to come in and testify again. You're not going to have finality of these violent crimes. I mean, you want that 14-year-old to come when she's 28 and testify again?

That, to me, is not something you want to do.

Chair Saris: Can I ask, how often is it that the modified Shepard approach doesn't answer the question?

In other words, you go to the plea colloquy and maybe a trial transcript or a motion
to suppress or a presentence report, you know, the kind of things that you can look at under the Deschamps case. Is that answering most of the questions --

MS. CAMPBELL: Yes.

CHAIR SARIS: -- as to which clause it's under?

MS. CAMPBELL: And you can't rely on these other, we going to have an eyewitness from eight years ago?

MR. MARGULIS-OHNUMA: You can use proffer statements of the defendant.

COMMISSIONER WROBLEWSKI: It would be the government's burden and if the government couldn't meet the burden, either because they didn't want to call the child or because nobody -- That would be the end of it. It wouldn't count, okay? The judge couldn't apply it, period, end of story. And so all the usual things, just like when you have a 14-year-old at the trial level. There has to be a decision
whether --

MS. CAMPBELL: Part of me already is thinking, well, you know what I'm going to do as a defense attorney is I'm going to use your approach and I'm going to challenge convictions where he admitted the conduct but he really wasn't guilty. I'm going to call the victims, you know, the domestics or, you know --

MS. ROTH: Well, we did that recently.

(Simultaneous speaking.)

CHAIR SARIS: I think just to get a sense of it. Are there other questions? Thank you very much. Very complicated area and it's useful to hear from people who are in the field. Thank you.

Welcome, and I know we went a little bit over so we took too long a break I think. My fault.

So at this point we are going to hear from the views from the field, from the probation
department.

The first witness is Richard Bohlken, the chair of the Commission's Probation Officers Advisory Group. He has been a member of POAG, as we call it, since 2010. Mr. Bohlken is the assistant deputy chief probation officer in the District of New Mexico, and welcome back.

And the other witness on the panel is Michael Andrews who is the chair of the Commission's Victims Advisory Group. He's also the managing attorney for the D.C. Crime Victims Resource Center and assistant professor of the University of Maryland University College in the Public Safety Department.

Welcome to both of you. Thank you.

MR. BOHLKEN: First, I wanted to thank Judge Saris and all the Commissioners for the opportunity to be here today and to comment on this proposed amendment.

When POAG first learned about this proposed amendment, we reached out to
representatives across the country and tried to solicit information and input from all 94 districts.

And the overwhelming response that we received from across the country was positive and this was a move in a positive direction overwhelmingly.

Over the past several years, as you all know, POAG has written and commented on several occasions about trying to come up with one crime of violence definition in the guidelines and we feel that that's the move that this amendment makes.

We'd also encourage single definitions for other terms used in multiple guidelines as helpful also. This would reduce confusion and it maintains uniformity.

We like the fact that this amendment addresses the issues that have been raised with the residual clause in the Johnson case, and by eliminating the residual clause, we think that's
a positive also.

We received positive feedback on the enumerated offense definitions in the application notes. We believe that the contemporary generic definitions will be helpful.

And the probation office, when using the categorical approach and the modified categorical approach, we already go to the Model Penal Code and things like that, so we saw these definitions as just putting them in the application notes and it would be useful to us.

We did receive a lot of feedback that the list didn't include some offenses that many across the country would like to see, such as aggravated fleeing from law enforcement officers, shooting at or from a motor vehicle, battery on a peace officer.

But we also acknowledge there will never be a perfect list that everyone agrees upon. That's just not something that can happen.

And I said during one of the breaks
I've been to many round table discussions on this topic and I've been in rooms with a lot of smart people and if there was an easy answer to all of this the Commission would have already come up with it so I know how complicated it is.

So the list, we like the list. Maybe it could be a little better with a few additions but we know it'll never be perfect.

POAG struggled with reaching a consensus on two items within the amendment. The first was deciding between burglary of a dwelling and just burglary. We've had numerous meetings and discussions on this topic.

Some like the narrowness and the similarity of the burglary of a dwelling which is what we use now with most crime of violence definitions within the guidelines, while others like the broadness and uniformity of burglary with the approach that we take to the ACCA. So we couldn't come up with one consensus on that.

Secondly we split on the proposed
changes to the requirements determining whether or not an offense was classified as a felony under state law.

Many believe that the definition should remain unchanged the way it's been right now where we look at the amount of imprisonment for the offense as whether or not it's going to be a misdemeanor or a felony under the guidelines. And this would avoid, those felt, would avoid unwarranted sentencing disparity amongst the different jurisdictions across the country.

And then on the other hand, others believe that the proposed change requiring the offense to be classified as a felony under state law would ease or simplify the application for them in a lot of cases.

One of the things that we did unanimously agree on was that should the change in requirements be implemented, we'd like the inclusion of the phrase "at the time the
defendant was initially sentenced," because across different jurisdictions offenses change from initial sentencing to the time they complete a term of supervision.

In sum, this is a good and a needed amendment. As I said before, will it fix all the issues and make it simple to apply? No, it's still going to be a complicated process determining whether predicate offenses are crimes of violence, but it's definitely a move in the right direction so thank you.

CHAIR SARIS: Thank you. Mr. Andrews.

MR. ANDREWS: Thank you, Chairman Saris and the distinguished Commission. My name is Mike Andrews and I'm the chair of the Victims Advisory Group and I appreciate the opportunity to come and speak with you on behalf of the crime victims community.

I had an opportunity to speak to our panel as well and we have just some
recommendations for the Commission to consider.

First, I think the group as a whole agrees that there needs to be a simplified and standardized approach to the definition that would provide clarity and consistency.

The group is also aware of the multiple different definitions of crime of violence and they're aware of that.

And I think the ultimate approach is to find some consistency where victims feel that the rules aren't changing depending on the type of crime that has been committed and which they're a victim of.

The VAG supports expanded definition of crime of violence. They propose three possibilities. One is the current element, so use, attempted use, threatened use of physical force against the person of another.

Of course, they also agree that that definition of itself may not catch all the different types of crime of violence and also
agrees that an enumerated offense approach would also be consistent with some of the crimes that aren't part of that definition, such as rape, murder, terrorism, some of the things that were discussed in a previous panel.

The third which we discussed just before coming here and prior to submission of the testimony is the other circumstances where are not caught between the definition of crime of violence or the enumerated offenses but those will give the judge discretion to determine those relevant facts that could also consider crime of violence because we know that there is also situations where even the enumerated offenses don't really fall in the definition of what a traditional crime of violence would be and this way this would give victims a third opportunity to have the court make that determination.

The one part that there is a unanimous approach is if the Commission is to adopt a new definition of crime of violence is to have any
type of retroactive application be perhaps taken
out or not considered for the simple fact that
relitigating any new application could induce
further revictimization of victims and would
cause further trauma.

Two definitions that the VAG did want
to comment on was the murder definition. The
VAG supports the proposed definition.

And the other one is the aggravated
assault definition and, like my colleague here,
I don't know how many different, I guess, special
classifications you can come up with.

The VAG would add to the list, besides
the ones that are already mentioned, athletic
officials, military, clergy, or public officials.
These are the folks that are often the most
vulnerable victims to interface with the public
the most and, of course, first responders would
be included --

CHAIR SARIS: Did you say athletic?

MR. ANDREWS: Athletic officials.
CHAIR SARIS: Helicopter parents or -

-Laughter.)

MR. ANDREWS: Well, one of the members of the panel indicated that there was a horrific case in Utah which a family member was a soccer referee and was --

CHAIR SARIS: And a parent hit him?

MR. ANDREWS: Yes. It killed him actually.

CHAIR SARIS: And how frequent is that?

MR. ANDREWS: Probably infrequent but they said that, you know, there's an opportunity that, you know, it's something that's not really considered. That's kind of a rare example with the death but they were saying about other assaults that have happened with either hockey
referees, soccer referees.

CHAIR SARIS: Really?

MR. ANDREWS: And then, of course, we just saw most recently in the state of Texas where there's assault on a football referee.

COMMISSIONER PRYOR: By two players.

MR. ANDREWS: By two players. I don't have the statistics. It was a --

COMMISSIONER PRYOR: They don't play football in Massachusetts.

(Simultaneous speaking.)

CHAIR SARIS: That's very interesting. So that was viewed as a common national problem.

MR. ANDREWS: Yes. They thought that when we were going through the extensive list, and it was exhaustive and I think, you know, we were just trying to pare it down and that was a consensus that they wanted me to bring up. Perhaps isn't on everybody's radar but it's something to consider.
CHAIR SARIS: Well, thank you.

MR. ANDREWS: Thank you.

COMMISSIONER BARKOW: Can I ask you a question, Mr. Andrews? So the last panel when we were discussing this the issue was if we expanded our, went beyond the categorical approach and we did kind of take into account additional things, kind of like your number three, relevant facts the court could consider, there's this issue of whether it would mean bringing victims in to testify or having people come in.

I don't know if you have a sense of whether or not going beyond the categorical approach, whether we, because it seems like what you're saying with retroactivity is don't do that because it'll mean that the victims have to come in, relitigate uncertainty.

And I'm wondering if you have the same concerns if we were to expand and go beyond the categorical approach to include these other
conduct-based things.

MR. ANDREWS: Yes, thank you. Obviously I do have that concern but, you know, with that my clients definitely know that part of the criminal justice process is, you know, the right of testifying and the right for the accused.

So not a lot of my clients like to do that but they know that's part of the deal, but I would probably err on, you know, to shy away from any type of relitigating those issues.

VICE CHAIR BREYER: So, I mean, that's the trade-off that I see, is that on the one hand you have finality. You have whatever the sentence was at the time and there could be some closure by some victims as to the offense.

And then what we're suggesting now is that that closure, it's not really closure because we'll look at it all over again. If we go beyond the categorical approach, we'll look at it all over again.
So I wonder, and maybe there's no general rule. Maybe some victims would say, well, I want to make sure that the sentence is, quote, "just," is appropriate to the circumstances.

And some people will say, well, I have closure on this and I have to move on with my life.

Is it that there are these two sort of slightly irreconcilable views of victims and we can't address both of them?

MR. ANDREWS: Yes. Oh, thank you. And that's exactly right. That's always an inherent conflict that I have with my clients especially when, you know, how much the government is asking them to participate in the criminal justice program.

And, you know, for most victims it's, you know, it's a unique situation. It's an environment they are very, you know, it's very strange to them.
And to ask them to rehash the incident that happened to them the first time, let alone, but then come back for a second or perhaps third time is very debilitating and that's where you see the I don't want any part of this. I just want to move on.

But as you indicated, yes, there is a sense of justice as well because in the back of the victim's mind is if I don't participate what about the next victim or the next victim that could possibly be in that situation.

So, you know, I don't have an answer. I'd like to find some middle ground there where it would give a victim an opportunity or that option.

CHAIR SARIS: Or at least give them notice that this is what's happening and --

MR. ANDREWS: You're exactly right, Judge, is to give them that notice of the event and then really engage them and see how much they
want to participate and want to be, you know, an
active victim.

CHAIR SARIS: Good point. Okay,
thank you. I have one question for you. We
heard from the government that a sentence imposed
requirement which is in the immigration area but
people have been proposing in terms of limiting
the predicate so the sentence imposed being at
least 13 months, various proposals, would be very
hard to prove.

And from a probation point of view,
you implemented on the immigration side. How
hard is it to figure out actually what they, what
time they spent?

MR. BOHLKEN: It's very difficult. I
concur. It's still very challenging for us to
obtain all the documents that we need to obtain
from different jurisdictions.

And if we had to come up with a
definitive amount of time someone actually
served, we would also have to try to get records
from detention centers, prisons, different things like that.

And then that brings into play sentence imposed and how much time someone actually does. Some jurisdictions give 50 percent off for good time. Sometimes they do 80 percent on violent crimes in different jurisdictions. So I think that would open it up to a lot more unwarranted disparity.

VICE CHAIR BREYER: Well, it comes up all the time in the immigration area, right, because it's right embedded in there so how big a deal is it in --

MR. BOHLKEN: Well, in the plus 16 and the plus 12, it is sentence imposed and you just have to figure out if the sentence was imposed. You don't have to figure out exactly how much time they actually did.

CHAIR SARIS: So it would be I impose five years in jail and you don't have to figure out what the good time was, what the offsets were
for detention centers or a state so that's why it's simple, is you word it that way.

MR. BOHLKEN: And the only difficulty see there would be what we have right now which is trying to track down all the necessary documents.

VICE CHAIR BREYER: Well, looking at the documents, I mean, one of my great concerns is that you can't get, and maybe for good reasons, but you can't get police reports on prior incidences. It's a very uneven thing. Sometimes they're there and I'd say most of the time they're not. Has that been a problem? Am I the only one having this problem or is it just nationwide?

MR. BOHLKEN: It is nationwide. Some jurisdictions are better than others. Some jurisdictions are better at record keeping than others.

Across the 94 districts in the United States probation office, different districts do,
some do better collateral investigations for other districts while some maybe don't do as good of collateral investigation. So it's always an issue of tracking down the core documents and the police reports.

As you know, we don't rely through the categorical approach and modified categorical approach on the police reports at all, but it is good information to have because one of our functions is to try to give the sentencing judge all the information that we have about a predicate offense and in a lot of cases there are no police reports available.

CHAIR SARIS: Thank you. Does anyone have any other questions?

COMMISSIONER BARKOW: Yes, can I just ask, has probation tried to urge Congress to do something about making it more easy for you to obtain records of conviction?

So since we heard from the earlier panels and you're saying again, like, it just
seems like we have this weird patchwork in the United States and Congress should have an interest in making sure that stops and that we are able to get from every state the convictions that are the backbone of this kind of a regime.

And I'm just kind of curious if, has probation ever made that point or, I'm just trying to, I want to alert Congress to the fact that this seems like a real problem, like that we should be able to get these records from people and I just wasn't sure if you knew of any effort to try to --

MR. BOHLKEN: I don't, but that would be something worthwhile to do because, like I said, it is different across -- Some jurisdictions, courts charge the United States probation office to make copies of actual records so it varies across the board.

COMMISSIONER BARKOW: Thank you.

CHAIR SARIS: Any other questions? I want to thank you very much for coming in --
MR. ANDREWS: Thank you.

MR. BOHLKEN: Thank you.

CHAIR SARIS: -- sharing your thoughts. We care. Probation has been --- you always come in and it's terrific. That round table we had, was it last year where everyone --

That was great. And the VAG, I mean, you always give us good feedback so thank you very much.

MR. ANDREWS: Thank you very much.

MR. BOHLKEN: Thank you, Your Honor.

(Whereupon, the above-entitled matter went off the record at 12:08 p.m.)