Deconstructing the Career Offender Guideline

Amy Baron-Evans
Jennifer Coffin, Sara Noonan

April 1, 2011

This paper is updated occasionally and is posted at
http://www.fd.org/odstb_SentDECON.htm.

Sentences recommended by the career offender guideline are among the most severe and least likely to promote sentencing purposes in the United States Sentencing Guidelines Manual. *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 133-34 (2004).[1] One problem is that the guideline range is keyed to the statutory maximum, the result of a congressional directive to the United States Sentencing Commission. Another problem, created by the Commission itself, is that the class of career offenders is defined much more broadly than the statute requires. Neither the severity of the guideline nor its breadth is the product of careful study, empirical research, or national experience.

On January 12, 2005, in *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court rendered the guidelines advisory. Judges are now invited to consider arguments that a guideline itself fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 551 U.S. 338, 351, 357 (2007). Judges "may vary [from guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines," *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (internal quotation marks omitted), particularly when the Commission did not act in "the exercise of its characteristic institutional role," *i.e.*, did not base a guideline on "empirical data and national experience." *Id*. at 109. The courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 551 U.S. at 347. Judges have embraced this invitation with respect to a number of guidelines, including the career offender guideline, with approval from the courts of appeals.[2]

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[1] This report, cited hereinafter as "Fifteen Year Review," is available at http://www.ussc.gov/15_year/15year.htm.

[2] *See United States v. Corner*, __ F.3d __, 2010 WL 935754 (7th Cir. Mar. 17, 2010); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. McLean*, 331 Fed. Appx. 151 (3d Cir. June 22, 2009); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *cf. United States v. Friedman*, 554 F.3d 1301, 1311-1312 & n.13 (10th Cir. 2009) (recognizing court's authority to disagree with career offender guideline but concluding that district court's sentence was not based on that disagreement). These courts have recognized that the courts may disagree with the career offender guideline, although it is based in part on a congressional directive, because that directive is to the Commission, not to the courts. *Ibid*. However, a panel of the Eleventh Circuit held that courts may not disagree with the career offender guideline because it is based on a directive to the Commission. *See United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009). Vazquez filed a

Writing for the Court in *Rita*, Justice Breyer said that it may be "fair to assume" that the guidelines "reflect a rough approximation" of sentences that "might achieve § 3553(a)'s objectives," because the original Commission based the guidelines on an empirical study of average time served before the guidelines, and because the guidelines *can* evolve in response to sentencing data, feedback from judges, practitioners and experts, and penological research. *Rita*, 551 U.S. at 348-50. The career offender guideline was not developed in that manner. It was initially based on a congressional directive requiring the Commission to set guideline ranges at or near the statutory maximum for certain specifically described repeat violent and repeat drug offenders. The Commission then significantly deviated from the directive, applying the severe punishments directed by Congress to offenders not described by Congress, without stated reasons or careful study, and contrary to feedback from the courts and its own empirical research.

Sentences recommended by the career offender guideline are many orders of magnitude higher than time served before the guidelines, than recommended by the ordinary guideline, or than sound policy would suggest, and in many instances than the congressional directive requires. The typical defendant subject to the career offender guideline today is a low-level drug offender, or occasionally a bank robber, with two prior state convictions for minor drug offenses or "crimes of violence," broadly defined to include offenses that are not violent, for which they received little or no jail time. The following chart shows the career offender sentence for such offenders compared to average time served before the guidelines and the applicable range if they were not classified as "career offenders."

Offense	**Average Time Served Pre-Guidelines**[3]	**Ordinary Guideline Sentence**	**Career Offender Guideline Sentence**
Drug Trafficking – 50 g. heroin	37-46 months	37-46 months	210-262 months
Drug Trafficking – 5 g. crack	27-33 months	57-71 months	262-327 months, or 360 months to life[4]

petition for certiorari, and the Solicitor General confessed error. The Supreme Court granted certiorari, vacated the judgment, and remanded to the Eleventh Circuit for consideration in light of the Solicitor General's position. *Vazquez v. United States*, 130 S. Ct. 1135 (Jan. 19, 2010). As of this writing, the Eleventh Circuit has not issued a new opinion after remand.

[3] *See* U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987) (hereinafter "Supplementary Report"), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf. For an explanation of how to use the Supplementary Report to determine the average past practice sentence, *see* Amy Baron-Evans, *Sentencing by the Statute*, Part V.B, http://www.fd.org/pdf_lib/Sentencing_By_the_Statute.pdf.

[4] The prosecutor has the power to increase the guideline range for this defendant to 360 months to life by filing a notice under 21 U.S.C. § 851.

Bank Robbery - $2,000	37-46 months	46-57 months	210-262 months

To obtain a lower sentence and to ensure that it is upheld on appeal, defense counsel must present evidence that the guideline is not based on empirical evidence or national experience, and that it recommends sentences that are greater than necessary to satisfy the purposes of sentencing. Judges must address only *nonfrivolous* arguments for a sentence below the guideline range, *Rita*, 551 U.S. at 357, and need not consider matters not raised. *Gall v. United States*, 552 U.S. 38, 54 (2007). According to *dicta* in *Kimbrough*, a disagreement with a guideline based on the judge's mere "view" might be subject to "closer review." *Kimbrough*, 552 U.S. at 109. But disagreement with a guideline that does "not exemplify the Commission's exercise of its characteristic institutional role" is entitled to as much appellate "respect" as any other variance or departure. *Spears v. United States*, 129 S. Ct. 840, 842-43 (2009). Counsel should also provide an objective basis for the sentence requested. For example, in a case involving the 100:1 crack to powder quantity ratio, the judge may adopt a different ratio that better complies with the purposes of sentencing. *Id*. at 843-44. Likewise, in a career offender case, the judge may, for example, use the guideline range that would apply absent the career offender guideline, or perhaps the average time served pre-guidelines.

Part I of this article provides an overview of the statutory directive from which the career offender guideline originated, the careful guideline development process set forth in other portions of the Sentencing Reform Act of 1984 and the Supreme Court's recent cases, and a summary of how the career offender guideline diverged from both. Part II details the guideline as first promulgated and the amendments over time. This history reveals that the Commission did not act in its characteristic institutional role, first because the severity of the guideline was set by Congress with the mistaken idea that it would apply to very serious repeat offenders, and second because the Commission broadened the reach of the guideline beyond the statute to minor repeat offenders, while failing to heed the sentencing data and complaints from judges and others in the field, failing to conduct empirical research, and failing to provide reasons for its actions. Part III describes a variety of empirical evidence that affirmatively demonstrates that the guideline produces punishment that is greater than necessary to satisfy any purpose of sentencing, and creates unwarranted disparities, including racial disparity, and unwarranted uniformity. Part IV describes textual challenges to the career offender guideline and its commentary.

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I. OVERVIEW

A. The Statutory Directive

The career offender guideline originated with a statutory directive, 28 U.S.C. § 994(h), enacted as part of the Sentencing Reform Act of 1984 (SRA). Section 994(h) directed the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and-(1) has been convicted of a felony that is-(A) a crime of violence; or (B) an offense described in" 21 U.S.C. § 841, 21 U.S.C. §§ 952(a), 955, 959, and 46 U.S.C. § 70503; "and (2) has previously been convicted of two or more prior felonies, each of which is-(A) a crime of violence; or (B) an offense described in" 21 U.S.C. § 841, 21 U.S.C. §§ 952(a), 955, 959, and 46 U.S.C. § 70503.

Congress expressly chose to make § 994(h) a directive to the Commission, rather than a sentencing mandate to the courts. As explained in the Senate Judiciary Committee Report, § 994(h) "replace[d] a provision . . . that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders" because Congress believed that a directive to the Commission would be "more effective," in that the "the guidelines development process" would "assure consistent and rational implementation of the [congressional] view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 98-225 at 175 (1983).

B. The Guidelines Development Process

1. The Sentencing Reform Act

The SRA directed the Commission to promulgate guidelines and policy statements to further the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), to provide "certainty and fairness," to reduce "unwarranted sentencing disparities," to "maintain[] sufficient flexibility to permit individualized sentences," and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1). The Commission was directed to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing," 28 U.S.C. § 991(b)(2), and was given extensive research powers in order to do so. 28 U.S.C. § 995 (a)(12)-(16). The Commission was to review and revise the guidelines based on its own research, feedback from judges, and consultation with other participants in and experts on the criminal justice system. 28 U.S.C. § 994(o).

The Commission was to engage in a "guidelines development process" with three basic components. *First*, it was to examine average sentences imposed (including probation) and prison time actually served in the pre-guidelines period (when there was

parole) as a starting point, but to ensure, independent of those average sentences, that the guidelines met the purposes of sentencing set forth in § 3553(a)(2). 28 U.S.C. § 994(m). Congress expected that guideline sentences "will not, on the average, be materially different from the actual times now spent in prison by similar offenders who have committed similar offenses," but that "there will be some logical changes from historical patterns, as in the case of serious violent crimes or white collar offenses for which plainly inadequate sentences have been imposed in the past, and in the case of minor offenses for which generally inappropriate terms of imprisonment have been imposed in the past, but for the most part the average time served should be similar to that served today in like cases." S. Rep. No. 98-225 at 116 (1983).

Second, the Commission was to periodically review and revise the guidelines in consideration of comments and data coming to its attention, and by consulting with authorities on and representatives of the criminal justice system, including the Judiciary, Probation Officers, Federal Defenders and the Department of Justice. 28 U.S.C. § 994(o). In doing so, it was to publish for comment and hold public hearings on amendments to the guidelines, 28 U.S.C. § 994(x), and to send guidelines and amendments thereto to Congress accompanied by a statement of reasons. 28 U.S.C. § 994(p).

Third, the Commission was to engage in extensive empirical research by systematically collecting and studying empirical evidence of sentences imposed under the guidelines, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. 28 U.S.C. § 995(a)(12)-(16). Congress considered this to be "essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." S. Rep. No. 98-225 at 182 (1983).

2. The Supreme Court's Decisions

The "guidelines development process" set forth in the SRA is similar to the Commission's "exercise of its characteristic institutional role" referenced in the Supreme Court's recent decisions. *Kimbrough*, 552 U.S. at 109; *see also Rita*, 551 U.S. at 348-50. The Commission's characteristic institutional role has two main components: (1) reliance on empirical evidence of pre-guidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and consultation with participants and experts in the field. *Rita*, 551 U.S. at 348-50. The importance of whether empirical evidence of past practice was used to develop a particular guideline was repeated in both *Gall* and *Kimbrough*. *See Gall*, 552 U.S. at 46 & n.2; *Kimbrough*, 552 U.S. at 96. This is important because the Commission has said that it used average past practice sentences as a substitute for sentencing purposes. Congress directed the Commission to use average time served before the guidelines as a starting point, but to independently ensure that the

guidelines met the purposes of sentencing. 28 U.S.C. § 994(m), § 991(b)(1)(A). A "philosophical problem" arose when the Commissioners could not agree on which sentencing purposes should predominate, so the Commission used an "empirical approach" based on data from 10,000 pre-guidelines presentence reports. *See* USSG, Ch. 1 Pt. A(1)(3); *Rita*, 551 U.S. at 349; *see also* Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988). The Commission, however, significantly diverged from past practice in important respects, including in the career offender guideline.[5]

If the Commission followed these steps -- relying on past practice, then reviewing and revising the guidelines in response to sentencing data, feedback from judges, practitioners and experts, and penological research -- it may be "fair to assume" that the guideline "reflect[s] a rough approximation" of sentences that "might achieve 3553(a) objectives," if the case is "typical." *Rita*, 551 U.S. at 350. However, when a guideline is not the product of "empirical data and national experience," it is not an abuse of discretion to conclude that it fails to achieve the § 3553(a)'s purposes, "even in a mine-run case." *Kimbrough*, 552 U.S. at 109-10.

C. Development of the Career Offender Guideline

The career offender guideline contains a table with seven offense levels corresponding to seven statutory maxima ranging from more than one year to life, and it automatically places the defendant in criminal history category VI, the highest in the Sentencing Table, regardless of whether the actual criminal history score is lower. *See* USSG § 4B1.1(b); Ch. 5, Pt. A. For nearly all defendants sentenced under the guideline, the statutory maximum is 20 years or more.[6] Thus, for most defendants, the guideline range is 210-262 months, 262-327 months, or 360 months to life.

The Commission did not use average time served in the pre-guidelines era as the starting point for the career offender guideline because it was directed by 28 U.S.C. § 994(h) to set guideline ranges at or near the maximum term authorized for those offenders with an instant offense and prior convictions described in the statute. Thus, according to the Commission, "much larger increases are provided for certain repeat offenders" under § 4B1.1 than under pre-guideline practice, "consistent with legislative

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[5] "[E]ither on its own initiative or in response to congressional actions, the Commission established guideline ranges that were significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including those subject to the career offender guideline, as well as white collar offenses, drug trafficking, immigration offenses, robbery of an individual, murder, aggravated assault and rape. *See* Fifteen Year Review *supra* note 1, at 47; Supplementary Report, *supra* note 3, at 44.

[6] Seventy-five percent of career offenders are convicted of drug trafficking, 11% are convicted of firearms offenses, and 7% are convicted of robbery. *See* USSC, 2009 Sourcebook of Federal Sentencing Statistics, Table 22. The statutory maxima for these offenses is 20 years or more.

direction."[7] According to the Supreme Court, the Commission's "empirical approach" of basing guidelines on actual time served before the guidelines is an important reason that it may be "fair to assume" that a guideline "reflect[s] a rough approximation" of sentences that "might achieve § 3553(a)'s objectives."[8] Just as the Commission did not use an empirical approach in developing the drug guidelines, instead keying offense levels to statutory minimum sentences,[9] the Commission did not use an empirical approach in developing the career offender guideline, instead keying offense levels to statutory maximum sentences. Thus, the guideline cannot be assumed to be a "rough approximation" of § 3553(a)'s objectives.

Nor did the Commission follow the plain terms of the statutory directive. As described in Part II, it expanded the class of "career offenders" subject to the guideline beyond that required by 28 U.S.C. § 994(h). It included numerous drug offenses not listed in the statute, and adopted a broader definition of "crime of violence" than Congress intended. And, although it appears that Congress intended the word "felony" to mean an offense classified as a "felony" by the convicting jurisdiction, the Commission defined "felony" to include state misdemeanors if subject to a statutory maximum of more than one year under state law. No empirical data was cited and no reason was given for these deviations from the statutory terms. Most of the expansions were adopted within the first few years after the guidelines went into effect in 1987. Yet, for the first eight years, the Commission stated as the sole authority for the guideline that "28 U.S.C. § 994(h) mandates that the Commission assure certain 'career' offenders, *as defined in the statute*, receive a sentence of imprisonment 'at or near the maximum term authorized.' *Section 4B1.1 implements this mandate*." *See* USSG 4B1.1, comment. (backg'd) (1987) (emphasis supplied).

In the early 1990s, some courts of appeals began to invalidate career offender sentences because the Commission had exceeded the plain statutory language of 28 U.S.C. § 994(h),[10] while other courts of appeals held that the Commission had acted

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[7] *See* U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 44 (1987) (hereinafter "Supplementary Report"), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

[8] *Rita*, 551 U.S. at 350.

[9] *See Gall*, 552 U.S. at 46 & n.2 ("Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes."); *Kimbrough*, 552 U.S. at 96 ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

[10] *See United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994); *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), reversed, 65 F.3d 691 (8th Cir. 1995) (en banc).

pursuant to its broader guideline amendment authority.[11] The Commission then issued an amendment acknowledging that it "ha[d] modified the statutory definitions in various respects," but stating that it had acted pursuant to "its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)," and claiming that in doing so, it had "focus[ed] more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and . . . avoid[ed] 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.' 28 U.S.C. § 994(b)(1)(B)."[12]

As detailed in Part II, however, none of the expansions of the class of "career offenders," before or after the Commission's *post hoc* justification, were explained with empirical evidence or any reason, and the Commission ignored explicit requests for reform from the courts and the sentencing data. As detailed in Part III, the Commission's own empirical research shows that the guideline, particularly as applied to drug offenders, who comprise the vast majority of career offenders, is more severe than necessary to achieve the purposes of sentencing and creates unwarranted disparity, including racial disparity, as well as unwarranted uniformity. The guideline does not in fact "focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate," or "avoid 'unwarranted sentencing disparities.'"

The Supreme Court soon rejected the Commission's position that its general guideline amendment authority permitted it to diverge from the plain terms of § 994(h). Ironically and unfortunately, this resulted in the invalidation of the Commission's one attempt to ameliorate the harshness and unwarranted disparity of the guideline. The Commission had amended the guideline to state that the term "offense statutory maximum" meant "the maximum term of imprisonment authorized for the offense of conviction . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D))."[13] In drug trafficking cases, the government has sole power to file an information under 21 U.S.C. § 851 for prior drug convictions (or not file if the defendant agrees to waive his right to trial and various other rights). The filing of this information doubles the mandatory minimum or requires mandatory life, and also increases the statutory maximum and thus the offense level under the career offender guideline. The Reason for Amendment was that it "avoids

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[11] *See United States v. Parson*, 955 F.2d 858, 867 (3d Cir. 1992); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir. 1994); *United States v. Allen*, 24 F.3d 1180, 1187 (10th Cir. 1994); *United States v. Hightower*, 25 F.3d 182, 185 (3d Cir. 1994); *United States v. Damerville*, 27 F.3d 254, 257 n.4 (7th Cir. 1994); *United States v. Piper*, 35 F.3d 611, 618 (1st Cir. 1994); *United States v. Kennedy*, 32 F.3d 876, 889 (4th Cir. 1994).

[12] *See* 58 Fed. Reg. 67522, 67532 (Dec. 21, 1993); USSG, App. C, Amend. 528 (Nov. 1, 1995); USSG § 4B1.1, comment. (backg'd.) (2009).

[13] USSG, App. C, Amend. 506 (Nov. 1, 1994).

unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions."[14]

In *United States v. LaBonte*, 520 U.S. 751 (1997), the Supreme Court held 6-3 that Amendment 506 was invalid because it was "at odds with § 994(h)'s plain language." *Id*. at 757. The Court made no mention of the legislative history stating that the Commission should use the "guidelines development process" to implement consistent and rational sentences. It rejected the notion that the Commission is free to disregard a specific congressional directive by relying on its general guideline amendment authority. *Id*. at 753. However broad that authority might be, it "must bow to the specific directives of Congress." *Id*. at 757. The Commission immediately amended the commentary to explicitly include any increase in the statutory maximum based on the defendant's prior criminal record. *See* USSG, App. C, Amend. 567 (Nov. 1, 1997); USSG § 4B1.1, comment. (n.2) (2009).

Nothing in *LaBonte* suggests that the Commission is bound by the plain language of 28 U.S.C. § 994 only insofar as it may not narrow its definitions but is free to disregard the language to expand its definitions. However, while a few courts have applied *LaBonte* to prohibit expansions of unambiguous statutory language in other guidelines,[15] challenges to expansions of the career offender guideline beyond the plain language of § 994(h) never regained any traction. Fortunately, after *Booker* and its progeny, courts are free to reject the career offender guideline, whether it complies with statute or not, because it fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, or does not treat defendant characteristics in the proper way.

II. EXPANSION OF THE CAREER OFFENDER GUIDELINE CONTRARY TO THE PLAIN LANGUAGE OF § 994(h) AND THE GUIDELINE DEVELOPMENT PROCESS REQUIRED BY THE SRA

This section recounts the relevant history of the amendments to the career offender guidelines, USSG §§ 4B1.1, 4B1.2. A chronological history of the material amendments is set forth in Appendix A (Chronology of Amendments to Career Offender

[14] *Id*.

[15] *See, e.g., United States v. Butler*, 207 F.3d 839, 850 (6th Cir. 2000) (applying *LaBonte* to conclude that "[w]e cannot conceive of a clearer example than that presented here where the Commission has so flatly ignored a clear Congressional directive."); *United States v. Handy*, 570 F. Supp. 2d 437, 474 (E.D.N.Y. 2008) ("*LaBonte* supports the conclusion that the Sentencing Commission is owed no deference when it interprets unambiguous federal statutes.").

Guidelines, Commentary and Policy Statements).[16] The original and current guidelines are set forth in Appendices B and C.[17]

The career offender guideline exceeds the express terms of § 994(h) by including as prior convictions drug offenses not listed in the statute, a definition of "crime of violence" broader than the definition intended by Congress, and offenses that are not "felonies" as defined by Congress. The only reason the Commission has given for these expansions is the blanket *post hoc* justification inserted in the commentary in 1995 in response to court decisions holding that it had exceeded its statutory authority. *See* USSG § 4B1.1, comment. (backg'd.); USSG, App. C, Amend. 528 (Nov. 1, 1995).

Reasons are important. First, they tell judges, lawyers, defendants and the public whether the Commission has followed sound practices to reach sound sentencing recommendations. Second, the Commission is required to provide reasons for guideline amendments to Congress, 28 U.S.C. § 994(p), and is required to systematically disseminate to the public information regarding sentences imposed under the guidelines and their effectiveness in meeting the purposes of sentencing.[18] Third, under the advisory guideline system, a sentence within the guideline range does not necessarily require lengthy explanation, but *only* if it is "clear that the judge rests his decision upon the *Commission's own reasoning* that the Guidelines sentence is a proper sentence (in terms of § 3353(a) and other congressional mandates) in the typical case."[19] A more lengthy explanation is required if the court rejects or accepts a party's argument "contest[ing] the Guidelines sentence generally under § 3553(a)" as "an unsound judgment" or because the guidelines "do not generally treat certain defendant characteristics in the proper way."[20] If the Commission gives no reason or an inadequate reason, the judge has no reason to follow the guideline. Fourth, if the Commission tried to explain its guidelines, it would have to find that some are in need of revision. For example, if the Commission were to explain the career offender guideline, it would have to confront the fact that its own empirical evaluation, not conducted until 2004, found that the guideline recommends punishment that is excessive in most cases in which it applies. *See* Section III.A, *infra*.

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[16] The full text of all amendments is available in Appendix C of the *Guidelines Manual*, in hard copy or on Westlaw.

[17] The Appendices are available at http://www.fd.org/odstb_SentDECON.htm.

[18] *See* 28 U.S.C. § 995(a)(15), (16) (requiring systematic collection and reporting of information regarding sentences imposed under the guidelines, their relationship to sentencing purposes, and their effectiveness in meeting sentencing purposes).

[19] *Rita*, 551 U.S. at 357 (emphasis supplied).

[20] *Id*.

A. Drug Trafficking Offenses

Congress directed the Commission to specify a term of imprisonment at or near the maximum for a defendant convicted of a "felony" that "*is* an offense *described in*" 21 U.S.C. §§ 841, 952(a), 955, 959, and 46 U.S.C. § 70503, and has two or more prior "felonies," each of which is one of these enumerated federal offenses or a "crime of violence." *See* 28 U.S.C. § 994(h)(1)(B), (2)(B) (emphasis supplied). An early version of the career offender guideline published for comment stated that "[t]he controlled substance offenses covered by this provision are identified in 21 U.S.C. § 841; 21 U.S.C. §§ 952(a), 955, 955a [later codified at 46 U.S.C. § 70503], 959; and in §§ 405B and 416 of the Controlled Substance Act as amended in 1986." *See* 52 FR 3920 (Feb. 6, 1987). This version was discarded without explanation. Beginning with the first official set of guidelines, the Commission added numerous state and federal drug offenses to those listed in § 994(h), all without explanation.

Congress had in mind "repeat drug traffickers."[21] Its view at the time was that drug trafficking was "extremely lucrative," that it was "carried on to an unusual degree by persons engaged in continuing patterns of criminal activity," and that "drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country."[22]

A typical repeat drug trafficker prosecuted in federal court today does not fit this description. He or she sells small quantities on a street corner, or acts as a courier for big dealers who seldom get caught.[23] The typical repeat offender is poor and often an addict, selling or carrying drugs to support a habit or simply to live or provide for family.[24] As the Commission has noted, African Americans are more likely to have prior drug convictions than similar white drug dealers because it is easy to detect offenses that take place on the street in impoverished minority neighborhoods.[25] It is not unusual for a confidential informant working with law enforcement to make repeated buys of small

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[21] S. Rep. No. 98-225 at 175 (1983).

[22] *Id*. at 20, 256.

[23]The largest proportion of powder offenders are couriers and mules and the largest proportion of crack offenders are street level dealers. USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 20-21, 85 (May 2007).

[24] The Director of the Bureau of Prisons reports that 40% of all federal inmates have a substance use disorder, and 53% of all federal inmates have been convicted of drug trafficking.. *See* Statement of Harley G. Lappin at 2, 7, Director, Federal Bureau of Prisons, Before the Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, U.S. House of Representatives, Mar. 10, 2009, http://appropriations.house.gov/Witness_testimony/CJS/harley_lappin_03_10_09.pdf.

[25] *See* Fifteen Year Review, *supra* note 1, at 134.

amounts, or to encourage a small-time dealer to cook powder cocaine into crack, for the purpose of increasing the punishment under the drug trafficking statutes, the drug guidelines, and the career offender guideline.[26] Thus, while Congress had in mind wealthy big time dealers with a record of federal drug trafficking offenses, the career offender guideline usually applies to repeat small time dealers with a record of relatively minor state offenses.

The courts have often complained about the harshness of the career offender guideline, particularly when based on minor or remote drug convictions, and have frequently imposed below-guideline sentences in such cases. *See* Part III.B. The Commission, in its only empirical evaluation of the guideline, has found that the guideline has a disproportionate impact on black defendants, and that it advances no sentencing purpose when applied on the basis of prior drug convictions. *See* Part III.A.

1. Amendment History

11/1/87 "Controlled substance offense" was defined in the initial guideline as "an offense identified in" the federal statutes enumerated in § 994(h), and also § 845b (employing persons under 18, later transferred to § 861), § 856 (maintaining drug involved premises), "and similar offenses." USSG § 4B1.2(2) (Nov. 1, 1987). The commentary explained that this included "the federal offenses identified in the statutes referenced in § 4B1.2, *or substantially equivalent state offenses*," that these offenses "include" manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute or dispense a controlled substance or counterfeit substance, and also *aiding and abetting, conspiring or attempting* to commit such offenses. *Id*., comment. (n.2). No explanation was given for expanding upon the list of federal drug trafficking offenses enumerated in § 994(h).

1/15/88 The covered offenses were broadened through the commentary by changing "the federal offenses identified in the statutes referenced in § 4B1.2, or substantially equivalent state offenses" to "any federal or state offense that is substantially similar to any of those listed in" § 4B1.2. Importing and possessing with intent to import were added to the commentary. *See* App. C, Amend. 49 (Jan. 15, 1988); USSG § 4B1.2, comment. (n.2) (Jan. 15, 1988). The reason given was "to correct a clerical error and to clarify the guideline."

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[26] *See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28, but a career offender range of 360 months to life]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14," and a career offender range of 210-262 months); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

11/1/89 The covered offenses were broadened by deleting all reference to identified federal offenses from the guideline and defining "controlled substance offense" in the guideline itself as "an offense under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." *See* App. C, Amend. 268 (Nov. 1, 1989); USSG § 4B1.2(2) (Nov. 1, 1989). This amendment also arguably narrowed the offenses by deleting 21 U.S.C. §§ 856 and 861 and omitting "dispensing." Aiding and abetting, attempt and conspiracy were retained in the commentary. *See id*. comment. (n.1). The reason given was "to clarify the definition[] of . . . controlled substance offense."

11/1/91 "Dispensing" was added back in, to make the definition "more comprehensive." *See* App. C, Amend. 433 (Nov. 1, 1991); USSG § 4B1.2(2) (Nov. 1, 1991).

11/1/95 In response to the holdings of some courts of appeals that the Commission had exceeded its authority under § 994(h) by expanding on the statutory list of drug trafficking crimes, *see United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993), *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994), *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), vacated, 65 F.3d 691 (8th Cir. 1995) (en banc), the Commission deleted the commentary citing § 994(h) as the sole statutory authority for the guideline, and inserted in lieu thereof:

> Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct ...." 28 U.S.C. § 994(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

See USSG, App. C, Amend. 528 (Nov. 1, 1995); USSG § 4B1.1, comment. (backg'd) Nov. 1, 1995. The Commission explained that it was responding to those court decisions that had invalidated the addition of offenses based on the plain language of § 994(h), and cited other decisions that instead "considered the legislative history to 994(h) and determined that the Senate Report clearly indicated that 994(h) was not the sole enabling statute for the career offender guidelines." USSG, App. C, Amend. 528 (Nov. 1, 1995). The Commission has not explained, then or since, how it carried out the instructions of any other enabling statute.

11/1/97 The Commission specified five offenses that some courts of appeals had held were not predicates. *See* USSG, App. C, Amend. 568 (Nov. 1, 1997); USSG § 4B1.2, comment. (n.1) (Nov. 1, 1997).

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance, 21 U.S.C. § 841(d)(1) [now 21 U.S.C. § 841(c)(1)], and unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance, 21 U.S.C. § 843(a)(6), were added. The Tenth Circuit had held in *United States v. Wagner*, 994 F.2d 1467, 1475 (10th Cir. 1993) that 21 U.S.C. § 841(d)(1) was not a "controlled substance offense" because it was not the manufacture or possession or attempt to manufacture a controlled substance, while the Fifth Circuit held in *United States v. Calverley*, 11 F.3d 505 (5th Cir. 1993) that it was a "controlled substance offense." The Reason for Amendment was that it was the Commission's "*view* that there is such a close connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses." *See* USSG, App. C, Amend. 568 (Nov. 1, 1997) (emphasis added).

Maintaining a place for the purpose of facilitating a drug offense, 21 U.S.C. § 856, using a communications facility in committing, causing, or facilitating a drug offense, 21 U.S.C. § 843(b), and possessing a firearm during and in relation to a crime of violence or drug offense, 18 U.S.C. § 924(c) were added with the proviso that the offense of conviction must have established that the underlying offense was a "controlled substance offense" or a "crime of violence." The Reason for Amendment was to "clarify," and cited two cases that essentially held that these offenses could not be used as career offender predicates if the offense facilitated or caused or committed was mere drug use. *See United States v. Baker*, 16 F.3d 854 (8th Cir. 1994); *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993).

2. Failure of the Guidelines Development Process

To summarize, the following offenses have been added to the drug trafficking offenses specified in § 994(h):

(1) inchoate offenses – aiding and abetting, attempt, conspiracy

(2) any state offense punishable by more than one year

(3) "[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance," 21 U.S.C. § 841(c)(1)

(4) "[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance," 21 U.S.C. § 843(a)(6)

(5) "[m]aintaining any place for the purpose of facilitating a controlled substance offense," 21 U.S.C. § 856, "if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense'"

(6) "[u]sing a communications facility in committing, causing or facilitating a drug offense," 21 U.S.C. § 843(b), "if the offense of conviction established that the underlying offense (the offense committed, caused or facilitated) was a 'controlled substance offense'"

(7) a "violation of 18 U.S.C. § 924(c) or § 929(a) . . . if the offense of conviction established that the underlying offense was a . . . 'controlled substance offense'"

USSG, § 4B1.2, comment. (n.1) (2009).

This was all done without explanation or any empirical study establishing why such severe punishment is warranted for these offenders not covered by § 994(h)'s plain terms. The only explanation given was the *post hoc* claim, inserted in the commentary in response to court decisions holding that the Commission had exceeded its authority under § 994(h), that the Commission had acted pursuant to its broader authority under 28 U.S.C. § 994(a)-(f), (b), (o) and (p). *See* USSG, App. C, Amend. 528 (Nov. 1, 1995). Those provisions, however, require actual study, research and consultation with judges, practitioners and experts, to reach a result that reflects advancement in knowledge of human behavior and achieves the purposes of sentencing. The Fifth Circuit found that the Commission did not *in fact* conduct any analysis to find that offenders outside the reach of § 994(h) warranted the same harsh punishment as those covered by its plain terms, and therefore declined to give the Commission's *post hoc* justification retrospective application. *Bellazerius*, 24 F.3d at 702. Three years later, the Supreme Court held that the Commission had no authority to exceed the plain language of § 994(h), even if it *did* act pursuant to its broader amendment authority. *See United States v. LaBonte*, 520 U.S. 751 (1997).

While the Commission says that its definitions "focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate" and "avoid unwarranted sentencing disparities," USSG § 4B1.1, comment. (backg'd.), if this were so, the predicate offenses would have to be similar in seriousness to those specified by Congress. But they are not. The consistent message from judges, when the guidelines were mandatory and now that they are not, is that the punishment under this guideline is inappropriately severe for a great many defendants subject to it. *See* Part III.B, *infra*.

The broad definition of "controlled substance offense" includes too many offenses that are too minor to warrant treatment as a "career offender." *Id*.

Some, including the Commission, say that a measure of offense seriousness is the statutory maximum.[27] If so, the career offender guideline vastly overstates the seriousness of the offenses it includes. The lowest statutory maximum for the drug trafficking offenses specified by Congress in § 994(h) was 15 years in 1984 and is now 20 years.[28] But the guideline includes any offense that is punishable by as little as a year and a day. Another indication of offense seriousness is, of course, the elements of the offense. The elements of the offenses enumerated in § 994(h) are that the defendant (a) knowingly or intentionally (b) manufactured, distributed, dispensed, imported or exported, or possessed with intent to do any of the foregoing (c) a "controlled substance." The elements of aiding and abetting, attempt, conspiracy, and violations of 21 U.S.C. §§ 841(c)(1), 843(a)(6), 843(b), and 856 do not include those elements.[29]

A likely scenario is a defendant with two prior state convictions for possession with intent to distribute with a statutory maximum of five years who is convicted in federal court as a minor participant in a drug conspiracy, which requires only an agreement and no overt act. He receives the same guideline sentence as a defendant convicted for the third time of drug trafficking under 21 U.S.C. § 841(a) or drug importation under 21 U.S.C. § 952(a), with active elements and at least a twenty-year maximum. Thus, considering only one purpose of sentencing – the seriousness of the offense -- the career offender guideline "leads to 'unwarranted uniformity,' which is really just another type of unwarranted disparity."[30]

B. Crime of Violence

Congress directed the Commission to specify a term of imprisonment at or near the maximum for a defendant who is convicted of a "felony" that "is . . . a crime of violence," and has two or more prior "felonies," each of which is a "crime of violence" or a listed federal drug felony. 28 U.S.C. § 994(h)(1)(A), (2)(A). Congress had in mind

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[27] The Commission often takes the statutory maximum as a measure of Congress' view of the seriousness of the offense. In truth, however, statutory maxima for federal offenses are haphazard and uncoordinated. Statutory maxima for similar offenses vary widely among the states.

[28] *See* Appendix D (Drug Trafficking Offense Chart).

[29] A "controlled substance" is a substance or its immediate precursor included in schedule I, II, III, IV or V. *See* 21 U.S.C. § 802(6). Possessing a "listed chemical," flask or equipment, using a communications facility, or maintaining a place where drugs are manufactured or distributed, are not manufacturing, distributing, dispensing, importing or exporting, or possessing a "controlled substance."

[30] Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83 (2003).

"repeat violent offenders,"[31] "a relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets," *i.e.*, those "who stab, shoot, mug, and rob."[32] In conducting its initial prison impact study, the Commission confined "crimes of violence" to "murder, manslaughter, forcible sexual offenses, robbery, burglary, [and] assault."[33]

Congress intended the Commission to use the definition of "crime of violence" set forth in 18 U.S.C. § 16.[34] The Commission, however, expanded the definition of "crime of violence" beyond that found in 18 U.S.C. § 16, or the later-enacted definition of "violent felony" under 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act (ACCA), without giving reasons for doing so. For many years, the Commission received feedback from the courts that its definition swept too broadly, and requests for empirical evidence to justify its definition. The Commission acknowledged that its definition reached offenses not traditionally considered crimes of violence, but took no action to narrow the definition or provide evidence to support it. The result was severe punishment for offenses that were not violent as well as unwarranted disparity and unwarranted uniformity. Eventually, the Supreme Court stepped in, narrowly interpreting the statutory definitions of "crime of violence" and "violent felony," and signaling that "crime of violence" under the career offender guideline should be interpreted narrowly as well.

1. Amendment History

11/1/87 The initial career offender guideline stated that "'crime of violence' is defined under 18 USC § 16."[35] Thus, it meant "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense."[36] The commentary said that it included "murder, manslaughter,

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[31] S. Rep. No. 98-225 at 175 (1983).

[32] 128 Cong. Rec. 26512, 26518 (Sept. 30, 1982).

[33] *See* Supplementary Report, *supra* note 3, at 59.

[34] Section 994(h) and 18 U.S.C. § 16 both were enacted as part of the Comprehensive Crime Control Act of 1984. Congress said that § 16 "defines the term 'crime of violence', used here and elsewhere in the bill." S. Rep. No. 98-225 at 304 (1983). "Congress . . . provided in § 16 a general definition of the term 'crime of violence' to be used throughout the [Comprehensive Crime Control] Act [of 1984]." *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004). "It is axiomatic that identical words used in different parts of the same act are intended to have the same meaning." *Sale v. Haitian Centers Council*, 509 U.S. 155, 203 n.12 (1993) (internal citations and quotation marks omitted).

[35] *See* USSG § 4B1.2(1) (Nov. 1, 1987).

[36] *Id*., comment. (n.1).

kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery."[37] Other offenses were covered "only if the conduct for which the defendant was specifically convicted" met the definition of 18 U.S.C. § 16.[38] The commentary explained: "For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered."[39]

11/1/89 Two years later, the Commission discarded the definition set forth in 18 USC § 16 and significantly broadened its meaning and reach. *See* App. C, Amend. 268 (Nov. 1, 1989). In the guideline itself, the Commission adopted the definition of a different term, "violent felony," from a different statute, 18 USC § 924(e)(2)(B), which was enacted after § 994(h),[40] as follows:

> The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

See USSG 4B1.2(1) (Nov. 1, 1989).

The stated reason for this amendment was "to clarify the definition[] of crime of violence . . . used in this guideline. The definition of crime of violence is derived from 18 U.S.C. § 924(e)." *See* USSG. App. C, Amend. 268 (Nov. 1, 1989). The only difference between the language of the guideline itself and that of § 924(e)(2)(B) was (and is) that the guideline limits burglary to "burglary of a dwelling" while § 924(e)(2)(B) covers "burglary" of any structure.[41]

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[37] *Id*.

[38] *Id*.

[39] *Id*., comment. (n.1).

[40] The definition of "violent felony" appears in the Armed Career Criminal Act which was enacted in 1986 as part of the Firearms Owners' Protection Act, two years after § 994(h) was enacted in 1984.

[41] *See Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (§ 924(e)(2)(B) "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle").

While the amendment to the guideline itself would have narrowed the class of offenders to which it applied, the Commission simultaneously amended the commentary in two ways that significantly broadened its reach. First, it included commentary stating that any "conduct set forth in the count of which the defendant was convicted" that "by its nature, presented a serious potential risk of physical injury to another" was a "crime of violence. *Id*., comment. (n.2). This removed the link between unspecified "conduct that presents a serious potential risk of physical injury to another" and the list of enumerated offenses against property that precede it in the guideline itself (and as in § 924(e)(2)(B)). While this de-linking was apparently unintentional on the Commission's part, *see* subpart 2, *infra*, most courts until recently, *see* subsection 3, *infra*, read it to mean that an offense consisting of "conduct that presents a serious potential risk of physical injury to another" need not be similar in kind or degree of risk to one of the enumerated offenses.[42] This similarity requirement has always existed under 18 U.S.C. § 924(e) as interpreted by the Supreme Court.[43]

Second, again through the commentary, the amendment added extortion, use of explosives, and aiding and abetting, conspiring and attempting to commit a crime of violence, to the offenses previously listed in the commentary, and deleted the language excluding escape by stealth and burglary of a structure other than a dwelling. *Id*., comment. (nn.1-2) (Nov. 1, 1989). Extortion and use of explosives are listed in § 924(e)(2)(B), but aiding and abetting, conspiracy and attempt are not.[44]

11/1/91 The commentary was amended to state that for offenses involving explosives or that by their nature involve risk of injury, the conduct must be "expressly charged," explaining that this "clarifies that the application of §4B1.2 is determined by the offense of conviction (i.e., the conduct charged in the count of which the defendant was convicted)," and that "the conduct of which the defendant was convicted is the focus of the inquiry." This was presumably intended to bring the guideline inquiry in line with

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[42] *See, e.g.*, *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006); *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. McCall*, 439 F.3d 967, 971 (8th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005), *overruled by United States v. Tiger*, 538 F.3d 1297 (2008).

[43] *See Taylor v. United States*, 495 U.S. 575, 578-80 (1990); H.R. Rep. No. 99-849, 99th Cong. 2d Sess. 5 (1986) (statute includes "felonies against property such as burglary, arson, extortion, use of explosives *and similar crimes* . . . where the conduct involved presents a serious risk of injury to a person").

[44] In 2007, the Supreme Court decided that a prior conviction for attempted burglary may fit within § 924(e)(2)(B)'s residual clause at least where the statute required an overt act directed toward entering or remaining in the structure. *James v. United States*, 550 F.3d 192 (2007). The Court has not resolved whether a conspiracy conviction counts. Given its analysis in *James*, that answer will likely depend on the elements of the statute at issue. *See United States v. King*, 979 F.2d 801, 802-03 (10th Cir. 1992) (prior conviction for conspiracy to commit armed robbery does not satisfy § 924(e)(2)(B) because overt act is not required under state statute and crime is completed simply "when the felonious agreement is reached").

Supreme Court law requiring a categorical approach for determining predicate offenses under § 924(e)(2)(B). *See Taylor v. United States*, 495 U.S. 575 (1990). The Commission also specified that unlawful possession of a firearm by a felon is not a crime of violence under the career offender guideline because when that is the instant offense, the sentence is enhanced for prior felony convictions under USSG § 2K2.1, or 18 U.S.C. § 924(e) and USSG § 4B1.4. *See* App. C, Amend. 433 (Nov. 1, 1991); USSG § 4B1.2, comment. (n.2) (Nov. 1, 1991).

11/1/04 The Commission amended the commentary to add as a "crime of violence" and exclude from the exception for possession of a firearm "unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun)." *See* App. C, Amend. 674 (Nov. 1, 2004); USSG § 4B1.2, comment. (n.1) (Nov. 1, 2004). The Reason for Amendment was that "Congress has determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes. . . . The amendment's categorical rule incorporating 26 U.S.C. § 5845(a) firearms includes short-barreled rifles and shotguns, machine guns, silencers, and destructive devices." *Id.* Note that this unusual instance when the Commission gave a reason is instructive. If the defendant did not possess the firearm for violent purposes, but, for example, as a collector's item, the "categorical rule" making it a career offender predicate should not apply.

2. Failure of the Guidelines Development Process

Within three years of the 1989 amendment, the Third Circuit identified the serious overbreadth problem with the Commission's definition of crime of violence, *i.e.*, "that a defendant could be deemed a career violent offender . . . even when he or she never intended harm, nor was there a substantial risk that he or she would have to use intentional force." *United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992). The court found that Congress had in mind the definition set forth in 18 U.S.C. § 16, and that the Commission had substantively amended it by adopting the definition of "violent felony" from § 924(e)(2)(B) in the guideline and expanding upon that definition in the commentary. Instead of striking the amendment as contrary to the congressional directive as it might have done, the court turned to the Commission to fix the problem.

The Third Circuit doubted that the Commission had expanded the definition of "violent felony" in § 924(e)(2)(B) intentionally, as the policy ramifications were serious and the Commission did not explain.[45] In the hope that the Commission would correct the mistake, the court painstakingly explained that the legislative history of § 924(e)(2)(B) and the principle of *ejusdem generis* indicated that Congress intended that

[45] While commentary to § 4B1.4, added in 1990, stated that the definition of "crime of violence" in § 4B1.1 and the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B) are "not identical," *see* USSG § 4B1.4, comment (n.1), the court thought this probably meant that the guideline limits burglary to "burglary of a dwelling" while § 924(e)(2)(B) does not. The court could not know for sure, however, since the Commission gave no explanation of how they are "not identical."

an unlisted crime that may qualify as a "violent felony" under the risk clause must be "similar" to one of the enumerated crimes. The court believed, correctly, that § 924(e)(2)(B) covers crimes of intentional force against the person in the first prong, and crimes of intentional harm against property that risk injury to persons in the second prong.[46] The Commission's commentary, by contrast, included crimes that do not require intent to harm property (or persons) but simply risk injury to persons.

Invoking the Commission's duty to review and revise the guidelines in response to feedback from the judiciary regarding flaws in the guidelines, 28 U.S.C. § 994(o), the court called upon the Commission to reconsider:

> [W]e question the Commission's decision not to follow Congress's suggested definition of "crime of violence" in 18 U.S.C. § 16, and we are concerned that it may have either misread or quietly deviated from the alternative definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B). Certainly the original and possibly both of the congressional definitions excluded reckless driving, child endangerment, and like crimes, and we doubt that Congress intended to endorse the Commission's current broad definition by acceding to the Commission's amendments of the Guideline.
>
> The term "career offender" implies an ongoing intent to make a living through crime, and it is doubtful that one can make a career out of recklessness. Moreover, the portions of the career offender provisions not dealing with drug offenses unquestionably grew out of concerns about crimes where intentional use of force is likely, if not necessarily a part of the offense. Accordingly, we recommend that the Commission consider a return to the original Guideline definition of "crime of violence," that adopted by Congress in 18 U.S.C. § 16, or else in some other way exclude pure recklessness crimes from the category of predicate crimes for career offender status.

Parson, 955 F.2d at 874-75. *See also id*. at 875 (Alito, J., concurring) ("I fully agree that the broad definition of a 'crime of violence' in U.S.S.G. § 4B1.2(1) merits reexamination by the Sentencing Commission.").

On December 21, 1993, the Commission published a proposed amendment in which it acknowledged that the *Parson* court had "pointed out" what it apparently did not intend, *i.e.*, that the commentary "calls for a considerably broader reading of the definition of crime of violence than is set forth in § 924(e)(2)(B), when this statute is

[46] This was the import of *Taylor v. United States*, 495 U.S. 575 (1990), and was made unmistakably clear in *Begay v. United States*, 551 U.S. 1191 (2008) (holding that clause (ii) covers "certain physically risky crimes against property" and that unenumerated offenses under clause (ii) must not only present a serious potential risk of physical injury to another, but must "involve purposeful, violent, and aggressive conduct," and do not include crimes of recklessness or negligence or strict liability crimes.).

read in conjunction with its legislative history," and "the principle of *ejusdem generis*." *See* 58 Fed. Reg. 67522, 67533 (Dec. 21, 1993). The Commission recognized that "crimes not traditionally considered crimes of violence," such as "driving while intoxicated or recklessly endangering a child by leaving it alone might qualify as a crime of violence under § 4B1.2, but would not qualify as a crime of violence under § 924(e)." *Id*. The amendment would have required that an unlisted offense be both similar in some respect to a listed offense and pose a serious potential risk of injury to another. *Id*.

With no explanation, the Commission failed to promulgate the amendment. The Commission has not responded to repeated requests since then from the courts and other participants in the criminal justice system to reexamine its position.[47]

In the same set of proposed amendments, the Commission proposed to state in the commentary that "crime of violence" does not include any kind of burglary other than burglary of a dwelling. *See* 58 Fed. Reg. 67522, 67533 (Dec. 21, 1993). This would have correctly resolved a circuit split consistent with "the express listing of burglary of a dwelling in § 4B1.2" in the guideline itself.[48] *Id*. Rather than ensure that the commentary was consistent with the guideline it purports to interpret and prevent further unwarranted disparity, the Commission did nothing and did not explain.

The Commission has also failed to act in its "characteristic institutional role" as directed in the SRA by failing to conduct or disseminate empirical research to assist the courts in deciding whether various offenses in fact present a serious potential risk of physical injury to another. At oral argument in a case in which the issue was whether

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[47] *See, e.g., United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995) (sharing *Parson*'s concerns and calling upon Commission to re-evaluate); *United States v. McQuilken*, 97 F.3d 723, 728-29 (3d Cir. 1996) (renewing request that Commission reexamine its position in including purely reckless crimes as career offender predicates); *United States v. Stubler*, 2008 WL 821071 *2 (3d Cir. Mar. 23, 2008) (reluctantly following *Parson* in a case involving reckless endangerment; though *Parson* "questioned the wisdom of the possibly inadvertent adoption of a definition for 'crime of violence' that can include offenses that do not involve the intentional use of force . . . neither Congress nor the Sentencing Commission has seen fit to revise that definition"). *See also* Letter from Jon Sands, Federal Public and Community Defenders, to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007 at 8-14, July 19, 2006, http://www.fd.org/pdf_lib/priority%2071906.pdf; Letter from Jon Sands, Federal Public and Community Defenders, to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2007-2008 at 6-11, July 9, 2007, http://www.fd.org/pdf_lib/Proposed%20Priorities%2020072008.pdf; Letter from Jon Sands, Federal Public and Community Defenders, to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007 at 1-10, July 16, 2008, http://www.fd.org/pdf_lib/Defender_Letter_Re_Priorities_July_16_2008.pdf.

[48] The Commission cited *United States v. Fiore*, 983 F.2d 1 (1st Cir. 1992) (includes burglary of a commercial structure), *United States v. Talbott*, 902 F.2d 1129 (4th Cir. 1990) (does not include burglary of a commercial structure), and *United States v. Smith*, 10 F.3d 724 (10th Cir. 1993) (does not include non-residential burglary). The First Circuit has since overruled *Fiore*. *See United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008).

attempted burglary under Florida law was a "violent felony" under the ACCA's residual clause, the Supreme Court struggled with the fact that there was no available evidence regarding the incidence of injury to another in attempted burglaries. Justice Breyer pointed out that the Commission "at least ha[s] a mandate," "the tools," and "the ability" to produce such evidence.[49] Although no such evidence was provided to the Court because there was none, the Court quoted a 1992 First Circuit opinion by then Judge Breyer asserting that the Commission collects data on every federal criminal case and is able to make informed judgments about the relation between a particular offense and the likelihood of accompanying violence, and speculated, incorrectly, that the Commission's inclusion of attempts in § 4B1.2 "presumably reflects an assessment that attempt crimes often pose a similar risk of injury as completed offenses." *James v. United States*, 550 U.S. 192, 206 (2007). With no actual empirical evidence, the Court decided that attempted burglary under Florida law is a "violent felony" under 18 U.S.C. § 924(e)'s residual clause.

Soon thereafter, the Seventh Circuit, in *United States v. Chambers*, a case involving whether an escape conviction for failure to report for service of sentence was a "violent felony" under 18 U.S.C. § 924(e)'s residual clause, stated that "it is an embarrassment to the law when judges base decisions of consequence on conjectures," and that the "Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return."[50] Other courts likewise have called upon the Commission to conduct and provide empirical research to assist in deciding whether various offenses present a serious risk of physical injury.[51] Finally, when the Supreme Court granted certiorari in *Chambers*, the Commission issued a report on the incidence of violence in escape cases.

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[49] *See* Tr. of Oral Arg. in *James v. United States*, No. 05-9264 (Nov. 7, 2006), pp. 12-13, 18-19, 29, 30, 40.

[50] *United States v. Chambers*, 473 F.3d 724, 726-27 (7th Cir. 2007), *reversed and remanded, Chambers v. United States*, Chambers v. U.S., 129 S. Ct. 687 (2009).

[51] *See, e.g., United States v. Golden*, 466 F.3d 612, 615-16 (7th Cir. 2006) (Rovner, J., concurring) ("we do not know the actual risks to law enforcement officers in recaptures following escapes . . . versus captures following failure to report to jail. . . and we have no way of knowing," as there are "no statistics to support a conclusion that failure to report to jail presents a serious potential risk to the public or to the officers involved in the subsequent capture. . . . If statistics do not bear out the assumption that persons who fail to report pose a *serious* potential risk of physical harm to others, we may have to reconsider our approach."); *United States v. Meader*, 118 F.3d 876, 884 (1st Cir. 1998) (expressing concern that its decision that a prior statutory rape conviction constitutes a career offender predicate "bypassed a number of troubling and complex issues" such as the standard age below which sexual intercourse typically may be considered to pose a substantial risk of physical injury and what "physical injury" means, issues which "in light of the growing number of cases in this area, should be handled expeditiously by the Sentencing Commission and Congress").

The Supreme Court relied on that report in part to hold that failure to report for penal confinement is not a "violent felony" under 18 U.S.C. § 924(e)'s residual clause.

3. The Supreme Court Steps In.

For nearly twenty years, applying the Commission's definition requiring no more than an abstract possibility of risk of injury, the courts interpreted § 4B1.2 to include offenses that involve no force or substantial risk of force, no injury or serious risk of injury, and no purposeful, aggressive, or violent conduct, including tampering with a motor vehicle,[52] burglary of a non-dwelling,[53] fleeing and eluding,[54] operating a motor vehicle without the owner's consent,[55] possession of a short-barreled shotgun,[56] oral threatening,[57] car theft,[58] and failing to return to a halfway house.[59] In a series of recent decisions, however, the Supreme Court has interpreted both 18 U.S.C. § 16's definition of "crime of violence" and 18 U.S.C. § 924(e)(2)(B)'s definition of "violent felony" to require purposeful, violent, and aggressive conduct, and has signaled that this narrower definition applies to the term "crime of violence" in the career offender guideline.

First, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court interpreted the term "crime of violence" in 18 U.S.C. § 16 to apply only to those offenses that naturally involve a person acting in at least reckless disregard of a substantial risk that physical force may be used against the person or property of another in committing the crime.[60] The Court limited the definition to "violent, active crimes":

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of

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[52] *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006); *United States v. Young*, 229 Fed.Appx. 423, 424 (8th Cir. 2007).

[53] *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992), *abrogated by United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008).

[54] *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

[55] *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

[56] *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

[57] *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

[58] *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir.2002).

[59] *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir.2002).

[60] *See Leocal*, 543 U.S. at 10-11 & n.7.

> physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. . . . Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes.[61]

After *Leocal*, the lower courts continued to interpret the term "crime of violence" under the career offender guideline broadly, even to include DUI.[62]

Then, in *Begay v. United States*, 553 U.S. 137 (2008), the Court interpreted the term "violent felony" in 18 U.S.C. § 924(e) to contain a similar requirement, though § 924(e) looks to the "risk of physical injury" rather than the "risk that physical force . . . may be used."[63] An offense is a "violent felony" under § 924(e)(2)(B)(ii) if it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The Court found that the four offenses enumerated in § 924(e)(2)(B)(ii) limit the scope of the residual clause to those offenses that are "roughly similar, in kind as well as in degree of risk posed, to the examples themselves."[64] The hallmark of the four example crimes, according to the Court, was that "they all typically involve purposeful, 'violent,' and 'aggressive' conduct,"[65] thereby distinguishing § 924(e) offenses from offenses that "need not be purposeful or deliberate."[66] In sum, clause (ii) covers "certain physically risky crimes against *property*," which must not only present a serious potential risk of physical injury to another, but must "involve *purposeful, violent, and aggressive conduct*."[67]

The Court held in *Begay* that DUI is not a "violent felony" and signaled that its interpretation should also apply to the identical "serious potential risk of physical injury" language in the career offender guideline's residual "crime of violence" clause under USSG § 4B1.2(a)(2). The Court granted certiorari, vacated the judgments below, and

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[61] *Id.* at 11 (internal citations omitted).

[62] *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. McCall*, 439 F.3d 967, 971 (8th Cir. 2006); *United States v. Moore*, 420 F.3d 1218, 1220-22, 1224 (10th Cir. 2005), *overruled by United States v. Tiger*, 538 F.3d 1297 (2008).

[63] *Compare* 18 U.S.C. § 924(e)(2)(B)(ii) *with* 18 U.S.C. § 16(b).

[64] *Begay*, 553 U.S. at 143.

[65] *Id.* at 144-45.

[66] *Id.* at 145.

[67] *Id*. at 144-45 (emphasis supplied).

remanded for further consideration in light of *Begay* in a number of cases that treated offenses as "crimes of violence" under this portion of the guideline definition.[68]

Immediately after its decision in *Begay*, the Court granted certiorari to decide whether an escape conviction based on a failure to report for service of sentence satisfied § 924(e)'s "otherwise" clause as interpreted by *Begay*. Applying the new standard, the Court first held that a failure to report is not similar in kind to the enumerated offenses because "the crime amounts to a form of inaction, a far cry from the 'purposeful,' 'violent,' and 'aggressive' conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." *Chambers v. United States*, 129 S. Ct. 687, 692 (2009).[69] The Court then held that a failure to report is also not similar in degree of risk to the enumerated offenses. In assessing the degree of risk, the Court noted that the government had failed to raise statistical or other proof showing that those people who fail to return to custody are "significantly more likely than others to attack, or physically resist, an apprehender," as required under the "otherwise" clause; in contrast, the Sentencing Commission's recent report on the incidence of violence in escape cases in fiscal years 2007 and 2008 was "conclusive" that no failure to report cases in those two years involved any violence.

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[68] *See, e.g., United States v. Archer*, 243 Fed. Appx. 564, 566 (11th Cir. 2007) (unpublished) (Florida conviction for carrying a concealed weapon was "crime of violence" under USSG § 4B1.2), cert. granted and judgment vacated, 128 S. Ct. 2051 (Apr. 21, 2008); *United States v. Tiger*, 240 Fed. Appx. 283, 284 (10th Cir. 2007) (unpublished) (DUI conviction was "crime of violence" under USSG § 4B1.2), cert. granted and judgment vacated, 128 S. Ct. 2048 (Apr. 21, 2008); *United States v. Thoma*s, 484 F.3d 542, 545 (8th Cir. 2007) (Missouri conviction for tampering with a motor vehicle in the first degree, consisting of unlawful operation of a motor vehicle without the owner's consent, was "crime of violence" under USSG § 4B1.2), cert. granted and judgment vacated, 128 S. Ct. 2046 (Apr. 21, 2008).

[69] This does not mean that *Begay*'s "purposeful, violent and aggressive" requirement is satisfied if the offense requires something more than merely passive conduct or non-action. Recall that *Begay* itself involved active conduct – drinking to intoxication and driving a car – but the Supreme Court nonetheless held that the active conduct at issue failed to satisfy the "purposeful, violent and aggressive" requirement because it did not show "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146. *Chambers* focused on the passivity involved in a failure to report, <u>not</u> because failure to act is necessary to find that an offense is not violent, but rather because the inaction inherent in a failure to report casts doubt on the government's "powder keg" theory – the notion that an escapee will be likely to resort to violence to avoid recapture. It was this theory upon which the government relied to argue that a failure to report "involves *conduct* that presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), and it is this theory that *Chambers* rejected. Indeed, in the very next line, the Court makes its point clear: "While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Chambers*, 129 S.Ct. at 692.

Id. at 692-93.[70] The Court was also unimpressed with the results of the government's case law search, which reflected only three failures to report in the past 30 years under state and federal law that had involved violence. *Id.* at 692-93.

The Court vacated and remanded several cases for further consideration in light of *Chambers* in which the lower courts had held that certain offenses were "crimes of violence" under the career offender guideline, including escape,[71] fleeing and eluding a police officer,[72] and attempted theft of a motor vehicle.[73]

Despite the critical role its own research played in *Chambers*, the Commission has still not produced empirical research on other offenses or amended the career offender guideline to comport with Supreme Court precedent. Thus, on its face, §4B1.2's definition remains broader than either 18 U.S.C. § 16 or 18 U.S.C. § 924(e)(2)(B). The courts of appeals, however, have been quick to apply *Begay*'s requirement of "purposeful, violent, and aggressive" conduct to the career offender guideline.[74] As explained by the Third Circuit, "though *Parson* says the definition of

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[70] *See* U.S. Sentencing Commission, *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (Nov. 2008), available at http://www.ussc.gov/general/escape_FY0607_final.pdf.

[71] *See, e.g.*, *United States v. Patterson*, 472 F.3d 767 (10th Cir. 2006) (escape is a "crime of violence" under USSG § 4B1.2), cert. granted and judgment vacated, 129 S. Ct. 2863 (June 29, 2009); *United States v. Mills*, 223 Fed. Appx. 516 (8th Cir. 2007) (same), cert. granted and judgment vacated, 129 S. Ct. 2863 (Jan. 21, 2009); *United States v. Summers*, 238 Fed. Appx. 552 (11th Cir. 2007) (same), cert. granted and judgment vacated, 129 S. Ct. 2863 (Jan. 21, 2009); *United States v. Parks*, 249 Fed. Appx. 484 (8th Cir. 2007) (same), cert. granted and judgment vacated, 129 S. Ct. 2863 (Jan. 21, 2009).

[72] *United States v. Blomquist*, No. 06-1111, slip op. (6th Cir. Nov. 27, 2007), cert. granted and judgment vacated, 129 S. Ct. 2863 (June 29, 2009), reversed after remand, slip op., 2009 WL 4824864 (6th Cir. Dec. 14, 2009).

[73] *United States v. Hott*, 262 Fed. Appx. 734 (8th Cir. 2008), cert. granted and judgment vacated, 129 S. Ct. 2863 (Jan. 21, 2009).

[74] *See United States v. Gear*, 577 F.3d 810, 812 (7th Cir. 2009) (noting previous holding that "the language defining crimes of violence for career-offender purposes should be read the same way as the definitions of 'violent felonies' in statutes such as 18 U.S.C. § 16 and 18 U.S.C. § 924(e), recidivist-sentencing statutes from which the Sentencing Commission borrowed when drafting §4B1.2"); *United States v. Polk*, 577 F.3d 515, 519 n.5 (3d Cir. 2009) ("though *Parson* says the definitions of 'violent felony' and 'crime of violence' in the ACCA and the Career Offender Guidelines, respectively, are not coextensive, *Begay* and the remands from the Supreme Court that have followed it indicate that the definitions are close enough that precedent under the former must be considered in dealing with the latter"); *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir. 2009) ("The definition of 'violent felony' is identical to that of 'crime of violence' in the Guidelines context. Thus, the Supreme Court's interpretation of § 924(e)(2)(B) [in *Begay*] guides us in applying the categorical approach to the residual clause of §4B1.2."); *United States v. Seay*, 553 F.3d 732, 739(4th Cir. 2009) (concluding that "*Begay*'s analysis is applicable to U.S.S.G. § 4B1.2"); *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008) ("Precedent in this circuit, as

'violent felony' and 'crime of violence' in the ACCA and the Career Offender Guidelines, respectively, are not coextensive, *Begay* and the remands from the Supreme Court that have followed it indicate that the definitions are close enough that precedent under the former must be considered in dealing with the latter."[75]

As a result of *Begay* in particular, courts have excluded numerous offenses that previously were career offender predicates, including auto theft and auto tampering,[76] non-residential burglary,[77] child endangerment,[78] walkaway escape,[79] fleeing and eluding

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well as in others, requires the application of case law interpreting 'violent felony' in ACCA to 'crime of violence' in U.S.S.G. § 4B1.2 because of the substantial similarity between the two sections."); *United States v. Tiger*, 538 F.3d 1297, 1299 (10th Cir. 2008) (applying *Begay* standard to career offender case because "the definition of 'crime of violence' contained in USSG §4B1.2(a) is virtually identical to that contained in the ACCA"); *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008) ("we are bound by cases interpreting whether an offense is a crime of violence under the Guidelines as well as cases interpreting whether an offense is a violent felony under the Armed Career Criminal Act"); *United States v. Gray*, 535 F.3d 128, 129 (2nd Cir. 2008) ("In analyzing the definition of 'crime of violence,' we have looked to cases examining the statutory definition of 'violent felony,' as found in the Armed Career Criminal Act ('ACCA') because the operative language of U.S.S.G. § 4B1.2(a)(2) and the statute is identical . . . Thus we are hard pressed to reject the views of the Supreme Court's most recent decision explaining the scope of the definition of 'violent felony' in understanding the reach of the term 'crime of violence.' The Government and defendant share that view."); *United States v. Archer*, 531 F.3d 1347, 1350 n.1, 1352 (11th Cir. 2008); *United States v. Bartee*, 529 F.3d 357, 363 (6th Cir. 2008) ("Adhering to our view that the parallel provisions in the definitions of a 'violent felony' under the ACCA and a 'crime of violence' under USSG § 4B1.2(a)(2) should be interpreted in a consistent manner, we conclude that § 4B1.2(a)(2) also should be limited to crimes that are similar in both kind and in degree of risk to the enumerated examples – burglary of a dwelling, arson, extortion, or crimes involving the use of explosives."). The Ninth Circuit alone has refused to extend *Begay*'s reasoning to the career offender guideline. *See United States v. Smith*, 329 Fed. Appx. 109, 111 (9th Cir. 2009) (holding that "*Begay* addressed only the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2), and thus has no bearing on whether Smith's conviction qualifies as a per se crime of violence under U.S.S.G. §4B1.2").

[75] *See United States v. Polk*, 577 F.3d 515, 519 n.1 (3rd Cir. 2009). Some courts have gone even further and applied *Begay* to 18 U.S.C. § 16's definition of "crime of violence," which is markedly different than the definitions of "violent felony" under § 924(e)(2)(B) and "crime of violence" under §4B1.2. *See, e.g., United States v. Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009) (holding in illegal reentry case that Texas crime of unauthorized use of motor vehicle does not satisfy *Begay* because "[t]he risk of physical force may exist where the defendant commits the offense of unauthorized use of a vehicle, but the crime itself has no essential element of violent and aggressive conduct"); *United States v. Castillo-Lucio*, 2009 WL 1904524 (5th Cir. July 2, 2009) (same); *Van Don Nguyen v. Holder*, 571 F.3d 524 (6th Cir. 2009); *United States v. Murueta-Espinosa*, 325 Fed. Appx. 468 (8th Cir. 2009).

[76] *United States v. Williams*, 537 F.3d 969 (8th Cir. 2009).

[77] *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008).

[78] *United States v. Wilson*, 562 F.3d 965 (8th Cir. 2009).

police,[80] carrying a concealed weapon,[81] reckless discharge of a firearm,[82] possession of a weapon in prison,[83] resisting or obstructing a police officer,[84] statutory rape,[85] vehicular homicide,[86] and numerous offenses that require only recklessness.[87]

The fix is not perfect, however, as some courts continue to interpret § 4B1.2 more broadly than § 924(e)(2)(B), finding that §4B1.2's commentary reaches offenses that would not satisfy § 924(e)(2)(B) as interpreted by the Supreme Court.[88] Moreover,

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[79] *United States v. Hopkins*, 577 F.3d 507 (3rd Cir. 2009); *United States v. Ford*, 560 F.3d 420 (6th Cir. 2009); *United States v. Templeton*, 543 F.3d 378 (7th Cir. 2008); *United States v. Nichols*, 563 F.Supp.2d 631 (S.D. W. Va. 2008).

[80] *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009);.*United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009); *United States v. Urbano*, Slip Op. 2008 WL 1995074 (D. Kan. May 6, 2008). The reasoning of these cases is likely to extend at least to unintentional failures to stop for a blue light. *See United States v. Roseboro*, 551 F.3d 226 (4th Cir. 2009) (finding that the negligent failure to stop for a blue light no longer constitutes an ACCA predicate under § 924(e)(2)(B)(ii)'s "otherwise clause" as interpreted by *Begay*); *United States v. Seay*, 553 F.3d 732, 739 (4th Cir. 2009) ("concluding that *Begay*'s analysis is applicable to U.S.S.G. §4B1.2").

[81] *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

[82] *United States v. Gear*, 577 F.3d 810 (7th Cir. 2009).

[83] *United States v. Polk*, 577 F.3d 515 (3rd Cir. 2009).

[84] *United States v. Mosley*, 575 F.3d 602 (6th Cir. 2009).

[85] *United States v. Dennis*, 551 F.3d 986 (10th Cir. 2009); *see also United States v. Wynn*, 579 F.3d 567 (6th Cir. 2009) (prior conviction under Ohio's sexual battery statute not categorically career offender predicate because some statutory subsections do not necessarily involve aggressive and violent conduct).

[86] *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008).

[87] *United States v. Johnson*, 587 F.3d 203 (3rd Cir. 2009) (reckless assault); *United States v. Hampton*, 585 F.3d 1033 (7th Cir. 2009) (criminal recklessness); *United States v. High*, 576 F.3d 429, 430-31 (7th Cir. 2009) (recklessly endangering safety); *United States v. Gear*, 577 F.3d 810 (7th Cir. 2009) (reckless discharge of a firearm); *United States v. Baker*, 559 F.3d 443 (6th Cir. 2009) (reckless endangerment); *United States v. Gray*, 535 F.3d 128 (2nd Cir. 2008) (reckless endangerment).

[88] *Compare United States v. Moore*, 326 Fed. Appx. 794, 795 (5th Cir. 2009) (possession of sawed-off shotgun is crime of violence based on express inclusion in guideline under §4B1.2, comment. (n.1)) *with United States v. Haste*, Slip. Op., 2008 WL 4218771 (4th Cir. Sept. 9, 2008) (possession of sawed-off shotgun is not ACCA predicate post-*Begay*); *see also United States v. Martinez*, __ F.3d __, 2010 WL 1530673 (10th Cir. Apr. 19, 2010) (attempted second degree burglary under Arizona law, which includes possessing burglary tools, is a crime of violence under § 4B1.2, though not a violent felony under ACCA, because guideline commentary includes

whether or not a given offense counts as a career offender predicate depends on statutory quirks rather than empirical evidence.[89] Thus, the Commission's failure to develop a definition of "crime of violence" under the residual clause (defined in *Begay* as "certain physically risky crimes against property," which must both present a serious potential risk of physical injury to another and "involve purposeful, violent, and aggressive conduct") based on empirical evidence of risk of physical injury to another, continues to have an effect post-*Begay*.

Most recently, the Supreme Court held in *Johnson v. United States*, 130 S. Ct. 1265 (2010), that simple battery defined as "actually and intentionally touching" another is not a "violent felony" under the ACCA's first clause, which requires that the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). The Court held that "physical force" means "*violent* force, that is, force capable of causing physical pain or injury to another." *Johnson*, 130 S. Ct. at 1271 (emphasis in original). The Court did not decide whether an intentional touching would satisfy the ACCA's residual clause because the government disclaimed reliance on it below. The Court noted, however, that the issue was briefed below and that the Eleventh Circuit had reasoned that the offense was a predicate if it satisfied the ACCA's first clause, "but 'if not, then not.'" *Id*. at 1274. As of March 11, 2010, the Court had vacated and remanded at least one career offender case in light of *Johnson*, where the offense was battery on a law enforcement officer. *See Williams v. United States*, No. 09-5135 (Mar. 8, 2010) (granting certiorari and remanding to the Eleventh Circuit). Courts of appeals have relied on *Johnson* to narrow the definition of "crime of violence" under the career offender guideline.[90]

Watch for the decision in *Sykes v. United States*, 08-3624, argued in January 2011, where the Question Presented is whether "fleeing police in a vehicle" is a "violent felony" under ACCA.

"attempt"); *United States v. Rooks*, 556 F.3d 1145, 1149-50 (10th Cir. 2009) ("Unlike the ACCA and §4B1.2(a), the [career offender guideline's] Application Note definition is not directly preceded by an 'otherwise' clause. Application Note 1 therefore arguably supports a broader reading of §4B1.2(a)'s scope."); *United States v. Billups*, 536 F.3d 574, 583 (7th Cir. 2008) (holding that false imprisonment (a crime against the person, not property) is a "crime of violence" under the residual clause, § 4B1.2(a)(2), in part because it is similar to kidnapping, which is listed in the commentary).

[89] *Compare, e.g., United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (resisting arrest under Massachusetts law is a crime of violence because it requires stiffening arms and pulling away) *with United States v. Mosley*, 575 F.3d 603 (6th Cir. 2009) (resisting arrest under Michigan law is not a crime of violence because it requires only a knowing failure to obey a command).

[90] *See, e.g., United States v. Holloway*, 630 F.3d 252, 254 n.1, 257, 262 (1st Cir. 2011) (conviction for assault and battery under Massachusetts law (which applies to harmful battery, offensive battery, and reckless battery) constitutes ACCA predicate only if court ascertains (from documents permissible under *Shepard v. United States*, 544 U.S. 13 (2005)) that defendant was convicted of harmful battery; construction applies under career offender guideline).

C. Previous "Felony" Convictions

Section 994(h) requires that the defendant "has previously been convicted of two or more prior *felonies*." *See* 28 U.S.C. § 994(h)(2) (emphasis supplied). When § 994(h) was enacted in 1984 and today, the unadorned term "felony" was and is defined as follows: "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. § 802(13), § 951(b). Since this is the definition of "felony" that Congress had in mind for "repeat drug offenders" convicted under Title 21 at the time,[91] it appears that it intended the same definition for "repeat violent offenders and repeat drug offenders" described in § 994(h).[92] *See* Part IV.B.4, *infra*.

1. Amendment History

The commentary in the initial guideline and today defines "prior felony conviction" as a "prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." USSG 4B1.2, comment. (n.3) (Nov. 1, 1987); USSG 4B1.2, comment. (n.1) (Nov. 1, 2007. The Commission has never given a reason for defining "felony" to include offenses classified by the convicting jurisdiction as misdemeanors.

2. Failure of the Guidelines Development Process

The maximum punishment for many garden variety misdemeanors is more than one year in several states, including Louisiana, Massachusetts, Maryland, North Carolina,[93] Pennsylvania and South Carolina. The Commission's rule therefore creates unwarranted disparity. For example, as shown in Appendix E, all of the states classify assault and battery as a misdemeanor, but only three states (Maryland, Massachusetts and Pennsylvania) assign that offense a statutory maximum of more than one year. Defendants with misdemeanor assault convictions in those three states can be classified as career offenders on that basis (assuming the offense of conviction meets the definition described in subpart 1, *supra*[94]), while defendants with misdemeanor assault convictions from any other state cannot. The Commission's definition creates unwarranted

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[91] *See* S. Rep. No. 98-225 at 260 (1983).

[92] *Id*. at 175.

[93] For certain North Carolina offenses, the statutory maximum under the state's statutory guidelines system is one year or less unless the state proves the defendant is a recidivist. *See* N.C. Stat. § 15A-1340.16, § 15A-1340.17.

[94] For example, only harmful battery under Massachusetts law qualifies regardless of its statutory maximum. *See United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011).

uniformity by punishing defendants with misdemeanor convictions as harshly as defendants with prior convictions for murder or forcible rape.

A state's classification of an offense as a misdemeanor indicates that the conduct is less serious than a felony, notwithstanding unorthodox statutory maxima for misdemeanors in some states. As Judge Sessions, former Chair of the Sentencing Commission, said: "Both of the predicate offenses were classified as misdemeanors under Massachusetts law, which provides, at minimum, some indication as to the seriousness of the underlying conduct." *See United States v. Colon*, slip op., 2007 WL 4246470 *6 (D. Vt. Nov. 29, 2007) (Sessions, J.). This is also recognized in § 924(e)(2)(B), from which the Commission's current definition of "crime of violence" is "derived." There, the definition of "crime punishable by imprisonment for a term exceeding one year" excludes "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *See* 18 U.S.C. § 921(a)(20)(B).

The career offender guideline thus creates, rather than dispels, state by state disparities.[95] It results in overly severe punishment for defendants with convictions deemed to be minor by the convicting state.[96] For example, a defendant convicted of drug trafficking in federal court in South Carolina had his guideline range increased nine-fold as a result of being classified as a career offender based on two state misdemeanors and one minor felony: (1) assault, a misdemeanor under state law punishable by 0-10 years; (2) "failure to stop for a blue light," a misdemeanor under state law punishable by 90 days to three years; and (3) possession of less than one gram of cocaine base, a felony under state law punishable by 0-5 years, all classified as non-violent under South

[95] In *Burgess v. United States*, 553 U.S. 124 (2008), the Supreme Court asserted that Congress's 1994 amendment to the statutory definition of "felony drug offense" (which is distinct from the standalone term "felony") to include any offense punishable by imprisonment for more than one year, regardless of its classification by the convicting jurisdiction as a felony or a misdemeanor, "serves an evident purpose: to bring a measure of uniformity to the application of § 841(b)(1)(A) by eliminating disparities based on divergent state classifications of offenses." *Id*. at 134. The Court cited no legislative history or factual basis for this proposition. What is more evident is that the states fairly consistently designate similarly minor or serious offenses as either misdemeanors or felonies, but do not consistently provide a one-year maximum for misdemeanors. Thus, classifying state offenses as felonies or misdemeanors based on the states' designation avoids unwarranted disparity, while classifying offenses as felonies or misdemeanors based on statutory maxima creates unwarranted disparity.

[96] *See, e.g.,United States v. Thompson*, 88 Fed.Appx. 480 (3d. Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and $25 fine qualified as career offender predicate).

Carolina law, and to all of which the defendant pled guilty on the same day at the age of 18, for which he received a suspended sentence.[97]

D. Limitation on Downward Departure

On October 27, 2003, the Commission set a limit of one criminal history category on downward departures in career offender cases when the guideline "significantly over-represents the seriousness of [the] defendant's criminal history or the likelihood that the defendant will commit further crimes." USSG, App. C, Amend. 651 (Oct. 27, 2003); USSG § 4A1.3(b)(3)(A), p.s. The Reason for Amendment was that the PROTECT Act, enacted April 30, 2003, directed the Commission to substantially reduce the incidence of downward departure within 180 days.[98] *Id*. The PROTECT Act did not specify that the incidence of downward departures in career offender cases should be reduced.

In its concurrent report to Congress, the Commission did not say what the incidence of this type of departure was or why it chose to limit it to one criminal history category.[99] The feedback the Commission had long received from judges counseled against this limitation, as even during the mandatory guidelines era, departures in career offender cases were frequent and extensive.[100] No explanation was given as to why this limited departure was adequate to correct the over-representation of criminal history or the likelihood of future crimes in these cases. Within a year, the Commission released a report showing that Criminal History Category VI, which is automatically assigned to every defendant with two qualifying prior convictions under the career offender guideline, is often several categories higher than their recidivism rate would justify.[101]

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[97] *See NACDL Report: Truth in Sentencing? The Gonzales Cases*, 17 Fed. Sent. Rep. 327, **7-11 (June 2005).

[98] This was one of many problematic results of the infamous Feeney Amendment. *See* Skye Phillips, *Protect Downward Departures: Congress and the Executive's Intrusion Into Judicial Independence*, 12 J.L. & Pol'y 947, 983-84 (2004). Freshman Congressman Tom Feeney, who introduced the bill, later admitted he was just the "messenger" for two Justice Department officials who authored it and chose not to notify or consult the Commission. *Id*. at 983 n.185, 986-87. Debate on the amendment was limited to twenty minutes, *id.* at 983, and it was passed despite objections by the Judicial Conference, the Federal Judges Association, the Commission, and the American Bar Association. *Id*. at 990-992.

[99] *See generally* USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* (October 2003) (hereinafter "Downward Departures"), http://www.ussc.gov/departrpt03/departrpt03.pdf.

[100] *See* Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996).

[101] Fifteen Year Review, *supra* note 1, at 134.

III. EMPIRICAL EVIDENCE AND NATIONAL EXPERIENCE

This Part details evidence that affirmatively demonstrates that the guideline is unsound.

A. Empirical Research by the Commission and Others Regarding the Purposes of Sentencing

1. Incapacitation

When a defendant has a qualifying instant offense and two qualifying priors, the career offender guideline assigns him an offense level that is keyed to the statutory maximum and a Criminal History Category of VI even when he has fewer than 13 criminal history points, the number of points otherwise required to be placed in Criminal History Category VI. *See* USSG 4B1.1.

In its 2004 Fifteen Year Review, the Commission reported that the overall rate of recidivism for category VI offenders two years after release is 55%, but the recidivism rate for such offenders who are career offenders based on prior drug offenses is only 27%, and thus "more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."[102] *See* Fifteen Year Review, *supra* note 1, at 134 (emphasis in original). This "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Id*. (emphasis in original).

The recidivism rate of those whose career offender status was based on one or more prior "crimes of violence" was about 52%. *Id*. However, this does not mean that the recidivating events were violent or otherwise serious. Only 12.5% of the recidivating events for Category VI offenders overall were a "serious violent offense," defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses, and only 4.1% were drug trafficking.[103] The largest proportion of recidivating events (38.3%) were probation or supervised release revocations,[104] which

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[102] In the year following *Booker*, the instant offense of 71.8% of defendants sentenced under the career offender guideline was drug trafficking. *See* USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 138 (March 2006) (hereinafter "Post-Booker Report"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf. What kinds of priors they had is not reported.

[103] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 32, Exh. 13 (May 2004) (hereinafter "Measuring Recidivism"), available at http://www.ussc.gov/publicat/Recidivism_General.pdf.

[104] *Id.*

can be anything from failing a drug test to failing to file a monthly report or to report a change of address.

2. Deterrence

The Commission notes that criminologists had testified that "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else." *See* Fifteen Year Report, *supra* note 1, at 134.

Current empirical research on general deterrence shows that while *certainty* of punishment has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006). Typical of the findings on general deterrence are those of the Institute of Criminology at Cambridge University. *See* Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999).[105] The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. It examined the effects of changes to both the *certainty* and the *severity* of punishment. While significant correlations were found between the certainty of punishment and crime rates, the "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance." The report concludes that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects."

Particularly relevant to the career offender guideline, there are additional reasons that severity does not deter violent or drug crime. "[S]erious sexual and violent crimes are generally committed under circumstances of extreme emotion, often exacerbated by the influence of alcohol or drugs." Tonry, *Purposes and Functions of Sentencing, supra*. Drug crimes are "uniquely insensitive to the deterrent effects of sanctions," because "[m]arket niches created by the arrest of dealers are . . . often filled within hours." *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime and Justice: A Review of Research 102 (2009).

3. Just Deserts, Respect for Law

The Commission is to take into account "the public concern generated by the offense" and the "community view of the gravity of the offense." 28 U.S.C. § 994(c)(5), (6). The Commission and the courts are to take into account the need for the sentence imposed to reflect "just punishment" and to "promote respect for law." 18 U.S.C. §

[105] A summary of these findings is available at http://members.lycos.co.uk/lawnet/SENTENCE.PDF.

3553(a)(2)(A). It is difficult to see how these considerations warrant the uniquely harsh career offender punishment for repeat drug offenders, drunk drivers, walkaway escapees, and unauthorized users of cars, but not for repeat fraudsters or dumpers of toxic waste. According to a public opinion survey conducted on behalf of the Commission in 1997, "there was little support for sentences consistent with most habitual offender legislation. To be sure, longer previous criminal records led to longer sentences, but at substantially smaller increments than under such initiatives as 'three-strikes-and-you're out.'"[106]

4. Unwarranted Disparity, Including Racial Disparity; Unwarranted Uniformity

The Commission reports that sentences in the guidelines era "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation," and that one of the reasons is the "increasingly severe treatment of . . . repeat offenders" under the career offender guideline. Fifteen Year Review, *supra* note 1, at 135. In fiscal year 2000, black offenders were 26% of offenders sentenced under the guidelines generally, but 58% of offenders sentenced under the career offender guideline. *Id*. at 133. "Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline." *Id*. The Commission suggested that African Americans are more often "subject to the severe penalties required by the career offender guideline" than similar white offenders because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods." *Id*. at 133-34.

The Commission's report indicates that the career offender guideline, especially as it applies to repeat drug offenders, does not "clearly promote an important purpose of sentencing," because the recidivism rates of such offenders more closely resemble the rates for offenders in the lower criminal history categories in which they would be under the normal criminal history scoring rules, and because incapacitating low-level drug sellers fails to prevent drug crime. *Id*. at 134. While this is true regardless of the race of any particular repeat drug offender, it is especially problematic because the guideline has "unwarranted adverse impacts on minority groups." *Id*.

Another form of unwarranted disparity is unwarranted uniformity, *i.e.*, sentencing unlike offenders the same. A 1988 Commission study notes that the career offender guideline "makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions . . . even if one defendant was a drug 'kingpin' with serious prior offenses, while the other

[106] *See* Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes, Executive Summary (1997), http://www.ussc.gov/nss/jp_exsum.htm.

defendant was a low-level street dealer [with] two prior convictions for distributing small amounts of drugs."[107]

And another form of unwarranted disparity is that caused by prosecutorial decisions to file an information under 21 U.S.C. § 851 for prior drug convictions (or not file if the defendant agrees to waive his right to trial and various other rights). The filing of this information doubles the mandatory minimum or requires mandatory life, and also increases the statutory maximum, and thus the offense level under the career offender guideline. As the Commission has found, inclusion of statutory enhancements for prior criminal record in the "offense statutory maximum" creates "unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions" to impose a lower sentence than the guideline recommends." USSG, App. C, Amend. 506 (Nov. 1, 1994).

B. Judicial Feedback

The Supreme Court's decisions, drawing on the SRA, contemplate an ongoing dialogue that results in the constructive evolution of the guidelines:

> The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 551 U.S. 350. "[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Booker*, 543 U.S. 264. The Commission acts in the "exercise of its characteristic institutional role" when it develops guidelines based on this "empirical data and national experience." *Kimbrough*, 552 U.S. at 109.

According to the Commission when the guidelines were still mandatory, "departures were considered an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines. The Commission envisioned that such feedback from the courts would enhance its ability to

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[107] USSC, *Career Offender Guidelines Working Group Memorandum* at 13 (March 25, 1988), http://www.src-project.org/wp-content/uploads/2009/08/ussc_report_careeroffender_19880325.pdf.

fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines [under 28 U.S.C. § 994(o)]."[108]

The feedback loop has yet to function effectively with respect to the career offender guideline. This is not for lack of data or reasons provided by judges, but a failure on the Commission's part to take the data and reasons into account.

1. Sentencing Data

The Commission has a duty to systematically collect, study and disseminate information regarding sentences imposed, their relationship to the purposes of sentencing, and their effectiveness in accomplishing those purposes.[109] Surprisingly, given the Commission's recognition that the career offender guideline produces "some of the most severe penalties imposed under the guidelines,"[110] and its claim that it has modified the statutory definitions to focus more precisely on offenders for whom this severe punishment is appropriate and to avoid unwarranted disparity,[111] the Commission has never published in its Annual Sourcebooks or its Quarterly Updates following the *Booker* decision the rate or reasons for below-guideline sentences in these cases, the mean or median sentence length, or what the qualifying instant or prior convictions were.

Some data, however, is available. A decade before *Booker*, a Commissioner and former Commissioner conducted a study of departures, which found "extensive use of [downward] departures from sentences generated by the career offender guideline," and that these were "quite substantial," "typically" to the sentence that would have applied absent the career offender provision. The reasons for departure identified in the article were that the predicates were "minor or too remote in time to warrant consideration." *See* Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996).

The Commission's only account of data on below guideline sentences in career offender cases appears in its March 2006 report on the impact of *Booker* after one year. There, it reported that the rate of below guideline sentences had risen from 10% in the pre-PROTECT Act period and 7.3% in the post-PROTECT Act period to 21.5% in the year after *Booker*.[112] The median percent decrease rose from 28.2% post-PROTECT Act,

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[108] Downward Departures, *supra* note 96, at 5.

[109] *See* 28 U.S.C. § 995(a)(12)-(16).

[110] Fifteen Year Review, *supra* note 1, at 133.

[111] USSG § 4B1.2, comment. (backg'd.).

[112] *See* Post-Booker Report, *supra* note 99, at 137.

to 33.4% for downward departures and 30.5% for variances post-*Booker*.[113] Three instant offense types comprised 91.9% of all career offender cases (71.8% drug trafficking, 10.9% robbery, 9.2% firearms) and these same types of offenses comprised 94% of below guideline sentences.[114] Three quarters of the below guideline sentences were in drug trafficking cases, and only 40.5% of sentences in such cases were within the guideline range.[115]

The sole account of the reasons for these many below guideline sentences was that variances occurred at a greater rate than "departures," and "the reason most often cited [apparently whether it was a "departure" or "other"] is criminal history, a guideline downward departure reason." *Id*. at 138-39. This confirms that judges avoid departures because they are limited to one criminal history category, but does not tell us why judges so frequently find that the career offender recommends punishment that is greater than necessary to satisfy the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

2. Judicial Opinions

The Commission gives no account of written opinions in sentencing outside the career offender guideline, and apparently does not examine them in any systematic fashion. Yet, these are a rich source for understanding the guideline's flaws and why a lower sentence is sufficient but not greater than necessary to satisfy sentencing purposes. Now that judges are free to disagree with the career offender guideline solely on policy grounds,[116] and to fully consider individual characteristics and circumstances as well, judicial opinions can serve as a "common law" for sentencing in this area. The following is a small sampling of the many decisions disagreeing with various aspects of the career offender guideline as a matter of policy and in light of the circumstances of the case, before and after *Booker* and its progeny. For other cases, *see United States v. Pruitt*, 502 F.3d 1154, 1167-70 (10th Cir. 2007) (O'Connell, J., concurring) (collecting cases), *cert. granted, judgment vacated*, 128 S. Ct. 1869 (Apr 14, 2008).

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[113] *Id*. at 140.

[114] *Id*. at 138.

[115] *Id*. at 138-39.

[116] *See United States v. Corner*, __ F.3d __, 2010 WL 935754 (7th Cir. Mar. 17, 2010); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. McLean*, 331 Fed. Appx. 151 (3d Cir. June 22, 2009); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); *cf. United States v. Friedman*, 554 F.3d 1301, 1311-1312 & n.13 (10th Cir. 2009) (recognizing court's authority to disagree with career offender guideline but concluding that district court's sentence was not based on that disagreement).

a. Drug Trafficking Offenses

Judges often depart or vary when the defendant is a career offender based on prior drug convictions. *See, e.g.*, *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (relying on the Commission's findings that when the priors are drug offenses, the career offender guideline is not justified by increased recidivism or deterrence and creates racial disparity, combined with individual characteristics, to conclude that a higher sentence "would be following a 'statutory directive' for the sake of the directive, *i.e.*, to exalt form over substance."); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (cataloguing a variety of failures to satisfy sentencing purposes especially when priors are minor and remote, and noting that punishing "defendants with relatively minor records" is "likely not what Congress had in mind."); *United States v. Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005) (imposing a below guideline sentence based on the fact that defendant was an addict, from which his offense stemmed, priors were remote, time previously served was less than one year).

Judge Goodwin's opinion in *United States v. Moreland*, slip op., 2008 WL 904652 **10-13 (S.D. W. Va. Apr. 3, 2008) is a good example of reasons for a sentence below the guideline range based on a combination of individual characteristics of the defendant (broken home, graduated from high school, took college courses) and circumstances of the offense (small amounts of drugs and no violence or firearms in instant offense or two priors), and policy grounded in purposes of sentencing.

The judge found that (1) the inflexible requirement that any drug offense that meets the broad definition be counted regardless of the amount of drugs, sentence imposed, or length of time passed is unjust; (2) the guideline puts a prior conviction for distribution of one marijuana cigarette on a par with a drug kingpin or a violent offender who uses firearms to commit crimes, *i.e.*, unwarranted similarity; (3) the guideline reaches defendants who are neither the "repeat violent offenders" nor the "repeat drug traffickers" Congress meant to target; (4) distribution of one marijuana cigarette in 1992 and distribution of 6.92 g. crack in 1996 "hardly constitute the type and pattern of offenses that would indicate Mr. Moreland has made a career out of drug trafficking," and the entire amount distributed in defendant's lifetime (14.77 g. crack and a single marijuana cigarette) "would rattle around in a matchbox"; and (5) "disposal" to 30 years in prison would interfere with rehabilitation, where the defendant had an excellent chance of turning his life around.

As to the need to avoid unwarranted disparities, the judge said:

> This factor initially seems to encourage deference to the Guideline range, because the Guidelines were developed to eliminate unwarranted sentencing disparities in federal courts. In practice, however, the focus of the Guidelines has gradually moved beyond elimination of *unwarranted* sentencing disparities and toward the goal of eliminating *all* disparities. . . . [T]his outcome is not only impractical but undesirable. The career

> offender provisions of the Guidelines, as applied to this case, perfectly exhibit the limits of a Guideline-centric approach. Two relatively minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison, vaulted this defendant into the same category as major drug traffickers engaged in gun crimes or acts of extreme violence. The career offender guideline provision provides no mechanism for evaluating the relative seriousness of the underlying prior convictions. Instead of reducing unwarranted sentencing disparities, such a mechanical approach ends up creating additional disparities because this Guideline instructs courts to substitute an artificial offense level and criminal history in place of each individual defendant's precise characteristics. This substitution ignores the severity and character of the predicate offenses.

As to congressional purposes, the judge said that "for this defendant," ten years in prison and eight years of supervised release "sufficiently captures Congressional policy . . . of imposing harsher sentences on repeat offenders," and "also fulfills Congress' other policy objectives aimed specifically at sentencing courts embodied in 18 U.S.C. § 3553(a), such as the mandate that the court impose a sentence that is sufficient, but not greater than necessary, to promote respect for the law and reflect the seriousness of the offense."

b. Crimes of Violence

The Third and Seventh Circuits have been particularly vocal about the absurdity of some of the offenses classified by the career offender guideline as "crimes of violence."[117] Some of the problems have been alleviated by the Supreme Court's recent cases indicating that the narrower definition of "violent felony" under § 924(e)(2)(B) should apply under the career offender guideline.

Judges often vary when the prior offense, though technically a "crime of violence," was not actually violent or indicative of a "career" of violence. *See*, *e.g.*, *United States v. Monroe*, slip op., 2009 WL 2391541 (E. D. Wis. July 31, 2009) (varying in part because the prior conviction for fleeing from the police "did not involve assaultive behavior or weapon possession"); *United States v. Gavin*, slip op., 2008 WL 4418932 (E. D. Ark. Sept.. 29, 2008) (varying in part because "defendant's criminal history [consisting of crimes of violence] reflects criminal behavior consistent with a vagrant and substance abuser as opposed to a violent offender"); *United States v. Overton*, slip op. 2008 WL 3896111 (E.D. Tenn. Aug. 19, 2008) (varying substantially because "defendant's career offender status greatly overstates the seriousness of the defendant's

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[117] *See United States v. Stubler*, 2008 WL 821071 *2 (3d Cir. Mar. 23, 2008); *United States v. Chambers*, 473 F.3d 724, 726-27 (7th Cir. 2007), *reversed and remanded, Chambers v. United States*, Chambers v. U.S., 129 S. Ct. 687 (2009); *United States v. Golden*, 466 F.3d 612, 615-16 (7th Cir. 2006) (Rovner, J., concurring); *McQuilken*, 97 F.3d 723, 728-29 (3d Cir. 1996); *United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995); *United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992).

prior criminal history" in that he "has never spent any time in jail or prison-in all likelihood because the convictions did not warrant it," *i.e.*, his "vehicular homicide conviction occurred when he was a very young man and his drug conviction was for mere possession."); *United States v. Harris*, slip op., 2008 WL 2228526 (E.D. Va. May 29, 2008) ("the Court finds that the application of the career offender provision in the context of this particular crack-cocaine case-where the career offender status is based on a ten year-old conviction for larceny from a person [a crime of violence]-reveals the inherent harshness of the crack cocaine/powder cocaine disparity and reflects unsound sentencing policy.").

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c. State Misdemeanors

In *United States v. Colon*, slip op., 2007 WL 4246470 (D. Vt. Nov. 29, 2007), Judge Sessions said that "although Colon's two prior offenses are considered felonies for purposes of the Guidelines, he has in fact never before been charged with a felony. Both of the predicate offenses were classified as misdemeanors under Massachusetts law, which provides, at minimum, some indication as to the seriousness of the underlying conduct." *Id*. at *6. *See also United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006) (noting that the definition of career offender predicates covers misdemeanors that are punishable in Massachusetts by more than one year, resulting in more Massachusetts offenders convicted of assault being classified as career offenders than elsewhere in the country).

d. Minor Instant Offense

In *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2007) (per curiam), the Eleventh Circuit upheld a 90-month sentence where the career offender sentence was 188 months. The instant offense was selling $350 worth of crack, and the priors were possession of cocaine with intent to sell or deliver, and carrying a concealed firearm. The judge noted that this was one of those "occasions when the [G]uidelines simply produce an unjust result," and found that "188 months in prison for selling $350 worth of cocaine is akin to the life sentence for the guy that stole a loaf of bread in California. To me, that . . . does not promote respect for the law and is way out of proportion to the seriousness of the offense and to [Williams'] prior criminal conduct."

e. Remoteness, Age at Time of Priors

In *United States v. Naylor*, 359 F. Supp.2d 521 (W.D. Va. 2005), Judge Jones reduced the defendant's career offender sentence because he committed the predicates (nine counts of breaking and entering sentenced on two separate occasions) during a six-week period in the middle of which he turned seventeen, and because of "technical distinctions concerning age" whereby the predicates would not have been counted if the state had treated him as a juvenile, or if his present crime was committed a few months later. "Juveniles have an underdeveloped sense of responsibility, are more vulnerable to negative influences and peer pressure, and their character is not as well formed as an adult's. Thus, 'it is less supportable to conclude that even a heinous crime committed by

a juvenile is evidence of irretrievably depraved character.'" *Id*. at 524 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). *See also United States v. Sain*, slip op., 2009 WL 1957485 (E. D. Mich. July 7, 2009) (varying in part because priors were more than ten years old); *United States v. Hodges*, slip op., 2009 WL 366231 (E. D. N. Y. Feb. 12, 2009) (varying in part because the defendant's only serious offense occurred 21 years previously when he was 20 years old, and all of his offenses were related to drug addiction); *United States v. Moreland*, slip op., 2008 WL 904652 **10-13 (S.D. W. Va. Apr. 3, 2008) (sentencing below the range in part because the priors lacked temporal proximity to each other or to the instant offense).

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f. Large Disparity Between Prior Sentences and Career Offender Sentence

When the guidelines were still mandatory, the Second Circuit reasoned that "a major reason for imposing an especially long sentence upon those who have committed prior offenses is to achieve a deterrent effect that the prior punishments failed to achieve. That reason requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the times served, for the prior offenses ... In some circumstances, a large disparity in that relationship might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present 'to a degree' not adequately considered by the Commission." *United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001).

Relying on *Mishoe* in *Colon*, Judge Sessions noted "the potentially large disparity between past and present sentences," *i.e.*, "Colon has never been sentenced to a term in the Massachusetts state prison system; he has only served short sentences (between three and six months) in the House of Corrections," while under the career offender enhancement, "the minimum Guidelines sentence would be 188 months," "more than a ten-fold increase over and above the total cumulative time Colon has previously served in his life" and "approximately fourteen years longer than all of Colon's previous sentences combined, including probation violations." Because the "relationship between the current sentence and prior sentences is an important factor in the over-representation inquiry," but "the Guidelines limit the extent of horizontal departures, only allowing courts to reduce the criminal history category by one level," "the Court hereby departs vertically to offense level twenty-five, the level mandated by the Guidelines absent the application of the career offender provision," and "also departs horizontally by one level to criminal history category V." *United States v. Colon*, slip op., 2007 WL 4246470 *7 (D. Vt. Nov. 29, 2007). *See also United States v. Moreland*, slip op., 2008 WL 904652 *11 (S.D. W. Va. Apr. 3, 2008) ("Mr. Moreland spent a total of less than six months in jail for his two previous offenses, and a sentence that takes ten years from his young life will certainly promote respect for law," as opposed to the 360-month career offender guideline sentence).

IV. TEXTUAL CHALLENGES TO THE CAREER OFFENDER GUIDELINE

A. Commentary Used to Expand the Guideline

As noted throughout Part II, the Commission expanded the reach of the career offender guideline largely through commentary. The following arguments can be made when the defendant would not be classified as a career offender but for commentary.

First, commentary that is broader than the guideline it interprets is invalid. Commentary is not the product of delegated rulemaking to the Commission by Congress but the Commission's interpretation of its own guideline. *Stinson v. United States*, 508 U.S. 36, 44 (1993). Commentary is invalid if it is "inconsistent with, or a plainly erroneous reading of" the guideline it purports to interpret. *Id*. at 38, 48. If it were otherwise, the Commission could change the meaning of a guideline through commentary, which Congress does not review. *Id*. at 40, 43-45, 46; *see also* 28 U.S.C. § 994(p). When "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other," the guideline controls. *Id.* at 43.

With respect to "crimes of violence," the similarity requirement that exists in the text of the guideline, *see* USSG § 4B.2(a)(2), and in 18 U.S.C. § 924(e)(2)(b)(ii) as interpreted by the Supreme Court, was removed through the commentary. Because the commentary includes any offense that "by its nature, presented a serious potential risk of physical injury to another," USSG § 4B1.2, comment. (n.1), with no requirement that the offense be similar in kind or degree of risk to an enumerated offense, following the commentary results in classifying defendants as career offenders who would not be so classified if the guideline were followed. Indeed, the Commission has acknowledged that the commentary is inconsistent with the guideline:

> Although the guideline itself uses the same phraseology as the statute, current Application Note 2 in the Commentary to §4B1.2 sets forth a broader definition of the term "otherwise involved." Thus, for example, driving while intoxicated or recklessly endangering a child by leaving it alone might qualify as a crime of violence under the definition in §4B1.2, but would not qualify as a crime of violence under 18 U.S.C. 924(e).

See 58 Fed. Reg. 67522, 67533 (Dec. 21, 1993). The commentary is invalid because "following one will result in violating the dictates of the other." *Stinson*, 508 U.S. at 43.

The same is true of some of the drug offenses included in the commentary but not the guideline. For example, the commentary includes "[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance," and "[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance" as career offender predicates. USSG § 4B1.2, comment. (n.1) Following this commentary would violate the dictates of the guideline, which includes only an offense "that prohibits the manufacture, import, export, or distribution, or dispensing of a

controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." USSG § 4B1.2(b).

Second, judges are no longer required by statute to consider commentary. The SRA does not expressly authorize the Commission to issue commentary, though Congress did refer to commentary in § 3553(b).[118] *See Stinson v. United States*, 508 U.S. 36, 41 (1993). When the Supreme Court excised § 3553(b) in *Booker*,[119] it removed from the SRA any direction to sentencing courts to consider commentary. As a result, sentencing courts are no longer under a statutory duty to consider commentary when calculating the guideline range.

B. Conflict with Plain Language of § 994(h)

1. Principles of Statutory Construction

Many defendants covered by the terms of the career offender guideline or its commentary would not be subject to this severe punishment if the Commission had followed the plain language of 28 U.S.C. § 994(h) and the statutory terms it incorporated. An argument that the Commission exceeded the plain statutory language can be used to buttress an argument that the guideline does not exemplify the exercise of the Commission's characteristic institutional role and reflects an unsound judgment. Some judges may be more willing to disagree with some aspect of the guideline or commentary if they know that it was not a permissible interpretation of § 994(h), or at least that it was not required by Congress.

During the early guidelines era, some courts invalidated career offender sentences because the Commission exceed the plain language of § 994(h).[120] Others declined, holding that the Commission was free to exceed the specific terms of § 994(h).[121] These

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[118] There, Congress directed courts to consider "official commentary" in determining departures, *i.e.*, "whether a circumstance was adequately taken into consideration" by the Sentencing Commission. 18 U.S.C. § 3553(b).

[119] *United States v. Booker*, 543 U.S. 220, 245 (2005) (excising § 3553(b)(1) and § 3472(e)). Courts have subsequently found that *Booker* excised by implication a similar reference in § 3553(b)(2). *See, e.g.*, *United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 704 (6th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n. 54 (5th Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 562-64 (7th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 116-18 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145-46 (10th Cir. 2005) (*en banc*).

[120] *See United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994); *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), reversed, 65 F.3d 691 (8th Cir. 1995) (en banc).

[121] *See United States v. Parson*, 955 F.2d 858, 867 (3d Cir. 1992); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir. 1994); *United States v. Allen*, 24 F.3d 1180, 1187 (10th Cir. 1994); *United States*

cases were all decided before *United States v. LaBonte*, 520 U.S. 751 (1997), where the Supreme Court held that the Commission had no authority to redefine unambiguous language in § 994(h).

When courts review an agency's construction of a statute, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is unambiguous, a different interpretation by the agency is invalid. Only "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. If the agency's interpretation is permissible, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 843-44. The Supreme Court has thus far declined to decide whether the Commission, even if it adopted a permissible construction of an ambiguous statute, could ever receive *Chevron* deference. *LaBonte*, 520 U.S. at 762 n.6. The Commission is not a typical agency; it is not subject to many of the requirements of the Administrative Procedures Act, and lacks the transparency and accountability of other agencies.[122]

Most courts of appeals did not apply ordinary principles of statutory construction to the Commission's interpretation of § 994(h), instead finding ways to give deference when no deference was due. Instead of enforcing the plain language, they relied on the Commission's broader guideline amendment authority under other subsections of 28 U.S.C. § 994, or the Commission's proposed modified background commentary claiming that it had relied on that broader authority (which was not yet in effect), or a misreading of a snippet of legislative history, or a combination of the foregoing.[123]

It appears that these cases were wrongly decided for several reasons. *First*, as the Supreme Court held in *LaBonte*, the Commission may not re-define unambiguous statutory terms in reliance on its broader guideline promulgation or amendment authority. *See* 520 U.S. at 753, 757. The Court struck down commentary that defined the statutory term "maximum term authorized" in a manner the Court found inconsistent with the plain

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v. Hightower, 25 F.3d 182, 185 (3d Cir. 1994); *United States v. Damerville*, 27 F.3d 254, 257 n.4 (7th Cir. 1994); *United States v. Piper*, 35 F.3d 611, 618 (1st Cir. 1994); *United States v. Kennedy*, 32 F.3d 876, 889 (4th Cir. 1994).

[122] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 221-24, 232 (2005); Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U.L. Q. 1199, 1222 (1999); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Sentence Bargains*, 36 Hofstra L. Rev. 639, 645-46 (2008).

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[123] *See Parson*, 955 F.2d at 867; *Heim*, 15 F.3d at 832; *Allen*, 24 F.3d 1186-87; *Hightower*, 25 F.3d at 185; *Damerville*, 27 F.3d at 257 & n.4; *Mendoza-Figueroa*, 65 F.3d at 693-94; *Piper*, 35 F.3d at 618; *Kennedy*, 32 F.3d at 888-89.

language of § 994(h). *Id*. at 757-58, 761-62. If the term "maximum term authorized" was unambiguous, then it seems that specified federal drug statutes, the term "crime of violence," and the word "felony" must be unambiguous. Relying on *LaBonte*, courts have rejected other guidelines that exceed specific statutory directives.[124]

Second, assuming for the moment that the legislative history indicated that the Commission was free to expand or narrow the statutory terms, courts may not look to legislative history for a different meaning or to find ambiguity when the statutory language is plain.[125] Recall the legislative history stating that Congress expected the Commission to engage in "the guidelines development process" with respect to the career offender guideline. *See* S. Rep. No. 98-225 at 175 (1983). The Supreme Court ignored this legislative history in holding that the Commission's ameliorative amendment to the guideline was invalid. The courts of appeals erred in looking to similar legislative history to support the Commission's broadening of § 994(h)'s unambiguous terms.

Third, even assuming that the courts could look to legislative history to interpret an unambiguous statute, these courts misread the legislative history in question. After describing § 994(h) as requiring "that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers," and § 994(i) as requiring a "substantial term of imprisonment for a convicted defendant who fits into one of five

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[124] *See United States v. Butler*, 207 F.3d 839, 849-852 (6th Cir. 2000) (holding that guideline creating enhancement for use of a minor regardless of the defendant's age flatly ignored a clear congressional directive to provide an enhancement for use of a minor if the defendant was 21 or older, rejecting the argument that congressional silence constituted congressional approval of the Commission's overruling of the statute, and holding that the guideline could not be applied to a defendant who was 20 years old at the time of the offense); *United States v. Martin*, 438 F.3d 621 (6th Cir. 2006) (approving *Butler*'s analysis but finding that defendant had not shown the Commission failed to follow the plain language); *United States v. Handy*, 570 F. Supp. 2d 437 (E.D.N.Y. 2008) (invalidating commentary requiring a four level enhancement if the defendant possessed a firearm without knowledge that it was stolen because it was inconsistent with a closely related statute requiring proof of *mens rea* beyond a reasonable doubt in such a case, relying in part on *LaBonte*); *Kiley v. Federal Bureau of Prisons*, 333 F. Supp. 2d 406, 414 (D. Md. 2004) (community confinement is imprisonment under 18 U.S.C. § 3621, and though USSG § 5C1.1 "differentiates between imprisonment and community confinement," it "cannot be squared with relevant statutes," and thus is not controlling, citing *LaBonte*).

[125] *See Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 132-33 (2002) ("reference to legislative history is inappropriate when the text of the statute is unambiguous"); *Lamie v. U.S. Trustee*, 540 U.S. 526, 540 (2004) (reference to "the plain meaning . . . respects the words of Congress," and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history."); *Ardestani v. INS*, 502 U.S. 129, 137 (1991) ("any ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language"); *Zuni Public Schools Dist. No. 89 v. Dept. of Educ.*, 127 S. Ct. 1534, 1543 (2007) ("neither the legislative history nor the reasonableness of the [agency's] method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose [its] interpretation.").

categories," the Senate Judiciary Committee Report "noted that subsections (h) and (i) are not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified." *See* S. Rep. No. 98-225 at 175-76 (1983). This does not mean that the Commission was free to redefine the terms Congress used to define the "types of cases" specified in § 994(h) or (i).[126] It means that the Commission could promulgate guidelines specifying a substantial term of imprisonment, including a term near the statutory maximum, for *other* "types of cases," not described in § 994(h) or (i). This the guidelines do, for example, for first time offenders convicted of first degree murder, rape, treason, fraud involving more than $400 million, and others.

Fourth, an agency may not retroactively justify its actions on the basis of statutory authority upon which it did not in fact act. As the Fifth Circuit found in *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994), while the legislative history cited above might be "relevant to whether the Commission had authority under other subsections of its enabling statute to exceed section 994(h)," it "is not relevant to . . . whether the Commission in fact acted on the basis of that additional authority." *Id*. at 702 n.9. The Commission did not in fact "conduct[] an analysis that found that certain offenders outside the reach of section 994(h) warranted the same punishment as section 994(h) career offenders," but instead "mistakenly interpreted section 994(h)." *Id*. at 702. Thus, the Fifth Circuit and the D.C. Circuit as well gave prospective application only to the Commission's claim that it had acted based on its broader amendment authority. *See United States v. Gaviria*, 116 F.3d 1498, 1514 (D.C. Cir. 1997); *United States v. Lightbourn*, 115 F.3d 291, 292-93 (5th Cir. 1997). But that did not solve the problem. "[A]gency action must be measured by what the [agency] did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943). An agency's action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate [implementation of] the Act. There must be such a responsible finding." *Id.* There have been no such findings to this day. The only findings that have been made are that the guideline recommends punishment that is greater than necessary to satisfy sentencing purposes in most cases in which it applies. *See* Part II.A, *supra*. Moreover, these cases preceded *LaBonte* and cannot be squared with its holding that the Commission could not rely on its broader amendment authority to modify the specific directive in § 994(h), period, even if it did engage in the guidelines development process set forth in other portions of the SRA.

The government has unsuccessfully argued, with respect to a different guideline, that a guideline can never be inconsistent with congressional intent because Congress can reject any guideline within 180 days under 28 U.S.C. § 994(p). *See United States v. Butler*, 207 F.3d 839, 849-852 (6th Cir. 2000). This argument has no relevance to commentary because Congress does not review commentary, *Stinson*, 508 U.S. at 46, and

[126] *See, e.g., Zuni Public Schools*, 127 S. Ct. at 1543 ("A customs statute that imposes a tariff on 'clothing' does not impose a tariff on automobiles, no matter how strong the policy arguments for treating the two kinds of goods alike.").

it fails on its merits with respect to guidelines. If this argument were correct, the Supreme Court would have had to uphold Amendment 506 in *LaBonte*, and it could not have found, as it did in *Kimbrough*, that the drug guidelines were not required by Congress to be tied to the mandatory minimum statute. *See Kimbrough*, 552 U.S. at 102-06. This argument would dictate that all guideline provisions satisfy congressional intent and would eliminate the courts' vital role in squaring guideline provisions with original statutory language. *United States v. Martin*, 438 F.3d 621, 632 (6th Cir. 2006).

2. Drug Trafficking Offenses

Congress directed the Commission to specify a guideline sentence at or near the maximum for a defendant convicted of a "felony" that "*is* an offense *described in*" enumerated federal statutes, after previously being convicted of two or more such felonies, crimes of violence or both. *See* 28 U.S.C. § 994(h)(1)(B), (2)(B) (emphasis supplied). The most serious overbreadth in the career offender guideline is its inclusion of drug offenses not listed in the statute. This aspect of the guideline impacts the most defendants and is the most indefensible as a policy matter according to the Commission's own empirical research. *See* Part III.A, *supra*.

In the early 1990s, three courts of appeals held that the Commission had impermissibly exceeded the terms of § 994(h) in including drug offenses in the guideline that are not enumerated in the statute, though these holdings were short-lived.[127] In *Price*, where the D.C. Circuit invalidated the guideline as applied to a defendant convicted of drug conspiracy, the government argued that the phrase "described in" in § 994(h)(1)(B) allowed the Commission to add offenses with the same elements as those in the specified federal statutes. The court expressed some doubt as to this proposition, but did not address it because conspiracy does not include the elements of any offense enumerated in § 994(h). *See Price*, 990 F.2d at 1369. A federal drug conspiracy under § 846 requires no overt act that could include the elements of any specified offense, but only an agreement. *United States v. Shabani*, 513 U.S. 10 (1994). None of the offenses in 21 U.S.C. §§ 841(c)(1), 843(a)(6), 843(b) or 856 contain all of the elements of any offense listed in § 994(h). The elements of a state offense sought to be used as a career offender predicate may or may not include the precise elements of an offense enumerated in § 994(h).

In any event, it appears that when a statute refers to offenses "described in" specific sections of the criminal code, it should be read to mean those *specific* offenses. *See Nijawan v. Holder*, 129 S. Ct. 2294, 2300 (2009) (noting that some sections of the

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[127] *See United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994); *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994). *Mendoza-Figueroa* was reversed by the en banc court. *See* 65 F.3d 691 (8th Cir. 1995) (en banc). The D.C. Circuit and the Fifth Circuit declined to give retrospective application to the Commission's claim that it acted based on its general amendment authority, but gave it prospective application. *See United States v. Gaviria*, 116 F.3d 1498, 1514 (D.C. Cir. 1997); *United States v. Lightbourn*, 115 F.3d 291, 292-93 (5th Cir. 1997).

aggravated felony statute, 8 U.S.C. § 1101(a)(43), refer to "generic crimes," such as "murder, rape, or sexual abuse of a minor," and "[o]ther sections refer *specifically* to an 'offense described in' a particular section of the Federal Criminal Code.") (emphasis added). The Supreme Court has noted that a state offense whose elements include the elements of a federal drug felony is an "aggravated felony" under 8 U.S.C. § 1101(a)(43), but that is because the statute states that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." *Lopez v. Gonzales*, 549 U.S. 47, 56-57 (2006). Section 994(h) contains no such provision.

The Seventh Circuit recently found that "the precision with which § 994(h) includes certain drug offenses but excludes others indicates that the omission of § 846 [drug conspiracy] was no oversight." *United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009). The issue before the court was whether the district court judge could disagree with the career offender guideline. Under then existing Seventh Circuit law, since clarified,[128] it was unclear whether judges were free to disagree with the career offender guideline, with some cases saying judges were not free to disagree with this guideline because it was the product of a congressional directive, and others noting that the directive was to the Commission, nit the courts. Since no congressional directive required that a person convicted of a drug conspiracy be sentenced "at or near the maximum," the court was free to disagree with the guideline. *Id*. at 450. The Seventh Circuit cited the cases from the 1990s holding that it was permissible for the Commission to have exceeded the statute's express terms, but that issue was not before the court and it did not revisit those decisions. *Id*. at 449. What is useful in *Knox* for purposes of statutory construction is its analysis of the precision with which Congress chose to include certain drug offenses and to exclude others, *i.e.*, including only federal offenses involving harmful drugs, excluding minor federal drug offenses, including attempts and conspiracies to commit maritime drug conspiracies but no other attempts or conspiracies. *Id*. at 448-49.

It should likewise be clear that Congress intentionally excluded state drug offenses. If Congress wished to include prior state drug convictions as a basis for punishment at or near the maximum under 28 U.S.C. § 994(h), it knew how to do so. The drug trafficking statute, 21 U.S.C. § 841, has always provided for enhanced penalties for prior state drug convictions.[129]

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[128] *United States v. Corner*, __ F.3d __, 2010 WL 935754 (7th Cir. Mar. 17, 2010) (holding that judges are free to disagree with the career offender guideline because the directive is to the Commission, not the courts, and reversing prior decisions to the contrary).

[129] *See* 21 U.S.C. § 841(b)(1)(A), (B) (2009) (providing enhanced penalties for a "felony drug offense"); 21 U.S.C. § 802(44) (2009) (defining "felony drug offense" as including an offense under the law of a state); *see also* Appendix D (1984 version of 21 U.S.C. § 841 providing enhanced penalties for a "felony" under the law of a state).

3. Crime of Violence

Because the definition of "crime of violence" in USSG § 4B1.2 and its commentary is broader than the definition of "crime of violence" under 18 U.S.C. § 16 or the definition of "violent felony" under 18 U.S.C. § 924(e)(2)(B), there are offenses that are "crimes of violence" under USSG § 4B1.2 that do not meet the definition under one or both statutes.

If the alleged predicate(s) do not meet the definition of "crime of violence" in 18 U.S.C. § 16, the Commission's definition is a straightforward violation of the plain and unambiguous language of 28 U.S.C. § 994(h). When Congress used the phrase "a felony that is . . . a crime of violence," it "said what it meant." *LaBonte*, 520 U.S. at 757. Congress meant the definition of "crime of violence" in 18 U.S.C. § 16. Both 28 U.S.C. § 994(h) and 18 U.S.C. § 16 were enacted as part of the Comprehensive Crime Control Act of 1984. Congress said that § 16 "defines the term 'crime of violence', used here and elsewhere in the bill." S. Rep. No. 98-225 at 304 (1983). "Congress . . . provided in § 16 a general definition of the term 'crime of violence' to be used throughout the [Comprehensive Crime Control] Act [of 1984]." *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004). "It is axiomatic that identical words used in different parts of the same act are intended to have the same meaning." *Sale v. Haitian Centers Council*, 509 U.S. 155, 203 n.12 (1993) (internal citations and quotation marks omitted); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (under rule of intra-statutory consistency, identical words appearing in different parts of the same act have the same meaning.). The term "violent felony," from which the Commission's current definition is loosely "derived," did not exist until 1986, two years after § 994(h) was enacted. *See Taylor v. United States*, 495 U.S. 575, 582 (1990).

If the alleged predicate(s) do not meet the definition of "violent felony" under 18 U.S.C. § 924(e)(2)(B), the Commission's definition is in conflict with the statute upon which it is said to be based. *See* USSG. App. C, Amend. 268 (Nov. 1, 1989) (definition of "crime of violence" is "derived from" 18 U.S.C. § 924(e)(2)(B)). The Commission's definition of "crime of violence" is broader than the definition of "violent felony" in § 924(e)(2)(B), as the Commission has acknowledged. *See* 58 Fed. Reg. 67522, 67533 (Dec. 21, 1993). The Commission's interpretation conflicts with the Supreme Court's interpretation of § 924(e)(2)(B) in *Begay v. United States*, 553 U.S. 137 (2008), *Chambers v. United States*, 129 S. Ct. 687, 692 (2009), and *Johnson v. United States*, 130 S. Ct. 1265 (2010). The Commission has no authority to interpret a statute differently than the Supreme Court has interpreted it. *Neal v. United States*, 516 U.S. 284, 290, 295 (1996).

As the Court said in *LaBonte*, "the statute does not license the Commission to select as the relevant 'maximum term' a sentence that is different from the congressionally authorized maximum term." *LaBonte*, 520 U.S. at 760-61. Likewise, the statute does not license the Commission to select a definition of the term "crime of violence" that is different from any definition Congress could have intended when § 994(h) was enacted or since then. Like the Commission's definition of "maximum term

authorized," the Commission's definition of "crime of violence" is "at odds with § 994(h)'s plain language," *id*. at 757, and "must yield to the clear meaning of [the] statute." *Stinson*, 508 U.S. at 44.

4. Prior "Felony" Convictions

The term "felony" is not defined in 28 U.S.C. § 994(h). However, the evidence indicates that when Congress used the word "felony" in § 994(h), it meant an offense designated as a "felony" by the convicting jurisdiction. When Congress enacted § 994(h) in 1984, the term "felony" was defined for all purposes under Subchapter I of Chapter 13 of Title 21 as follows: "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. §§ 802(13), 951(b). That definition of "felony" was enacted as part of the Drug Abuse Prevention and Control Act of 1970 and remains today.

In addition, in 1984, the statutes defining federal drug trafficking felonies in Title 21 (including the federal drug trafficking felonies enumerated in 28 U.S.C. § 994(h)) provided for an enhanced statutory maximum if the defendant had one or more "prior convictions" for a "felony," which had to be a "felony under" Subchapter I or II of Chapter 13 of Title 21 "or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances." *See* 21 U.S.C. 841(b)(1)(A), (b)(1)(B), (b)(2); Pub. L. 98-473, Oct. 12, 1984; Appendix D (Drug Trafficking Offense Chart). The Supreme Court has since held that the word "under" between the word "felony" and the phrase "the Controlled Substances Act" in § 924(c)(2) means "a crime punishable as a felony under the federal Act," not a crime punishable as a felony "under" state law. *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006). Likewise, "felony under" the "law of a State" must mean that the offense is punishable as a felony under state law.

In 1988, Congress added a different term to 21 U.S.C. § 841, "felony drug offense," which also required that the offense be a felony under the law of the convicting jurisdiction. *See Burgess v. United States*, 553 U.S. 124, 133-34 (2008) (detailing legislative history). In 1994, Congress amended the definition of "felony drug offense" to include any offense "punishable by imprisonment for more than one year under the law of the United States or of a state or foreign country," regardless of its classification by the convicting jurisdiction as a felony or a misdemeanor. *Id*.; *see* 21 U.S.C. § 802(44). However, § 802(13), defining what the standalone word "felony" "means," remains. When a definition "declares what a term 'means,'" as 21 U.S.C. § 802(13) does, it "excludes any meaning that is not stated." *Burgess*, 553 U.S. at 130 (internal citations and quotation marks omitted). Section 802(13) defines the term "felony" standing alone to refer only to felonies classified as such by the convicting jurisdiction. *See Lopez*, 549 U.S. at 56 n.7; *Burgess*, 553 U.S. at 127-28, 132-33. It "serves to define 'felony' for many CSA provisions using that unadorned term." *Id*. at 132-33.

Although § 994(h) is not located in the CSA, it uses the unadorned term "felony." At the time it was enacted, "felony" meant, for all purposes relating to federal drug

trafficking crimes, including those enumerated in § 994(h), "any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. §§ 802(13), 951(b). That definition is still on the books, § 994(h) still uses the standalone term, and it has never been amended to say that "felony" can be an offense designated by a state as a misdemeanor if punishable by imprisonment for more than one year.

In *United States v. Pinckney*, 938 F.3d 519 (4th Cir. 1991), the Fourth Circuit found that the Commission was authorized to define "felony" to include state misdemeanors under the career offender guideline. The offense at issue was possession of a small amount of marijuana with intent to distribute, classified as a misdemeanor but punishable by more than one year under South Carolina law. Pinckney argued only that § 994(h) was "silent on a definition." The court turned to 18 U.S.C. § 3559(a), which places the dividing line between federal misdemeanors and felonies at a statutory maximum of more than one year, and concluded that the Commission had acted properly in adopting the same definition. *Id*. at 522. But § 3559(a) is irrelevant to the question. It sets forth a classification system for federal offenses, not state offenses. It says nothing about the treatment of an offense the state classifies as a misdemeanor that is punishable by more than one year.[130]

The definition of "felony" in 21 U.S.C. § 802(13), dealing specifically with state offenses in the same statute containing the drug trafficking statutes Congress enumerated in § 994(h), is the definition Congress had in mind in 1984 for "repeat drug offenders" convicted of federal drug trafficking offenses, *see* S. Rep. No. 98-225 at 260 (1983), and thus appears to be the definition Congress had in mind for "repeat violent offenders and repeat drug offenders" described in § 994(h). *Id*. at 175.

[130] At one time, 18 U.S.C. § 3559(a) had some relevance to a different term in § 994(h), "maximum term authorized." Enacted in 1984, § 3559(a) set forth a classification system for federal offenses. Section 3581(b), enacted at the same time, set forth "authorized terms" of imprisonment for felonies and misdemeanors under the same classification system. When § 994(h) was enacted in 1984, it said "maximum term authorized by section 3581(b) of title 18." Pub. L. No. 98-473. In the initial set of Guidelines, the Commission also referenced §§ 3559 and 3581 in defining the "maximum term authorized." *See* Appendix A (Chronology of Amendments to Career Offender Guidelines, Commentary and Policy Statements). But, as Justice Breyer explained in *LaBonte*, "Congress later enacted a technical amendment [to § 994(h)] that eliminated the cross-reference . . . because the cross-reference was 'misleading' and 'incorrect' in that '[t]o date, no Federal offense' uses the classification system in the section to which it referred.." 520 U.S. at 774-75, citing Pub.L. 99-646; H.R.Rep. No. 99-797, p. 18 (1986) (Breyer, J., dissenting). On January 15, 1988, the Commission eliminated the reference to §§ 3559 and 3581. *See* USSG, App. C, Amend. 48 (Jan. 15, 1988).