

**FEDERAL DEFENDER  
SENTENCING GUIDELINES COMMITTEE**

Lyric Office Centre  
440 Louisiana Street, Suite 1350  
Houston, Texas 77002-1634

Chair: Marjorie Meyers

Phone: 713.718.4600

November 25, 2015

Honorable Patti B. Saris  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

**Re: Public Comment on Proposed Amendment Regarding “Crime of Violence”  
and Related Issues**

Dear Chief Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendment published on August 12, 2015: “Crime of Violence” and Related Issues. At the public hearing on November 5, 2015, we submitted written testimony. A copy of that testimony is attached and incorporated as part of our public comment. Here, we address issues raised at the hearing, and offer additional comment on the Commission’s proposal.

**I. Introduction**

Less than a third (27.5%) of all defendants who qualify as career offenders under the guidelines receive sentences within the recommended guideline range.<sup>1</sup> The vast majority of defendants are sentenced below the range, and significantly below the range.<sup>2</sup> This suggests that

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<sup>1</sup> USSC, “*Crime of Violence*” and Related Issues, *Public Data Briefing* 8 (Nov. 10, 2015).

<sup>2</sup> In FY 2014, 71.5% of those who fell within the career offender guideline were sentenced below the guideline recommended range, and the average sentence imposed was 29% less than the average guideline minimum. *Id.* at 8-9. The numbers are similar under the immigration guideline for individuals who qualify for offense level enhancements based on prior convictions. In FY 2014, less than a third (29.1%) of all defendants sentenced under §2L1.2 with an offense level increase for a conviction that is (b)(1)(A)(i) a drug trafficking offense for which the sentence imposed exceeded 13 months or (b)(1)(A)(ii) a crime of violence, were sentenced within the guideline range. *Id.* at 49. In FY 2014, 70.6% of those defendants were sentenced below the guideline recommended range and the average sentence imposed was 25% lower than the average guideline minimum. *Id.* at 49-50.

the harsh penalty prescribed by the guideline is not appropriate for most of the individuals who fall within it. In response, the Commission should reduce the severity of the penalty and/or limit the scope of who falls under the guideline. While the Commission may believe it is limited in what it can do regarding the severity of the penalty without Congressional action, it can and should immediately limit the categories of individuals who are subject to it. It may be that these numbers are driven at least in part by the broad reach of the residual clause, and would change should the Commission or the courts strike the residual clause from the guidelines. But it seems unlikely those numbers will change if the Commission deletes the residual clause only to add enumerated offenses that sweep too broadly. We urge the Commission to be parsimonious in defining the reach of the career offender guideline and other guidelines that enhance the offense level on the basis of prior criminal conduct. The practice of double counting prior offenses both for criminal history and also to severely enhance offense levels is not necessary to protect the public and comes at great expense to individual human lives, whole communities that are deeply affected by mass incarceration, and the country as a whole by diverting limited resources to the cost of unnecessary years of incarceration.

## **II. Definition of “Felony”**

Defenders support the Commission’s interest in amending the definition of felony to reduce unwarranted disparity by including only offenses classified as felonies by the convicting jurisdictions. As indicated in the testimony of Molly Roth, however, Defenders oppose the bracketed language “[at the time the defendant was initially sentenced]” because it is likely to cause confusion and disrupt settled law in the Ninth Circuit regarding California wobblers, and also fails to respect other state systems that allow the classification to change over time.<sup>3</sup> The determination of the classification of the prior offense should be made at the time of the sentencing for the instant federal offense, just like prior sentences for criminal history purposes under §4A1.1.<sup>4</sup>

Defenders believe the fairest approach would be to define felony to include only those offenses where the defendant was actually incarcerated for more than 13 months.<sup>5</sup> If that is deemed to be too difficult to determine, the Commission could instead consider looking to the

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<sup>3</sup> See Statement of Molly Roth Before the U.S. Sentencing Comm’n, Washington, D.C., at 22-24 (Nov. 5, 2015) (providing examples of states including California, Minnesota and North Dakota, where the classification of an offense may change over time).

<sup>4</sup> See USSG §4A1.2, comment. (n.1) (“A sentence imposed after the defendant’s commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense.”).

<sup>5</sup> See Statement of Molly Roth Before the U.S. Sentencing Comm’n, Washington, D.C., at 19 (Nov. 5, 2015).

actual sentence imposed as it currently does elsewhere in the guidelines, and include only those prior offenses for which the defendant received a sentence of imprisonment exceeding 13 months for the original offense of conviction.<sup>6</sup> This would simplify the analysis for probation officers and courts. This 13-month measure is already familiar from §4A1.1 and prior drug trafficking offenses in §2L1.2(b)(1)(A).

If the Commission rejects both of these options, we believe the Commission's proposal to include only those prior offenses that are both punishable by imprisonment for a term exceeding one year, and also classified as felonies by the convicting jurisdictions, is an important improvement over the current practice. At the hearing earlier this month, Commissioners asked whether it would be possible to do this by taking an approach identical or similar to that in 18 U.S.C. § 921(a)(20), and if so, what would be the right number to select as the maximum term for which a state misdemeanor could be punishable and still be excluded from the definition of felony. While this would be better than the current definition, Defenders believe the clearest approach is to specify what is included in the definition of felony – convictions classified as felonies by the convicting jurisdictions – rather than what is excluded. If, however, the Commission proceeds with the idea of excluding misdemeanors, we strongly oppose the idea of excluding only some, but not all, misdemeanors based on the maximum allowable punishment. Instead, the Commission could add language to the current definitions like this:

*The term “punishable by death or imprisonment for a term exceeding one year” does not include any State offense classified by the laws of the State as a misdemeanor (or similar classification) at the time of the sentencing on the instant federal offense.*

Picking a maximum allowable punishment would require drawing an arbitrary line that would result in unwarranted disparity. If misdemeanors punishable by 2 years in Iowa are excluded from the definition of felony, why not also exclude misdemeanors punishable by 2 ½ years in Massachusetts? If misdemeanors punishable by 3 years in South Carolina are excluded from the definition of felony, why not also exclude misdemeanors punishable by 5 years in Pennsylvania, or the one in Maryland that is punishable by 10 years? The best and most just approach is to respect how the states classify the prior offenses and include only those offenses classified by the convicting jurisdiction as a felony.

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<sup>6</sup> *Id.* For career offender and Chapter Two enhancements, where the intent is to assess the seriousness of the original offense and whether it rises to the level to warrant significant increases to the recommended period of incarceration, the 13-month measure should be for the sentence imposed on the original offense, and not based on new conduct that precipitated a revocation. Therefore, it should be made clear that the 13-month period for career offender status and Chapter Two enhancements does not include subsequent revocation sentences as happens under §4A1.2(k) when calculating the sentence imposed to determine the criminal history score.

**III. Statutory Rape Should Expressly be Excluded as a Crime of Violence, Sexual Abuse of a Minor Should be Defined, and Sexual Conduct as Defined in 18 U.S.C. § 2246 Should not be Included.**

The Commission requests comment on whether statutory rape should be expressly excluded or included as a crime of violence and whether there are offenses included in the definition of forcible sex offense that should not be considered crimes of violence. Defenders encourage the Commission to expressly exclude statutory rape and to limit which sex offenses involving “minors”<sup>7</sup> should count as crimes of violence. It should also define forcible sex offense by reference to the definition of “sexual act” as defined in 18 U.S.C. § 2246, rather than “sexual act” and “sexual contact.”

Statutory rape should be expressly excluded from the guidelines’ definitions of crimes of violence.<sup>8</sup> Strict liability offenses involving sexual acts with minors are not crimes of violence or violent felonies as several circuits have recognized under *Begay*.<sup>9</sup> See, e.g., *United States v. Harris*, 608 F.3d 1222, 1232 (11th Cir. 2010) (collecting cases); *United States v. Rogers*, 363 F. App’x 401, 402 (7th Cir. 2010); *United States v. McDonald*, 592 F.3d 808, 814 (7th Cir. 2010); *United States v. Thornton*, 554 F.3d 443, 446-49 (4th Cir. 2009). Including them as crimes of violence will incorporate too many non-violent strict liability offenses because some Circuits have interpreted the general reference to “statutory rape” and “sexual abuse of a minor” in §2L1.2 to depend upon the vagaries of state law rather than a generic definition based upon the categorical approach.<sup>10</sup> As Judge Graves in the Fifth Circuit noted, a definition of statutory rape

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<sup>7</sup> The term “minors” is in quotations because it lacks a consistent meaning in the case law.

<sup>8</sup> It is unclear whether the proposed definition of “forcible sex offense,” which references “incompetent consent” while eliminating express reference to statutory rape or sexual abuse of a minor as those terms appear in §2L1.2, would include statutory rape and “sexual abuse of a minor.” Several Circuits have rejected the argument that “incompetent consent” in the definition of forcible sex offense includes all statutory rapes, regardless of whether the statute requires an age difference between the defendant and the minor, or sexual abuse of a minor under §2L1.2 because it would render the latter terms superfluous. See *United States v. Caceres-Olla*, 738 F.3d 1051, 1056 (9th Cir. 2013). Omitting those terms from the list of enumerated offenses, without expressly excluding those offenses, would generate litigation over the meaning of incompetent consent.

<sup>9</sup> While cases interpreting the residual clause under the Armed Career Criminal Act are no longer valid, the reasoning of *Begay v. United States*, 553 U.S. 137 (2008), which focuses on purposeful, violent, and aggressive conduct, is an instructive benchmark for the Commission to use in determining which enumerated offenses might appropriately be considered crimes of violence.

<sup>10</sup> See *United States v. Gomez*, 2015 WL 5933445 (6th Cir. 2015) (Moore, J., dissenting) (favoring Fourth and Ninth Circuit’s approach to determining the generic definition of statutory rape because it is consistent with the *Taylor* categorical approach; noting that under the Fifth and Sixth Circuit’s approach if a state statute “labels consensual sexual intercourse between two fifteen-year olds as ‘statutory rape,’ [it] would qualify as a crime of violence”).

that depends on state law and is not uniform is “fundamentally flawed.” *Rodriguez*, 711 F.3d at 569 (Graves, J., concurring).

Including these offenses also would sweep too broadly because some states set the age of consent at 18 without any age difference between the two individuals engaging in sex whereas others use a lower age of consent and require an age difference between the individuals.<sup>11</sup> As Judge Winmill from the District of Idaho observed, broad definitions of statutory rape are troubling because it means an 18-year-old who has sexual relations with someone who is 17 years and 364 days old can be convicted of statutory rape and be subjected to the same enhancement as a person who commits a forcible rape under brutal circumstances.<sup>12</sup>

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<sup>11</sup> According to the Fourth Circuit, only eleven states set the age of consent at eighteen. *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013). A few examples of the vast differences in state laws follow:

- Colorado punishes sexual assault where one person is at least 15 but less than 17 years old and the other is at least ten years older; or where one person is less than 15 and the other is at least 4 years older. Colo. Rev. Stat. Ann. § 18-3-402 (d) and (e).
- Alabama defines statutory rape as a person 16 years or older engaging in sexual intercourse with a member of the opposite sex who is less than 12 years old; or a person who is 16 or older engaging in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old, provided the older person is at least two years older than the younger person. Ala. Code §§13A-6-61 & 13A-6-62.
- Illinois criminalizes sex with anyone at least 13 but under 17 years of age where the actor is at least 5 years older. 720 Ill. Comp. Stat. Ann. 5/11-1.60(d). This has created a circuit split. Compare *United States v. Zuniga-Galeana*, 2015 WL 5005131 (7th Cir. Aug. 24, 2015) (ordinary meaning of “minor” is person who has not reached the age of 18) with *United States v. Acosta-Chavez*, 727 F.3d 903 (9th Cir. 2014) (generic version of sexual abuse of a minor and statutory rape place age of consent at 16).
- South Dakota punishes sexual penetration of a person less than 13, or if the victim is 13 to 15 years old, the perpetrator must be at least three years older than the victim. S.D. Codified Laws § 22-22-1.
- In Tennessee, consensual sex between a 17-year-old and a 21-year-old is considered statutory rape. *United States v. Perez-Velasquez*, 67 F. App’x 890 (6th Cir. 2003).
- Michigan sets the age of consent at 16 years old without regard to an age differential. Mich. Comp. Laws Ann. § 750.520 (a).

<sup>12</sup> See Brief of Appellant, *United States v. Villasenor-Valdez*, 2004 WL 2448235, \*8 (2004) (quoting sentencing transcript). The same result holds true for states where statutory rape is defined by reference

Because of such over inclusiveness in §2L1.2, some judges have already called upon the Commission to reconsider its “blunderbuss approach” to defining sex offenses.<sup>13</sup> We agree that the sex offenses enumerated in §2L1.2 and the Commission’s proposed definition of “forcible sex offense” lack precision. Rather than focus on truly violent offenses, the proposal, like §2L1.2, would include individuals whose prior crime was based on nothing more than having sex with a girlfriend in the wrong place at the wrong time. For example, in one case where the defendant was represented by Defenders, the defendant was in a sexual relationship with a girl in Nevada where the age of consent was 16. They traveled to Washington where the age of consent was also 16, but they stopped in California en route and had sex. Because the age of consent in California was 18, he was guilty of statutory rape.

Examples of young adults or teenagers having sexual relationships and being convicted of statutory rape or “sexual abuse of a minor” are not uncommon. One example is the *Rodriguez* case in the Fifth Circuit, where the defendant who was 19 years and 3 weeks old had sexual contact with a 16-year-old and was convicted in Texas for sexual assault of a child. As a result of that conviction and the Fifth Circuit’s broad definition of statutory rape and sexual abuse of a minor, he received a 16-level enhancement under §2L1.2.<sup>14</sup>

Our survey of Defender offices revealed numerous other cases of clients having been convicted of a sex offense for having sexual contact, including over-the-clothes contact, with a girlfriend. Some examples include:

- a defendant who was 16 years and 3 months old had sex with his girlfriend who was 15 years and 11 months old;
- a developmentally disabled 18-year-old still in high school who had sex with a 14-year-old;
- a man in his 20s, who was raised in Central America and who, with the support of both families, had a consensual relationship with a 15-year-old from Central America and later married;
- a 17-year-old who had sex with a 13-year-old and later married;

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to the age of person deemed not capable of consenting without any requirement that the other actor be a specified number of years older.

<sup>13</sup> *United States v. Rodriguez*, 711 F.3d 541, 568 (5th Cir. 2013) (Haynes, J., concurring). *See also United States v. Hernandez-Castillo*, 449 F.3d 1127, 1132 (10th Cir. 2006) (urging Commission to take a “hard look” at guideline definitions that define all statutory rape as violent and that count California wobbler offenses).

<sup>14</sup> *Rodriguez*, 711 F.3d at 568.

- a 20-year-old with a mental disability who was seduced by a 14-year-old and had sex for less than a minute;
- a 20-year-old with a 15-year-old girlfriend who told him she was 19 and showed him what turned out to be a fake identification;
- an 18-year-old who engaged in a relationship with a 14-year-old with her parent's consent.

To account for the prevalence of sexual relations between teenagers/young adults, cultural differences in sexual relations, and in recognition that many “statutory rape” and “sexual abuse of a minor” offenses are non-violent strict liability offenses, the best option to capture the worst offenses is to strike the general reference to “incompetent” consent and include only rape and aggravated sexual abuse offenses where a person “knowingly engages in a sexual act with another person who has not attained the age of 12 years,” or “knowingly engages in a sexual act . . . with a person who has attained the age of 12 years, but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).”<sup>15</sup> This definition would cover the most serious offenses of aggravated sexual abuse of children and sexual abuse of a minor as defined in 18 U.S.C. § 2241(c) and 18 U.S.C. § 2243(a).

If the Commission rejects our recommendations to expressly exclude strict liability sex offenses and to define the meaning of sexual abuse by reference to 18 U.S.C. § 2241(c) and § 2243(a), it should define “sex abuse of a minor” and “statutory rape” as an offense where a person 18 years of age or over engages in a sexual act with a child who has not yet reached the age of 13 – the average age of sexual maturity.<sup>16</sup> Either of our recommendations will resolve a significant Circuit split about the reach of statutory rape and sexual abuse of a minor.<sup>17</sup>

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<sup>15</sup> 18 U.S.C. §§ 2241(c), and 2243(a).

<sup>16</sup> The average age of menarche is between 12 and 13 years old. Karen Sarpolis, *First Menstruation: Average Age and Physical Signs*, Obgyn.net (2011). And, regardless of the age of consent, under no circumstances should the age difference between the two individuals be less than four years. *See United States v. Caceras-Olla*, 783 F.3d 1051, 1056 (9th Cir. 2013) (age difference of at least four years is essential element of statutory rape and sexual abuse of a minor).

<sup>17</sup> The Fifth, Seventh, and Eighth Circuits set the age of consent at 18 and require no age differential for an offense to qualify as a “crime of violence.” *United States v. Rodriguez*, 711 F.3d 6541, 562, n.28 (5th Cir.) (en banc), *cert. denied*, 134 S.Ct. 512 (2013); *United States v. Zuniga-Galeana*, 799 F.3d 801 (7th Cir. 2015); *United States v. Medina-Valencia*, 538 F.3d 831, 834 (8th Cir. 2008). Other courts follow the federal statutory definition, which sets 16 as the age of consent (with a 4 year age differential) under the sexual abuse of a minor statute, 18 U.S.C. § 2243. *United States v. Rangel-Castaneda*, 709 F.3d 373, 380-81 (4th Cir. 2013); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152–53 (9th Cir.2008) (en banc) (interpreting “sexual abuse of a minor” in 8 U.S.C. § 1101(a)(43)(A) to require that the victim be less than sixteen on account, inter alia, of the age of consent for the generic definition of statutory rape).

Defenders also do not believe that the definition of “forcible sex offense” should incorporate the definition of “sexual contact” in 18 U.S.C. § 2246. Unlike “sexual act,” the term “sexual contact” in § 2246 is quite broad and includes the slightest touching of the breast, inner thigh, or buttocks of a person even when covered in clothing. Including “sexual contact” in addition to “sexual act” will perpetuate the overbreadth of the definition of “forcible sex offense” in §2L1.2. The broad definition of “forcible sex offense” in §2L1.2 has been used to enhance a sentence based on relatively benign conduct that no one would reasonably characterize as violent. For example, in *United States v. Mendez-Sosa*, 782 F.3d 1061, 1064 (9th Cir. 2015), the defendant received a 16-level enhancement based on a New Jersey conviction of intentionally touching an adult victim’s breasts without consent.<sup>18</sup> Many other decisions interpret “forcible sex offense” to include any touching of an intimate body part without the person’s consent. *See United States v. Quintero-Junco*, 754 F.3d 746 (9th Cir. 2014). Even “indecent liberties with a child . . . who is 14 or more years of age but less than 16 years of age” has counted as a “sexual abuse of a minor” under §2L1.2, with indecent liberties being defined as “fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender.” *See United States v. Vera-Garcia*, 2011 WL 831174, \*11-12 (D.N.M. 2011) (reviewing other state statutes that cover sexually related offenses against “minors” – many of which are significantly broader than the federal offense of “sexual abuse of a minor” in 18 U.S.C. § 2243).

#### **IV. Simple Assaults Directed at Specified Individuals Should not Count as a Crime of Violence.**

The Commission seeks comment on whether it should include simple assault offenses that states classify as felonies because they are directed at certain individuals. Defenders believe that including such offenses would be over inclusive, create significant disparity, and foster disrespect for the law. No matter the victim’s status, simple assault is the least serious form of assault that can involve the slightest touching and a minor injury. To elevate that conduct to a crime of violence because some states have chosen to increase the penalties based upon the victim’s status would not serve the purposes of sentencing and is inconsistent with case law interpreting “aggravated assault” in §2L1.2.<sup>19</sup> No consensus has emerged in the states as to who

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<sup>18</sup> The statute defines sexual contact as “intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present; ‘Intimate parts’ means the following body parts: sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person.” N.J. Stat. Ann. § 2C:14-1.

<sup>19</sup> *See, e.g., United States v. Fierro-Reyna*, 466 F.3d 324, 329 (5th Cir. 2006) (concluding that the “generic, contemporary meaning of aggravated assault... does not include considerations regarding the victim’s status as a police officer”); *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010)



merits special victim status and under what circumstances. Some states include lengthy lists of victims who get special treatment, but the content of the lists varies from state-to-state.<sup>20</sup> Other states include a short list of special victims.<sup>21</sup> And even though some states may place some individuals in a special status, not all elevate the offense to a felony or provide for a penalty longer than 12 months.<sup>22</sup> Often the decision of which victims are given special status is driven by politics and the strength of any particular lobbying organization. For example, the Montana Nurses Association has launched a campaign called, “Your Nurse Wears Combat Boots”<sup>23</sup> aimed at creating a new law to make it a felony to assault a health care worker in a state that already provides specific laws for police dogs and sports officials.<sup>24</sup>

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(holding that Arizona “aggravated assault” conviction for simple assault on law enforcement officer is not a crime of violence under §2L1.2).

<sup>20</sup> See, e.g., 720 Ill. Comp. Stat. Ann. 5/12-3.05 (taxi driver, transit employee, state or local government employee, nurse, a person age 60 or older; teacher, school employee, police officer, fireman, private security officer, correctional institution employee, human service employee, and others); Mich. Comp. Laws Ann. § 750.81d (misdemeanor assault elevated to felony when committed against specified public employees such as police officers and emergency medical personnel); Haw. Rev. Stat. Ann. § 707-711 (assault elevated when committed against educational worker, emergency medical service provider, mental health facility worker, firefighter, water safety officer); Haw. Rev. Stat. Ann. § 707-712.5 (assault against a law enforcement officer); Ind. Code Ann. § 35-42-2-1 (f) (assault against public safety individual, a child under 14, a person with a disability of committed by a caregiver, an endangered adult); Tex. Penal Code §22.01(b)-(c) (establishing multiple penalties depending upon the status of the victim).

<sup>21</sup> See, e.g., Mont. Code Ann. § 45-5-210 (assault on peace officer or judicial officer); Mont. Code Ann. § 45-5-211 (assault upon sports official); Mont. Code Ann. § 45-5-212 (assault on minor [under 14] by person 18 or older); N.D. Cent. Code Ann. § 12.1-17-01 (peace officer, correctional institution employee, employee of state hospital, person engaged in judicial proceeding, fire or emergency worker); Md. Code Ann. Crim. Law § 3-203 (law enforcement officer, parole or probation agent, firefighter, first responders in providing emergency or rescue services).

<sup>22</sup> In West Virginia, “any person who unlawfully, knowingly and intentionally makes physical contact of an insulting or provoking nature with a government representative, health care worker or emergency service personnel acting in his or her official capacity, or unlawfully and intentionally causes physical harm to that person acting in such capacity, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$500 or confined in jail not less than one month nor more than twelve months or both fined and confined.” W. Va. Code Ann. § 61-2-10b.



<sup>23</sup> <http://www.krtv.com/story/30167362/nurses-call-for-law-to-protect-them-from-assault>.

<sup>24</sup> Sanjay Talwani, MTN News, *Montana Nurses Call for Law to Protect them from Assault* (Oct. 2, 2015), <http://www.ktvq.com/story/30172020/montana-nurses-call-for-law-to-protect-them-from-assault>.

If the Commission were to include all of these named victims, it would perpetuate these stark differences and create more reasons for judges to vary from the guidelines because of the mere happenstance of where the person committed the offense. And if the Commission were to select which victims warrant special status, then it would itself be making a policy decision that some victims are more important than others. To pick some special victims but not others would disregard state law and be both over- and under- inclusive, which would promote disrespect for the law. In addition, we are not aware of any empirical evidence that supports the proposition that a person who commits a simple assault is more dangerous simply because of the status of the victim. Absent such evidence, it would be a mistake to enhance federal penalties for subsequent conduct on that basis. If the state views it as a more serious offense, the state court will have already imposed a more severe sanction. In any event, counting simple assault against special victims as a crime of violence used to enhance penalties would do nothing to meaningfully protect the public from further crimes of the defendant.<sup>25</sup>

#### **V. The Definition of Felony Murder is too Broad.**

The Commission proposes to define felony murder as “causing the death of a human being in the course of committing another felony offense.” This is a massive step back in time to the English common law felony-murder rule, which English courts began to limit in the 1800s,<sup>26</sup> and Congress, the Model Penal Code, and the majority of states have rejected.<sup>27</sup> Only six states apply the felony murder doctrine to all felonies no matter whether they involve the use or threatened use of violence.<sup>28</sup> As LaFave explains:

Today the law of felony murder varies substantially throughout the country, largely as a result of efforts to limit the scope of the felony-murder rule. American jurisdictions have limited the rule in one or more

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<sup>25</sup> The assumption that a lengthy period of incarceration is an effective way to protect the public or account for increased culpability of those who engage in assaultive behavior ignores reality. Because alcohol abuse is commonly associated with assault and other so-called violent crimes, many purposes of sentencing – protection of the public, specific deterrence, and the rehabilitative needs of the individual – are best met through treatment, not lengthy periods of incarceration. See William Pridemore, *Alcohol Outlets and Community Levels of Interpersonal Violence: Spatial Density, Outlet Type, and Seriousness of Assault*, 50 J. Res. Crime & Delinq. 132, 134 (2013) (discussing link between alcohol consumption, the availability of alcohol, and violence); Mildred Maldonado-Molina, et al., *Does Alcohol Use Predict Violent Behaviors? The Relationship Between Alcohol Use and Violence in a Nationally Representative Longitudinal Sample*, 9 Youth Violence & Juv. Just. (2011).

<sup>26</sup> See generally LaFave, 2 Subst. Crim. L. § 14.5 (2d ed.).

<sup>27</sup> *Id.*; 18 U.S.C. § 1111(a); Model Penal Code §210.2.

<sup>28</sup> Ark. Code Ann. § 5-10-102; Del. Code Ann. Tit. 11, § 635, § 636; Ga. Code Ann. § 16-5-1; Minn. Stat. Ann. § 609.19; N.M. Stat. Ann. § 30-2-1; Tex. Penal Code Ann. § 19.02.

of the following ways: (1) by permitting its use only as to certain types of felonies; (2) by more strict interpretation of the requirement of proximate or legal cause; (3) by a narrower construction of the time period during which the felony is in the process of commission; (4) by requiring that the underlying felony be independent of the homicide.

2 Subst. Crim. L. § 14.5 (2d ed.).

If the Commission wants to include felony murder among the enumerated offenses, it should follow the lead of many states and limit its scope in the ways LaFave identifies. One solution is to limit it to those felonies most commonly considered in state codes – robbery, rape, arson, burglary, and kidnapping,<sup>29</sup> and where death was a “natural and probable consequence” of the defendant’s conduct.<sup>30</sup> Another approach is to follow the Model Penal Code (§ 210.2), which limits felony murder to robbery, rape, forcible deviant sexual intercourse, arson, burglary, kidnapping, and felonious escape.

The Commission should also define the meaning of “in the course of committing.” That term would be subject to conflicting interpretations – with one defining “course” as hours and miles away from the scene of the offense to another limiting it to the precise location of the felony.<sup>31</sup>

In no event should the definition include those who were vicariously responsible for the felony murder. The responsibility for the crime is too far removed to use it as a reason to enhance the offense levels when the conviction is already counted in criminal history.

## **VI. Arson Should Be Limited to Offenses that Threaten Harm to A Person Rather than Property.**

If the Commission continues to include arson as a crime of violence, Defenders recommend that the definition focus on conduct that poses a threat to human life.<sup>32</sup> The case law

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<sup>29</sup> See, e.g., 18 Pa. Cons. Stat. Ann. § 2502 (homicide committed while defendant engaged in the perpetration of a felony – robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping).

<sup>30</sup> *Id.*

<sup>31</sup> LaFave, *supra* note 26, at 14.5.

<sup>32</sup> Cf. 18 U.S.C. § 3559(c)(2)(B) defines “arson” as “an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive.” 18 U.S.C. § 3559(c)(3) expressly excludes arson where “the defendant establishes by clear and convincing evidence that (i) the offense posed no threat to human life; and (ii) the defendant reasonably believed the offense posed no threat to human life.” “[B]ecause ‘the modern arson statutes have extended the arson offenses to cover a wide range of risks and damages to person and property

in some Circuits and the Commission’s proposed definition include offenses that pose no threat to human life. Defenders have had clients receive enhancements for offenses deemed “arson” where the offense could not reasonably be considered to pose a threat to another. Some examples follow:

- Setting fire to an unoccupied vehicle in an open field.
- Setting a fire in the garbage can of a parking lot to stay warm.
- Throwing lit matches at a doorway without causing any damage.
- Lighting a roll of toilet paper in a jail cell and tossing it into the hallway to get the attention of guards so they could help another inmate who was having a seizure.
- Burning shoes and cash in a sump pump pit of an unfinished basement.

In contrast to the definition the Commission proposes and that is used in some Circuits, some state laws acknowledge the difference in offense seriousness between damaging property by fire and starting a fire or explosion in a structure where persons are present or a person suffers serious bodily injury as a result.<sup>33</sup>

The proposed definition of arson also lacks clarity. The term “real property” typically has a well-defined meaning in law,<sup>34</sup> but the phrase “building, *vehicle*, or *other* real property,” suggests that “real” means something akin to “tangible” or something that actually exists. The confusion stems from how the term “other” follows two specific terms – building and vehicle. Under the doctrine of *eiusdem generis* – the general reference to “other real property” “should be read to include only things of the same type as those specifically enumerated.”<sup>35</sup> Because a vehicle is not traditionally considered “real property,” the baseline from which to measure the reference to “other real property” is not clear.

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unprotected at common law,’ it is apparent that all those who commit the crime of arson ‘should not be treated as equally culpable.’” LaFave, 3 Subst. Crim. L. § 21.3 (2d ed.).

<sup>33</sup> See Tenn. Code Ann. § 39-14-301 (knowingly damages any structure by means of a fire or explosion); Tenn. Code Ann. § 39-14-302 (aggravated arson when one or more persons are present). See also Cal. Penal Code Ann. § 451 (distinguishing between arson that causes bodily injury; arson that causes and inhabited structure or property to burn; arson of a structure of forest land; and arson of property); Ala. Code §§ 13A-7-41 & 13A-7-42; Iowa Code §§ 712.2 & 712.3; Ohio Rev. Code Ann. §§ 2909.02 & 2909.03; Fla. Stat. Ann. § 606.09(1) & (2); Tex. Penal Code Ann. § 28.02.

<sup>34</sup> Black’s Law Dictionary defines “real property” as “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements).” Black’s Law Dictionary (10th ed. 2014).

<sup>35</sup> *James v. United States*, 550 U.S. 192, 199 (2007).

Even if the Commission intends for the definition to cover “real property” (as the term is commonly used) and vehicles, the definition is too broad to capture truly violent offenses where a person may be injured. The inclusion of real property is so broad as to cover a state offense that prohibits the burning of timber, grain, grass or soil itself, as well as fences, lumber, and gates. *See* Mass. Gen. Laws ch. 266 § 5<sup>36</sup>; *see also* N.M. Stat. Ann. § 30-17-5(A)(2) (arson includes “a bridge, utility line, fence or sign”).

**VII. The Definition of “Crime of Violence” or “Controlled Substance Offense” Should not Include the Offenses of Aiding and Abetting, Conspiracy, or Attempt to Commit a Crime of Violence.**

The Commission should not include attempt, conspiracy, or solicitation in the definition of crime of violence. These inchoate offenses cover a broad range of behavior that may not present any danger to an individual.

Courts have assumed that the commentary to the career offender guideline that includes inchoate offenses is “based on the Commission’s review of empirical sentencing data and 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).<sup>37</sup> To our knowledge, however, no such empirical data exists. In the absence of it, attempt and other inchoate offenses should not count as crimes of violence.

If, absent any evidence of a reason consistent with the purposes of sentencing to do so, the Commission nonetheless decides to include attempt in the definition of crime of violence for career offender, §2L1.2, and related provisions, at minimum it should require an overt act that presents a risk of injury. Mere preparatory action – *e.g.*, reconnoitering, planning, obtaining tools to commit the offense – is not sufficiently risky to be considered violent. *See United States v. Burghardt*, 796 F. Supp. 2d 996, 1003 (D. Neb. 2011). An overt act requirement would be consistent with the Supreme Court’s decision in *James v. United States*, 550 U.S. 192 (2007) – the only Supreme Court decision that addresses whether an inchoate offense qualifies as a violent felony. In *James*, the Court held that Florida’s attempted burglary statute qualified as a violent felony. The statute at issue required that the burglar take “an overt act directed toward entering

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<sup>36</sup> This offense is punishable by imprisonment in the state prison for not more than three years, or by a fine of not more than five hundred dollars and imprisonment in a jail or house of correction for not more than one year.

<sup>37</sup> *See also United States v. Martinez*, 602 F.3d 1166, 1175 (10th Cir. 2010) (affirming application of career offender guideline to attempt offense after concluding it was not a violent felony for purposes of ACCA because “the inclusion of attempt offenses [in the guideline’s commentary] as crimes of violence depends on empirical data”); *United States v. Gore*, 636 F.3d 728, 737 (5th Cir. 2011) (assuming that Commission had empirical data to support inclusion of conspiracy as a crime of violence).

or remaining in the structure.” *Id.* at 202. Based on *James*, some courts have required that an attempt offense include a substantial step or overt act toward completion of the crime to be considered violent. See *United States v. Martinez*, 602 F.3d 1166, 1173 (10th Cir. 2010); *United States v. Mansur*, 375 F. App’x 458, 465 (attempted robbery counted as violent felony because it required defendant to take a substantial step); *United States v. Davis*, 689 F.3d 349, 356 (4th Cir. 2012). Even before *James*, courts held that attempt without a substantial step did not present enough of a risk of injury to be counted as a violent offense. *United States v. Moore*, 108 F.3d 878, 880 (9th Cir. 1997) (to qualify as a violent felony, attempted burglary conviction must be based on statute that requires a substantial step toward completion of the crime).

Because conspiracy and solicitation are even farther removed than attempt from the risk of injury, they should be excluded as crimes of violence in §4B1.2 and §2L1.2. A conspiracy may be nothing more than an agreement to commit an offense,<sup>38</sup> and a solicitation nothing more than a request for someone to commit the offense or an attempt to communicate with a person about committing an offense. ALI, Model Penal Code § 5.02 (1985) (It is “immaterial” that the actor “fails to communicate with the person he solicits ... if his conduct was designed to effect such communication.”).

The government claims that conspiracy should count as a crime of violence because the Supreme Court has stated that “conspiracy poses a ‘threat to the public’ over and above the threat of the commission of the relevant substantive crime.” *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).<sup>39</sup> The Tenth Circuit found that same argument unpersuasive. See *United States v. Fell*, 511 F.3d 1035, 1042-43 (10th Cir. 2007). The Tenth Circuit explained:

Notably, the Court did *not* opine that all conspiracies pose a greater threat of *physical harm* to others than the threat posed by the substantive offense. It simply observed that individuals involved in conspiracies are more likely to engage in additional and more complex criminal activity. *Id.* Although *Jimenez Recio* characterizes concerted criminal activity as posing a greater overall threat to the social order, the Court did not identify that threat as implicating a potential risk of physical injury to others, the heart of the question before us.

*Id.* The Tenth Circuit rejected the notion that *Jimenez Recio* shed any light on whether conspiracy to commit second degree burglary under Colorado law was a violent felony, and ultimately concluded it did not. Even though it included an overt act, such an act could occur a

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<sup>38</sup> See *United States v. White*, 571 F.3d 365 (4th Cir. 2009), abrogated by *Johnson v. United States*, 135 S. Ct. 2551 (2015).

<sup>39</sup> Letter from Jonathan Wroblewski, U.S. Dep’t of Justice, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 9 (Oct. 30, 2015).

considerable distance from the location of the substantive offense and thus could not be said to create a risk of physical injury.

### **VIII. Expansive Definitions of Crimes of Violence are Not Necessary to Ensure that Severe Sentences are Imposed on the Most Violent Individuals.**

In addition to our specific comments about the proposed amendments, we also want to remind the Commission that to accomplish its goal of ensuring that truly dangerous individuals receive long sentences, the Commission need not adopt over-inclusive definitions of crimes of violence. The vast majority of individuals subject to increased offense levels because of prior convictions for what has been characterized as “crimes of violence” were convicted in federal court of a nonviolent offense – either illegal reentry or a drug offense.<sup>40</sup> Because overly broad definitions sweep in individuals who are not the most dangerous persons responsible for violent crimes, imposing long periods of imprisonment simply contributes to racial disparity in sentencing,<sup>41</sup> prison crowding,<sup>42</sup> and the negative impact of mass incarceration on poor communities.<sup>43</sup>

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<sup>40</sup> In FY2014, three quarters of persons sentenced under the career offender guideline were sentenced for a drug trafficking offense, USSC, *Quick Facts: Career Offenders* (2014); 24.2% of individuals sentenced in 2014 primarily fell under the illegal reentry guideline. USSC, *2014 Sourcebook of Federal Sentencing Statistics*, tbl. 17. More than a quarter of the individuals sentenced under §2L1.2 in FY 2014 had their sentences enhanced for a prior conviction for a felony that is (b)(1)(A)(i) a drug trafficking offense for which the sentence imposed exceeded 13 months or (b)(1)(A)(ii) a crime of violence. USSC, “*Crime of Violence*” and *Related Issues Public Data Briefing* (Nov. 2015).

<sup>41</sup> M. Marit Rehavi & Sonja Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1323 (2014) (criminal history is among the factors that explains the majority of the racial disparity in sentencing); *id.* at 1332 (“black defendants, on average, have more extensive criminal histories”). In FY 2014, 59.7% of persons sentenced under the career offender guideline were Black; 63.7% sentenced under the Armed Career Criminal Act were Black; 59% of persons sentenced for a violation of 18 U.S.C. § 922(g), and sentenced under §2K2.1 with a base offense level of 20, 22, 24 or 26 were Black; and 97.5% of persons sentenced for illegal reentry under §2L1.2 with an offense level increase for a conviction for a felony that is (b)(1)(A)(i) a drug trafficking offense for which the sentence imposed exceeded 13 months or (b)(1)(A)(ii) a crime of violence were Hispanic. USSC, “*Crime of Violence*” and *Related Issues Public Data Briefing* (Nov. 2015).

<sup>42</sup> The PEW Charitable Trusts recently released a report showing that the average time served rose 293% for immigration offenses and 153% for drug offenses from 1988 to 2012. Pew Charitable Trusts, *Prison Time Surges for Federal Inmates* (2015), [http://www.pewtrusts.org/~media/assets/2015/11/prison\\_time\\_surges\\_for\\_federal\\_inmates.pdf](http://www.pewtrusts.org/~media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf). The 16-level increase in §2L1.2, the career offender guideline, and other guidelines that double count criminal history have undoubtedly played a role in those increases.

<sup>43</sup> Emily von Hoffmann, *How Incarceration Infects a Community*, The Atlantic (2015), <http://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/> (discussing research linking prison admission rates to neighborhood health); Mark Hatzenbuehler et al.,

Individuals who commit violent offenses and/or have prior convictions for violent crimes are subject to other statutory provisions that call for extremely high sentences. For example, a person who commits a violent felony as defined in 18 U.S.C § 3559 and has two other prior violent felonies is subject to a mandatory life sentence. 18 U.S.C § 3559(c). Even a person who has no prior felony conviction but who commits a crime of violence such as robbery with a firearm is subject to the sentence imposed for the underlying crime of violence as well as a consecutive mandatory sentence that is not less than 5, 7, or 10 years. 18 U.S.C. § 924(c).<sup>44</sup> With an average guideline range of 126 to 132 months added to a consecutive sentence of 5 to 10 years, the guidelines and statute combined provide for a sentence of 15 to 20 years – very close to the range under the career offender guideline.<sup>45</sup> And those who commit true crimes of violence, such as murder, rape, and armed robbery, are subjected to higher offense levels under the guidelines. If neither mandatory minimum statutes nor the guideline calculation call for a sufficiently severe sentence, the guidelines have numerous upward departures to account for violence – present and past –including departures for underrepresentation of criminal history, death, physical injury, extreme psychological injury, abduction or unlawful restraint, weapons and dangerous instrumentalities, extreme conduct, and violent street gangs.<sup>46</sup> Accordingly, expansive definitions of crimes of violence are not necessary to ensure that violent individuals are incapacitated.

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*The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High- Incarceration Neighborhoods*, 1 Am. J. Pub. Health 138 (2015).

<sup>44</sup> In FY 2014, more than one-third (35.7%) of persons convicted of robbery were also sentenced under 18 U.S.C. § 924(c). USSC, *Quick Facts: Robbery Offenses* (2014).

<sup>45</sup> A person convicted of robbery with two prior crimes of violence or drug trafficking offenses faces an offense level of 32, Criminal History score of VI, with a range of 210-262 months.

<sup>46</sup> See USSG §4A1.3; §5K2.0. The government's claim at the November hearing that it has historically been unable to obtain such departures when the categorical approach precludes a finding that a prior conviction is a crime of violence (USSC, *Transcript of Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines* 91 (Nov. 5, 2015)), does not warrant expansive definitions of crimes of violence or adopting an exception to the categorical approach. Under the current scheme, the government is free to bring in as much evidence and as many witnesses as it wants at a hearing to show that the defendant is a violent person who must be incapacitated for a lengthy period of time. That the government rarely secures upward departures (although no data is available on how often an upward departure is sought and denied) speaks volumes about how the current guidelines are far too severe and how the government's expressed concerns exaggerate the issues.



**IX. The Commission Should Make Retroactive the Elimination of the Residual Clause and Any Other Change that Reduces the Term of Imprisonment Recommended by the Guidelines.**

The Commission has requested comment on whether the proposed amendment to the definition of crimes of violence should be made retroactive. In the past the Commission has addressed retroactivity during a separate comment period after voting on an amendment, and in anticipation of the Commission following a similar course with this proposed amendment, our comments here are brief. Defenders believe that all of the factors the Commission considers in deciding whether to make an amendment retroactive – the purpose of the amendment; the magnitude of the change in the guideline range; and the difficulty of applying the amendment to past cases – support retroactivity.

Retroactive application of an amendment that eliminates the residual clause is an important step in ensuring fairness and consistent application of the guidelines and statutory provisions. As it stands now, a person with three prior convictions who qualified for a mandatory minimum sentence may be resentenced because a prior conviction no longer qualifies under *Johnson*. Under §2K2.1, he would then receive the same offense level as a person who has only two prior convictions, one of which is considered a violent crime only because of the residual clause. To promote respect for the law and provide for a more just punishment, both should be eligible for a reduction in sentence. The same holds true for persons whose sentence was increased under other guideline provisions using the residual clause, such as §4B1.2.

The magnitude of the change in the guideline range is self-evident. The Commission has stated that it does not make retroactive amendments that “generally reduce the maximum of the guideline range by less than six months.” §1B1.10, comment. (backg’d.). These amendments will exceed that six month mark. Justice Scalia observed that “years of prison hinge on the scope of ACCA’s residual provision.”<sup>47</sup> The same holds true for the guidelines’ residual provisions.

As to identifying those individuals eligible for relief under a retroactive amendment, Defenders have taken on that responsibility and have been working with the courts since June. In addition, many individuals have self-identified by filing petitions for habeas relief. In some courts, relief is being granted to defendants who are filing initial habeas petitions pursuant to 28 U.S.C. § 2255 because the government has conceded that *Johnson* applies to the residual clause of the guidelines. In other districts, litigation has not been as active. To ensure that all individuals subjected to enhanced sentences have an opportunity for a sentencing reduction, retroactivity is the best solution. We look forward to providing additional comments on this matter should the Commission vote to eliminate the residual clause from the guidelines.

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<sup>47</sup> *James v. United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting).

Honorable Patti B. Saris

November 25, 2015

Page 18

**X. Conclusion**

As always, we appreciate the opportunity to submit comments on the Commission's proposed amendment. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,  
/s/ Marjorie Meyers  
Marjorie Meyers  
Federal Public Defender  
Chair, Federal Defender Sentencing  
Guidelines Committee

Enclosures

cc (w/encl.): Hon. Charles R. Breyer, Vice Chair  
Dabney Friedrich, Commissioner  
Rachel E. Barkow, Commissioner  
Hon. William H. Pryor, Commissioner  
Jonathan J. Wroblewski, Commissioner *Ex Officio*  
J. Patricia Wilson Smoot, Commissioner *Ex Officio*  
Kenneth Cohen, Staff Director  
Kathleen Cooper Grilli, General Counsel

**Statement of Molly Roth**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission**

**Public Hearing on Proposed Amendments to**

**Definitions of Crimes of Violence**

**November 5, 2015**

My name is Molly Roth. I am an Assistant Federal Public Defender for the Western District of Texas. I thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the definitions of crime of violence.

Defenders believe the Commission should:

- reconsider whether the purposes of sentencing are served by enhancing offense levels based upon prior convictions
- instead of focusing on redefining crimes of violence and using prior convictions to increase offense levels in §2K1.1, §2L1.2, and other guidelines, prioritize simplifying the guidelines and leaving Chapter 4 to address prior convictions
- narrow the reach of the career offender guideline to satisfy only the minimum requirements of 28 U.S.C. § 994(h)<sup>1</sup> and the elements clause in 18 U.S.C. § 924(e)(2)(B)(i); if state drug offenses must be included, count only those that are analogous to the required federal offenses and punishable by a maximum term of ten years or more, consistent with 18 U.S.C. § 924(e)(2); count only convictions that are classified as felonies by the convicting jurisdiction, *see* 21 U.S.C. § 802(13), receive three points under §4A1.1(a), unless the only reason they receive three points is because of a sentence imposed on revocation pursuant to §4A1.2(k), and for which the defendant actually served at least one year and one month in prison.<sup>2</sup>
- issue a report to Congress about the need to repeal the career offender provision of the Sentencing Reform Act, 28 U.S.C. § 994(h), because it is incompatible with the empirical research, the feedback the Commission receives from the courts, and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

To the extent the Commission thinks it necessary to use prior convictions to increase offense levels, it should do so only for those offenses that have as an element the use, attempted

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<sup>1</sup> *United States v. Knox*, 573 F.3d 441, 449 (7th Cir. 2009) (discussing how Congress did not intend to include § 846 conspiracy offenses in the career offender guideline); *United States v. Piper*, 35 F.3d 611, 618 (1st Cir. 1994) (discussing cases recognizing that the Commission included within the career offender guideline offenses not required under § 994(h)).

<sup>2</sup> The Commission may make such a change to the career offender guideline for the same reason that it chose to apply the time period limitations and related cases rules in §4A1.2(a) and (e). Congress anticipated that the Commission would place appropriate limitations on the qualifying offenses when it opted to issue a directive to the Commission rather than adopt a fixed mandatory minimum. S. Rep. 98-225, at 176 (1983).

use, or threatened use of physical force against the person of another. If it believes that enumerated offenses are necessary, the Commission should not promulgate new definitions that will lead to more complexity and litigation. Instead, it should keep the current list in place, but remove burglary because it is a crime against property that rarely results in any physical injury. A narrower set of enumerated offenses will help foster some level of proportionality in guideline calculations. If the defendant's prior conviction actually involved a physical injury and that conviction warrants a longer period of incarceration, the court is always free to depart upwardly and impose a longer sentence under §4A1.3(a).

The Commission also should only count those convictions that are considered felonies or classified at a higher grade under state law, receive three points under §4A1.1(a), unless the only reason they receive three points is because of a sentence imposed on revocation pursuant to §4A1.2(k), and for which the defendant actually served at least one year and one month in prison.

**I. Neither Empirical Evidence nor the Purposes of Sentencing Support Offense Level Enhancements for Crimes of Violence.**

Defenders believe that rather than focus on defining the prior crimes used to increase sentence length, the Commission should seek to mitigate the cumulative impact of criminal history by reassessing the scope and severity of guidelines that use past offenses to enhance offense levels, and advise Congress to remove, or at least narrow, 28 U.S.C. § 994. We think it is time to cease punishing individuals multiple times for the same conduct by “placing such heavy emphasis on the defendant’s prior record – which is already accounted for in the defendant’s criminal history category.”<sup>3</sup> The Commission should also acknowledge that enhancing sentences for prior “crimes of violence” often results in sentences that do not appropriately balance the multiple purposes of sentencing and result in sentences higher than necessary, in violation of 18 U.S.C. § 3553(a).

Individuals who received lengthy terms of imprisonment for violent crimes are often placed in higher criminal history categories. Even if they are not, the guidelines encourage judges to impose upward departures in cases where the criminal history “substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” USSG §4A1.3(a)(1). To add additional points as specific offense characteristics, or to treat individuals as career offenders, results in sentences greater than necessary to achieve the purposes of sentencing.

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<sup>3</sup> Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 Drake L. Rev. 575, 589 (2009).

**A. No empirical evidence supports using prior convictions to increase offense levels.**

Congress did not base the career offender directive on empirical evidence. Nor has the Commission provided any empirical support for enhancements under §2K2.1, §2L1.2, or other guidelines that increase offense levels based upon prior convictions.

Congress originally considered enacting career offender provisions as a statute directed toward judges. *United States v. Sanchez*, 517 F.3d 651, 663-64 (2d Cir. 2008) (discussing history behind 28 U.S.C. § 994(h)). Instead, Congress chose to delegate the matter to the Commission, anticipating that the Commission would “rational[ly] implement” a career-offender guideline that the Commission could revise “over time.” *Id.* at 664 (quoting S. Rep. No. 98-225 (1983)).

History shows that the Commission did not base the guideline on empirical evidence. Unlike other guidelines, the career offender guideline was not based on past practice.<sup>4</sup> And the Commission’s own data show that the guideline is too harsh.<sup>5</sup> Yet the Commission has failed to revise the Guideline to reflect those studies or data from the courts,<sup>6</sup> even though such revision is what Congress anticipated when it enacted § 994(h) rather than a mandatory statute directed at courts.

Section 2K2.1(a)(2) also lacks support in the empirical data. The base offense level of 24 in §2K2.1(a)(2) for a defendant with at least two felony convictions for a crime of violence or a controlled substance offense is double that of the original base offense level of 12, which applies if the defendant had previously been convicted of any felony offense. That dramatic increase, added to the guidelines in 1991,<sup>7</sup> was contrary to empirical evidence the Commission had produced, which concluded that “[t]he length of sentence imposed does not seem strongly correlated with the existence of prior firearms or drug-related offense or convictions for crimes of violence.”<sup>8</sup> The reason for amendment merely stated that the offense levels were changed to “more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substances offenses.”<sup>9</sup> The

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<sup>4</sup> See USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 44 (1987) (“much larger increases are provided for certain repeat offenders” under §4B1.1 than under pre-Guideline practice).

<sup>5</sup> See part III, *infra*.

<sup>6</sup> Amy Baron-Evans et al., *Deconstructing the Career Offender Guidelines*, 32-40 (June 2008).

<sup>7</sup> USSG, App. C, Amend. 374 (Nov. 1, 1991).

<sup>8</sup> USSC, *Firearms and Explosive Materials Working Group Report* 19 (Dec. 1990).

<sup>9</sup> USSG, App. C, Amend. 374 (Nov. 1, 1991).

Commission made no mention of the other statutory purposes of sentencing and provided no explanation as to how the increase resulted in sentencing ranges “consistent with the purposes of sentencing” in 18 U.S.C. § 3553(a)(2). 28 U.S.C. § 994(m).

Even assuming the 1991 amendment was designed to promote proportionality between the guidelines and the Armed Career Criminal Act, the Commission’s current proposal would do the opposite. Under *Johnson*, the only offenses that may now qualify a person for an ACCA mandatory minimum sentence are those that have “as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, or involves use of explosives.” Yet, the Commission’s proposal would expand the reach of §2K2.1 by adding more enumerated offenses than are set forth in 18 U.S.C. § 924(e). Under the Commission’s proposal, a person convicted of possessing a firearm after having been convicted of a felony who has three prior convictions for reckless assault would have a higher guideline range (77-96 months) than a person with two prior convictions for murder (63-78 months).<sup>10</sup>

The 16-level enhancement in §2L1.2 based on a crime of violence and other offenses also lacks empirical support and is not justified by the purposes of sentencing.<sup>11</sup> As several commentators have explained:

The Commission did no study to determine if such sentences were necessary – or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion. The 16-level increase, therefore, is a guideline anomaly – an anomaly with dire consequences.

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<sup>10</sup> The individual with the reckless assault convictions would have an offense level of 24 and Criminal History category of IV (assuming 3 points for each offense), whereas the individual with two murder convictions would have an offense level of 24 and Criminal History category of III.

<sup>11</sup> In the reason for amendment, the Commission stated:

This amendment adds a specific offense characteristic providing an increase of 16 levels above the base offense level under §2L1.2 for defendants who reenter the United States after having been deported subsequent to a conviction for an aggravated felony. Previously, such cases were addressed by a recommendation for consideration of an upward departure. The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.

Subsequently, the Commission attempted to diminish “some of the harshness of [this guideline] by providing gradations of enhancements, from 8 to 16 levels depending on the perceived seriousness of the prior felony.” Today, the sixteen-level enhancement is reserved for drug-trafficking offenses for which the sentence imposed exceeded thirteen months, crimes of violence, firearms offenses, child-pornography offenses, national-security or terrorism offenses, human-trafficking offenses, or alien-smuggling offenses. Nevertheless, application of the guideline remains problematic for many defendants. First, by placing such heavy emphasis on the defendant’s prior record – which is also accounted for in the defendant’s criminal history category – the guideline effectively punishes the defendant twice for the same misconduct. The Commission has never explained what penological goals are furthered by such double counting. Second, a sixteen-level enhancement – which increases the sentence by anywhere from five to fourteen times – seems far out of proportion to any reasonable assessment of dangerousness.

Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important Role for District Courts*, 57 Drake L. Rev. 575, 590-91 (2009) (quoting *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005) and Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime?: A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent’g Rep. 275, 275 (1996)).<sup>12</sup>

Because neither §2K2.1 nor §2L1.2 are grounded in empirical evidence or national experience, the Commission should not feel bound to continue double counting prior convictions in criminal history and offense level.<sup>13</sup> Instead of focusing on redefining crimes of violence, the Commission should prioritize simplifying the guidelines and leaving Chapter 4 to address prior convictions.<sup>14</sup> As to the career offender guideline, the Commission should narrow its reach in accordance with empirical data and seek the repeal of 28 U.S.C. § 994(h).

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<sup>12</sup> See also *United States v. Garcia-Jaquex*, 807 F. Supp. 2d 1005, 1011-1015 (discussing lack of empirical support for §2L1.2(B)(1) and how double-counting of prior convictions by using them to enhance criminal history and offense level “places excessive and unwarranted emphasis on the defendant’s prior acts instead of placing the focus where it should be – on the instant offense.”). See also Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Reentry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C.L. Rev. 719, 748 (2010) (discussing Commission’s failure to articulate a purpose for its prior conviction scheme in §2L1.2).

<sup>13</sup> *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

<sup>14</sup> The Commission is not obliged to model a guideline after statutory language or pile on specific offense characteristics to reach the statutory maximum sentence. While Congress directed the Commission to



**B. Counting criminal history in the offense level does not serve the purposes of sentencing.**

From the first version of the guidelines to the present day, the introductory commentary to Chapter Four sets forth how the criminal history score is relevant to the four purposes of sentencing:

The Comprehensive Crime Control Act sets forth four purposes of sentencing. (*See* 18 U.S.C. § 3553(a)(2)). A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

USSG Ch. 4, Pt. A, intro. comment.

Because the criminal history category was designed to promote the four purposes of sentencing, early versions of the guidelines contained few offense level enhancements for prior convictions.<sup>15</sup> Those that did were minuscule compared to the present day. For example, §2L1.2, had a base offense level of 6 and a 2-level increase if the defendant previously had

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promulgate guidelines that are “consistent with all pertinent provisions of any Federal statute,” 28 U.S.C. § 994, that directive is satisfied by §5G1.1, which addresses how the “statutory authorized maximum sentence, or a statutorily authorized minimum sentence, may affect the determination of a sentence under the guidelines.” USSG §5G1.1 comment. *See also Kimbrough*, 552 U.S. at 103 (Sentencing Reform Act “says nothing about the appropriate sentences within [statutory maximum and minimum sentences], and we decline to read any implicit directive into that congressional silence”). When Congress wanted the Commission to set penalties “at or near” the statutory maximum, it knew how to say so. *Id.* at 103. Nowhere in the legislation that increased penalties for 8 U.S.C. § 1326 or 18 U.S.C. § 924(e) did Congress direct the Commission to set specific penalties. The Commission implicitly recognized how much discretion it had on setting offense levels when, in 1988, Congress set a maximum term of imprisonment of 15 years for a person who reentered after being convicted of an aggravated felony. Pub. L. No. 100-690 (1988). In response, the Commission added an upward departure provision, but did not add offense level enhancements for aggravated felonies. USSG App. C, Amend. 193 (Nov. 1, 1989).

<sup>15</sup> The criminal history score has a long history of producing sentences longer than necessary to serve the purposes of sentencing. The Commission’s data shows that criminal history issues have been the number one reason given for downward departures from the guidelines for years. USSC, *Interactive Sourcebook* tbl. 25, FY 2006-2014 (“criminal history issues” cited in 36.6% of downward departure cases).

unlawfully entered or remained in the United States. The 2-level enhancements applied when the previous entry resulted in deportation with or without a conviction. The commentary noted the adjustment applied in addition to any points added to the criminal history score. USSG §2L1.2, comment. (n.1). Section 2K2.1 contained no offense level enhancement for prior convictions.

### **C. General deterrence is not served by longer sentences.**

The most recent empirical evidence shows no support for the proposition that longer sentences deter others from committing crimes. As the Commission is well aware, “[t]he certainty of being caught is a vastly more powerful deterrent than the punishment.”<sup>16</sup> And a recent comprehensive research study by the Brennan Center for Justice found that “increased incarceration had no statistically significant effect on reducing violent crimes.”<sup>17</sup>

Three National Research Council studies concluded that “insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects.”<sup>18</sup> “Newly published research, which considered a multitude of theories and collected extensive data on the entire population of North Carolina between 2001 and 2005 also shows that “severity of punishment seems to have no influence at all” on deterring violent crimes.<sup>19</sup> The study’s authors conclude: “Instead of focusing on expensive prison sentences, which to a large extent are not significant, government focus should be on rehabilitation, decreasing poverty, and improving social controls.”<sup>20</sup>

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<sup>16</sup> National Institute of Justice, *Five Things About Deterrence* (Sept. 2014), <http://www.nij.gov/fivethings/pages/deterrence.aspx>. See also Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013) (“[T]here is little evidence that increases in the length of already long prison sentence yield general deterrent effects that are sufficiently large to justify their social and economic costs.”); Gary Kleck & J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a “Collective Wisdom”?*, 59 *Crime & Delinq.* 1006, 1031-33 (2013) (deterrent effect of punishment “does not consistently increase with punishment levels or diminish with decreased punishment levels”).

<sup>17</sup> Brennan Center For Justice, *What Caused the Crime Decline* 22 (2015).

<sup>18</sup> National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 90 (2015).

<sup>19</sup> Pater-Jan Engelen, et al., *What Determines Crime Rates? An Empirical Test of Integrated Economic and Sociological Theories of Criminal Behavior*, *Soc. Sci. J.* (Article in Press) (2015).

<sup>20</sup> *Id.*

**D. Increasing offense levels based upon prior convictions does not serve the goal of specific deterrence or protect the public.**

The need for selective incapacitation to protect the public from further crimes of the defendant is served by the criminal history score, not the offense level. The Commission's research shows that the criminal history score is a good measure of the risk of recidivism.<sup>21</sup> We are not aware of any research that links prior conviction offense level increases to recidivism.

The Commission's data also shows that individuals with prior convictions that qualify for career offender status do not have high rates of recidivism for violent crime. In its Fifteen Year review, the Commission reported that only 12.5% of the recidivating events for all individuals falling with Category VI were a "serious violent offense," defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses.<sup>22</sup> The largest proportion of recidivating events (38.3%) for individuals in Category VI was probation or supervised release revocations, which can be anything from failing a drug test to failing to file a monthly report or to report a change of address.<sup>23</sup>

Research shows that "imprisonment does not have special powers in persuading the wayward to go straight."<sup>24</sup> A selective incapacitation theory should be aimed at incarcerating a person only as long he or she can reasonably be expected to continue to pose a danger. The age/crime correlation shows that keeping individuals over 30 locked away for long period of time is unnecessary. Young adults, specifically those between the ages of 15 and 24, commit the vast majority of crimes. As individuals grow older, especially as they reach middle age and older, the likelihood of engaging in crime declines.<sup>25</sup>

The idea that incapacitation is needed to protect the public is particularly questionable given that the vast majority – 73% in FY 2014 – of individuals receiving the career offender enhancement were convicted of a drug offense.<sup>26</sup> The enhancements sweep too broadly and fail to focus on the most dangerous individuals.

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<sup>21</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004).

<sup>22</sup> *Id.* at Ex. 13.

<sup>23</sup> *Id.*

<sup>24</sup> Francis Cullen, et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Prison J.* 48S, 51S (2012).

<sup>25</sup> Brennan, *supra* note 17, at 58; National Research Council, *supra* note 18, at 145.

<sup>26</sup> USSC, *2014 Sourcebook of Federal Sentencing Statistics* tbl. 22 (2014).

**E. The retributive or “just deserts” purpose of punishment does not warrant sentence increases based upon the nature of the past crime.**

Under the Commission’s historical view of “just deserts,” “punishment should be scaled to the offender’s culpability and the resulting harms.”<sup>27</sup> This rationale has been used to justify using prior convictions to increase the offense level. That rationale, however, ignores a crucial research finding that “all evidence on the effect of imprisonment on reoffending points to either no effect or a criminogenic effect.”<sup>28</sup> The criminogenic “effect increased with longer amounts of time served.”<sup>29</sup> Because many individuals convicted of crimes of violence have already served periods of incarceration, the criminogenic effect of those past sentences may well have contributed to the current offense, thereby undercutting the rationale of just deserts.<sup>30</sup>

The one size fits all approach of counting intentional crimes like murder the same as reckless aggravated assault also undermines any rationale of just deserts. The criminal justice system has long recognized that individuals who act intentionally are more culpable than those who are reckless.<sup>31</sup> As discussed in more detail below, any prior criminal convictions used to increase offense levels should at least have a mens rea of intentionality.

Some people may argue that long periods of incarceration serve the needs of crime victims for retribution. No evidence supports that belief. But there is evidence to the contrary. For example, “[a] survey of Iowa burglary victims found 81 percent wanted restitution, 76 percent wanted community service, and only 7 percent wanted a prison sentence of a year or more.”<sup>32</sup> Restorative justice also teaches us that victims have needs other than incarceration. They want to learn about why the offense happened, feel more in control, feel less isolated, receive some form of restitution, and deal with trauma that occurs as a result of the crime and the criminal justice process.<sup>33</sup> In any event, any retributive purpose of sentencing flowing from the crime of violence is served at the time of the original sentencing.

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<sup>27</sup> USSG, Ch. 1, Pt. A. See Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purpose of Punishment*, 6 Buff. Crim. L. Rev. 1043, 1064 (2003).

<sup>28</sup> National Research Council, *supra* note 18, at 150.

<sup>29</sup> *Id.* at 194.

<sup>30</sup> *Id.* at 150.

<sup>31</sup> *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

<sup>32</sup> Gene M. Lutz et al., Iowa Crime Research Initiative, *The 1997 Iowa Adult Crime Victimization Survey* (Apr. 1998).

<sup>33</sup> See generally Howard Zehr, *The Little Book of Restorative Justice* 14-15 (2002).

**F. The rehabilitative purposes of sentencing cannot support a sentence of imprisonment.**

The Supreme Court held in *Tapia v. United States*, 131 S. Ct. 2382 (2011), that neither the statutory purposes of sentencing in 18 U.S.C. § 3553(a)(2) nor the Commission's organic statute permit the use of imprisonment as a means of promoting rehabilitation or correctional treatment. Accordingly, this purpose of sentencing is in no way served by increasing offense levels based upon prior criminal history.

**II. In Making Decisions on How to Use Crimes of Violence to Increase Sentence Length, the Commission Should be Mindful of the Disparate Impact such Sentences have on People of Color.**

Black individuals bear the brunt of the severe enhancements under §2K21.1 and §4B1.1 because of increased exposure to policing rather than increased involvement in violent crime. In FY 2014, 60% of individuals sentenced under the career offender guideline were black compared to 21.5% white.<sup>34</sup> Of those who received a base offense level of 24 under §2K2.1 (at least two felony convictions of either a crime of violence or a controlled substance offense), 66.2% were black compared to 22% white.<sup>35</sup> And, of course, Hispanic individuals bear the brunt of §2L1.2. Of the individuals receiving the 16-level increase under §2L1.2, 97.7% were Hispanic.<sup>36</sup>

That impact is not because either group is more involved in violent crime. In fact, the involvement of black individuals in violent crime has dropped since the early 1990s. Yet, as the National Research Council's Committee on Causes and Consequences of High Rates of Incarceration observed: "even though participation of blacks in serious violent crimes has declined significantly, disparities in imprisonment between blacks and whites have not fallen by much; the incarceration rate for non-Hispanic black males remains seven times that of non-Hispanic whites."<sup>37</sup> Recent research from the Bureau of Justice Statistics also shows racial disparity in the number of black and Hispanic prisoners sentenced for violent offenses compared to whites.<sup>38</sup>

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<sup>34</sup> USSC Monitoring Dataset.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> National Research Council, *supra* note 18, at 60.

<sup>38</sup> Bureau of Justice Statistics, *Prisoners in 2014* 16 (2015).

By using prior convictions to enhance offense levels and criminal history, the Commission replicates disparities that occur in the state systems. As one commentator recently explained:

[T]he criminal records of those subject to sentencing in federal court have been shaped at least in part by experiential differences in exposure to early and repeated police contact. As such, the “prior record” is hard to sustain as an objective and true measure of either criminal propensity or punishment desert.

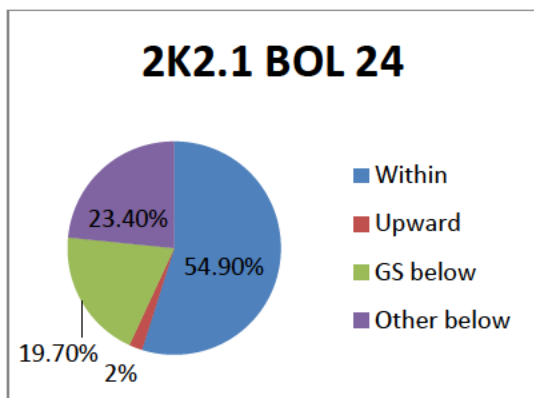
Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 Am. J. Crim. L. 91, 119 (2013).

To avoid the disparity arising from counting prior convictions, the Commission should carefully narrow the reach of the career offender guideline and other guidelines that increase offense levels based upon prior convictions.

### III. Commission Data Show that §2K21.1(a)(2), §2L1.2(b)(1)(A), and §4B1.2 Often Call for Sentences Higher than Judges Deem Necessary to Satisfy the Purposes of Sentencing.

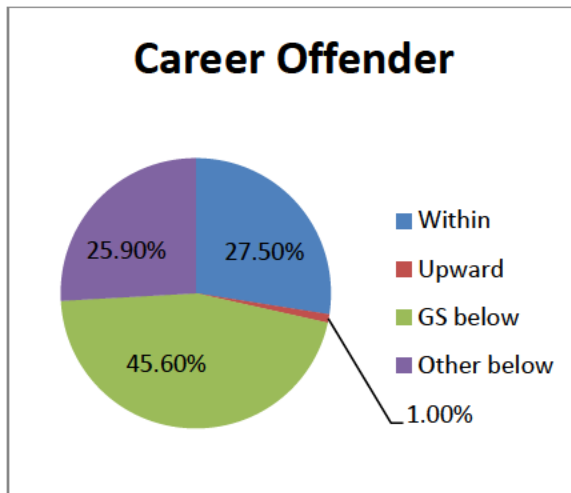
While Defenders do not have access to the data to determine the nature of the prior convictions that lead to the base offense level of 24 in §2K2.1(a)(2), the 16-level enhancement under §2L1.2, or application of the career offender guideline, the available data continues to show that those guidelines are considered too high in a sizable percentage of cases.

In FY 2014, only 54.9% of individuals sentenced under §2K2.1 with a base offense level of 24 were sentenced within the guideline range.<sup>39</sup> Of the below guideline range sentences, 19.7% were government sponsored and 23.4% were other below guideline range sentences.

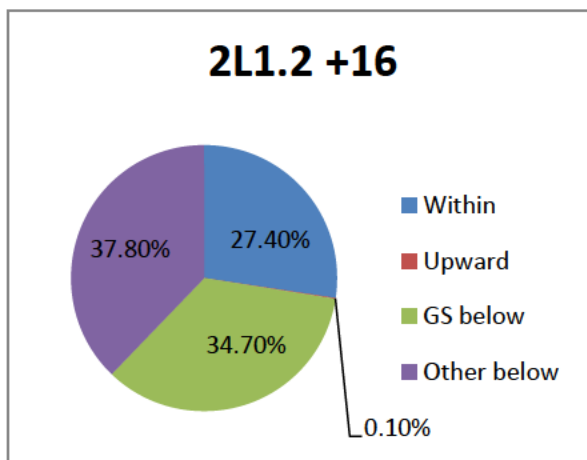


<sup>39</sup> USSC Monitoring Dataset.

For career offenders, the below guideline range was even greater. Only 27.5% percent of individuals with career offender status were sentenced within the range. Of the below guideline range sentences, 45.6% were government sponsored and 25.8% were other below range sentences.



Similar below guideline rates appear for those sentenced under §2L1.2 with a 16-level increase under §2L1.2(b)(1)(A). Only 27.4% percent of individuals subject to the 16-level enhancement were sentenced within the range. Of the below guideline range sentences, 34.7% were government sponsored and 37.8% were other below range sentences.



#### IV. The Commission Should Remove the Residual Clause from the Guidelines.

We agree with the Commission's proposal to eliminate the residual clause because, as the government has conceded in litigation,<sup>40</sup> it suffers from the same lack of clarity as the residual clause in 18 U.S.C. § 924(e) that the Supreme Court struck down in *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), and that formed the basis for USSG §4B1.2(a)(2). Regardless of whether the constitutional vagueness doctrine applies to advisory sentencing guidelines,<sup>41</sup> the lack of clarity in the residual clause and "uncertainty about how much risk it takes for a crime to qualify" as a crime of violence "invites arbitrary enforcement by judges," *id.* at 2558, which

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<sup>40</sup> See, e.g., *United States v. Townsend*, No. 14-3652 (3d Cir. Aug. 28, 2015) (government 28(j) letter conceding that *Johnson* invalidates residual clause in §4B1.2).

<sup>41</sup> While the Eleventh Circuit has held that the vagueness doctrine does not apply to the guidelines, *United States v. Matchett*, 2015 WL 5515439, at \*8 (11th Cir. 2015), we do not think the Commission must take a position on the constitutional question to justify deleting the residual clause. If, however, the Commission deems it necessary to do so, we would welcome an opportunity to fully brief the legal issue, particularly given the number of career offender cases that the Supreme Court has granted, vacated, and remanded (GVR'd) in light of *Johnson* and the rulings by some courts that 18 U.S.C. § 16 and the guideline residual clause are unconstitutionally vague.

The Court GVR'd at least six direct appeal cases involving §4B1.2. See, e.g., *Banks v. United States*, No. 15-5722, \_\_\_ S. Ct. \_\_\_, 2015 WL 4987655 (Oct. 19, 2015); *McCarthren v. United States*, No. 15-5654, \_\_\_ S. Ct. \_\_\_, 2015 WL 4916396 (Oct. 13, 2015); *Gonzales v. United States*, No. 14-9996, \_\_\_ S. Ct. \_\_\_, 2015 WL 2473125 (Oct. 5, 2015); *Maldonado v. United States*, 135 S. Ct. 2929 (2015); *Smith v. United States*, 135 S. Ct. 2930 (2015); *Vinales v. United States*, 135 S. Ct. 2928 (2015). It has also GVR'd at least five cases filed under 28 U.S.C. § 2255, which raised *Johnson* related challenges to §4B1.2. See *Beckles v. United States*, 135 S. Ct. 2928 (2015); *Denson v. United States*, 135 S. Ct. 2931 (2015); *Jones v. United States*, 135 S. Ct. 2944 (2015); *Jones v. United States*, No. 15-5667, \_\_\_ S. Ct. \_\_\_, 2015 WL 4916474 (Oct. 13, 2015); *Wynn v. United States*, 135 S. Ct. 2945 (2015). Other guideline cases also have been gvr'd in light of *Johnson*. See *Talmore v. United States*, 135 S. Ct. 2937 (2015) (§2K1.1); *Cooper v. United States*, 135 S. Ct. 2938 (2015) (§7B1.1).

The Ninth Circuit has found that the language in 18 U.S.C. § 16(b) "suffers from the same indeterminacy the Supreme Court found in the Armed Career Criminal Act's 'residual clause.'" *Dimaya v. Lynch*, 2015 WL 6123546 (9th Cir. Oct. 19, 2015).

The Eighth Circuit remanded a case to the district court for consideration of a due-process vagueness challenge to the career offender guideline. *United States v. Taylor*, 2015 WL 5918562 (8th Cir. Oct. 9, 2015).

The court in *United States v. Litzy*, 2015 WL 5895199, at \*8 (S.D.W.V. Oct. 8, 2015), found "unpersuasive the notion that the Vagueness Doctrine does not apply to the Guidelines" and ruled that the "same vagueness problems plaguing the ACCA residual closure persist when applying the career offender enhancement's residual clause").



leads to inconsistent application of the guidelines. The guidelines are “the starting point and the initial benchmark” for a sentencing decision to help “secure nationwide consistency,” even if the judge later determines that the guideline recommendation does not meet the purposes of sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007).

The shortcomings of the “common sense” analysis used by many courts to interpret the residual clause provides further support for the Commission to remove the language in §4B1.2 and to delete any reference to 18 U.S.C. § 16(b).<sup>42</sup> As the Court explained in *Johnson*: “common sense is a much less useful criterion than it sounds” and the Court’s previous decisions “failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.” 135 S. Ct. at 2557. Moreover, “common sense” or intuition should not be used to decide whether to take away years of a person’s liberty. See *United States v. Oliveira*, 798 F. Supp. 2d 319, 325 (D. Mass. 2011) (Gertner, J.) (“It is surely troubling that substantial punishment enhancement should turn on as ambiguous a category as the ‘residual’ clause of the ACCA.”). The best solution to the problems caused by the residual clause is to abandon it altogether.

#### **V. New Definitions of Enumerated Offenses Will Inevitably Lead to Confusion and Protracted Litigation Over which State Convictions Fit within the Definitions.**

Our comments here offer only a sampling of the myriad problems with the Commission’s proposed definitions. Rather than simplifying the guidelines, the proposals add to complexity and increase the risk of judges, probation officers, and attorneys coming to different conclusions about the application of the guidelines.

If it creates new definitions, the Commission will be shunning existing case law and forcing probation officers, attorneys, and judges to undergo yet another lengthy analysis of whether a particular statute fits within the Commission’s new definitions. Courts for years have undertaken the arduous task of analyzing the Model Penal Code, state statutes, and treatises, to determine the generic definitions of enumerated offenses and then deciding whether the prior conviction fit the generic definition. Since the Supreme Court’s 2013 decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), more litigation has focused on the divisibility of state statutes that contain definitions broader than the generic definitions. But in many places, for many of the current enumerated offenses, the law is now settled.

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<sup>42</sup> See, e.g., *United States v. Jonas*, 689 F.3d 83, 87 (1st Cir. 2012) (“determination [of whether an offense falls within the residual clause of §4B1.2(a)(2)] hinges on a commonsense assessment of the risk of violence that typically ensues during the commission of the crime”); *United States v. Sonnenberg*, 628 F.3d 361, 366 (7th Cir. 2010) (“best we can do is use common sense and experience” to decide if crime falls within §4B1.2(a)); *United States v. Alexander*, 609 F.3d 1250, 1257 (11th Cir. 2010) (court relies on its “own common sense analysis of whether this conduct poses a serious potential risk of physical injury”).

With new definitions, attorneys, probation officers, and judges, will have to start from scratch: study the new definitions of the enumerated offenses, compare them to state statutes, determine if the state statute fits the enumerated offense definition, and if the state statute is overbroad, determine if it is divisible. This will be a difficult and time-consuming task for experienced lawyers who have spent years studying the generic definitions of current enumerated offenses. More troubling, however, is how new definitions will create more traps for attorneys who do not practice full-time federal criminal trial work and who have constraints on time, resources, and knowledge to be able to determine whether a probation officer is making the right legal analysis in identifying a particular prior conviction as a crime of violence.

One example of how new definitions will make existing case law obsolete and create confusion is the definition of kidnapping. The Commission's proposed definition of kidnapping is:

an offense that includes at least (i) an act of restraining, removing, or confining another, (ii) an unlawful means of accomplishing that act; and (iii) at least one or more of the following aggravating factors: (I) the offense was committed for a nefarious purpose; (II) the offense substantially interfered with the victim's liberty; or (III) the offense exposed the victim to a substantial risk of bodily injury, sexual assault, or involuntary servitude.

The Ninth Circuit has used similar language in defining kidnapping, but lists two key elements in the conjunctive rather than disjunctive: "the generic definition of kidnapping 'encompasses, at a minimum, the concept of a 'nefarious purpose' motivating restriction of a victim's liberty' in addition to 'the unlawful deprivation of another person's liberty of movement.'" *United States v. Marquez-Lobos*, 697 F.3d 759, 761 (9th Cir. 2012). If, as the Commission proposes, unlawful deprivation of another person's liberty of movement through any act of confining, restraining, or removing is sufficient, then the California kidnapping statute, which is quite broad,<sup>43</sup> and which has previously been held not to qualify as a crime of violence, will undoubtedly be the subject of litigation.<sup>44</sup> What is likely to generate litigation about the California offense is the Commission's proposed language: "the offense substantially interfered with the victim's liberty." Does "carr[ying] a person into another . . . part of the same county" through a multitude of means "substantially interfere" with liberty?

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<sup>43</sup> Cal. Code § 207(a) provides: "every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

<sup>44</sup> See *United States v. Moreno-Flores*, 542 F.3d 445, 449 (5th Cir. 2008) (Cal. Code §207(a) "sweeps more broadly than the generic, contemporary meaning of 'kidnapping.'").

The overbreadth of the Commission’s proposed definition of kidnapping also upsets settled law. By defining kidnapping to include (i) an act of restraining, removing, or confining another, (ii) an unlawful means of accomplishing that act; and (iii) substantial interference with the victim’s liberty, the Commission’s definition is more like the Model Penal Code’s definition of misdemeanor false imprisonment: “knowingly restrains another unlawfully so as to interfere substantially with his liberty.”<sup>45</sup> True kidnapping must at least be accomplished through force, threats, or deception and done for some specific purpose.<sup>46</sup> The Commission’s definition, however, contains no such requirements.

New definitions will require yet another round of complex litigation over the meaning of the terms used, and whenever a state statute is broader than the guideline definition, whether it is divisible. Because the definitions are different than set forth in established provisions, such as 18 U.S.C. § 3559(c), the Model Penal Code, or treatises, existing case law will not clarify the meaning of some of the ambiguous terms. The proposed definition of extortion provides another example of the type of issue likely to be litigated if the Commission adopts the proposed new definitions. The Commission’s proposal defines extortion as “obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.” Just as the child pornography guideline has generated litigation over the meaning of a “thing of value,” §2G2.2(b)(3)(B),<sup>47</sup> this definition will result in similar litigation. Extortion is commonly classified as an offense against property,<sup>48</sup> yet “obtaining something of value” could be interpreted to mean obtaining an admission from a person admitting to an illicit love affair.<sup>49</sup>

State definitions of extortion also vary widely and not all state statutes are clearly divisible.<sup>50</sup> For example, Florida contains a definition of extortion considerably broader than the proposed definition:

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<sup>45</sup> *Model Penal Code* § 212.3 (2001).

<sup>46</sup> *Model Penal Code* § 212.1 (2001); Wayne R. LaFave, 3 *Subst. Crim. L.* § 18.1 (2d ed. 2015).

<sup>47</sup> See, e.g., *United States v. Spriggs*, 666 F.3d 1284, 1288 (11th Cir. 2012) (discussing different views of Eighth and Eleventh Circuits on meaning of “expectation of receiving a thing of value”).

<sup>48</sup> LaFave, *supra* note 46, § 20.4

<sup>49</sup> LaFave, *supra* note 46, § 20.4 (citing *Furlotte v. State*, 350 S.W.2d 72, 75 (Tenn. 1961)).

<sup>50</sup> See Iowa Code Ann. § 711.4 (Iowa statute includes threats to wrongfully injury property of another and to withhold testimony or information about a legal claim); *State v. Gant*, 597 N.W. 2d 501, 504-05 (Iowa 1999) (extortion statute covered refusal to provide information about whereabouts of victim’s stolen property unless victim paid money for information); Haw. Rev. Stat. §§ 707-765 – 707-767 (statute includes reputational and other harms that do not require force, fear of physical injury, or a threat of physical injury); S.D. Codified Laws § 22-30A-4 (includes obtaining property by threat to “inflict any other harm which would not benefit the person making the threat”); Cal. Penal Code § 519 (West 2015)

Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree.

Fla. Stat. Ann. § 836.05 (West 2015).

Massachusetts has a similarly broad statute.<sup>51</sup> The Massachusetts extortion statute, which can either be a felony or a misdemeanor, is broader than the proposed definition because it includes a malicious threat “to accuse another of a crime or offence (sic),” or to “injure the person *or property of another*,” as well as the use or threatened use by a police officer or employee of a licensing authority of “the power or authority vested in him,” with “intent thereby to extort money or any pecuniary advantage, or with *intent to compel any person to do any act against his will*.” Because of the breadth of the state statutes regarding extortion, which are typically classified as crimes against property rather than crimes of violence, the Commission’s proposed definition of extortion is fraught with peril.

The proposed definitions of robbery and aggravated assault also provide examples of how difficult it will be to determine the required elements of the offense. The Commission’s proposed definition of robbery borrows from the Fifth Circuit’s: “the misappropriation of

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(includes obtaining property or “an official act of a public officer” by fear caused by threat to expose a secret, report immigration status, or expose or impute “a deformity, disgrace, or crime”).

<sup>51</sup> The Massachusetts statute, Mass. Gen. Laws ch. 265 § 25, provides:

Whoever, verbally or by a written or printed communication, maliciously threatens to accuse another of a crime or offence, or by a verbal or written or printed communication maliciously threatens an injury to the person or property of another, or any police officer or person having the powers of a police officer, or any officer, or employee of any licensing authority who verbally or by written or printed communication maliciously and unlawfully uses or threatens to use against another the power or authority vested in him, with intent thereby to extort money or any pecuniary advantage, or with intent to compel any person to do any act against his will, shall be punished by imprisonment in the state prison for not more than fifteen years, or in the house of correction for not more than two and one half years, or by a fine of not more than five thousand dollars, or both.

property under circumstances involving [immediate] danger to the person.” *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006). While the Fifth Circuit purported to use the definition set forth in LaFave’s treatise, it overlooked how LaFave sets forth eight specific elements of robbery:

Robbery, a common-law felony, and today everywhere a statutory felony regardless of the amount taken, may be thought of as aggravated larceny—misappropriation of property under circumstances involving a danger to the person as well as a danger to property—and thus deserving of a greater punishment than that provided for larceny. Robbery consists of all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished by means of force or putting in fear.

Wayne R. LaFave, *3 Subst. Crim. L.* § 20.3 (2d ed.).

A definition that looks to “circumstances involving immediate danger to the person of another” rather than setting forth specific elements of how the taking of property must be accomplished is even more vague than the residual clause’s term: “serious potential risk of physical injury to another.” The focus on “circumstances” also invites a subjective analysis that is more focused on facts than elements and is inconsistent with the categorical approach.

What “circumstances” present “immediate danger”? Danger means “the possibility that you will be hurt or killed”; “the possibility that something unpleasant or bad will happen”; “a person or thing that is likely to cause injury, pain, harm or loss.”<sup>52</sup> “Immediate” means “happening or done without delay; happening or existing now; important now.”<sup>53</sup> If a person calls a neighbor and says: “*deliver the money to me in two minutes or I will come take it immediately,*” is that a loss that happens quickly enough to be “immediate danger” or must the person be in the presence of the neighbor for the danger to be immediate? If a person is pickpocketed and loses some money, is that danger because “something unpleasant” happened? Depending upon how the courts answer such questions, an offense like larceny from the person could qualify as a crime of violence under the Commission’s proposed definition of robbery.

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<sup>52</sup> *Merriam-Webster*, <http://www.merriam-webster.com>.

<sup>53</sup> *Id.*

The term “deadly weapon” in the aggravated assault proposal also suffers from an ambiguity that will lead to extensive litigation over its meaning. Does it mean the defendant’s hands and feet as the Fifth Circuit ruled or must it be an “object extrinsic to the human body”?<sup>54</sup>

## **VI. Requiring that the State Classify the Offense as a Felony is a Step toward Fairer Sentences.**

The Commission has proposed amending §4B1.2 and related commentary to require that to qualify as a crime of violence or a controlled substance offense, a prior offense must not only be “punishable by imprisonment for a term exceeding one year” but also be “classified as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted.” The Commission also includes as a bracketed option the requirement that the prior offense be classified “at the time the defendant was initially sentenced” as a felony. Defenders support the proposal to include the requirement that the prior offense be classified by the convicting jurisdiction as a felony, but urge the Commission to reject the bracketed language that requires the classification to have occurred when the defendant was initially sentenced.

While Defenders support the proposed amendment, except for the bracketed language, we believe there is an even better approach that would more effectively measure the seriousness of prior offenses and avoid unwarranted disparity. Specifically, in addition to the proposed change that a prior offense be classified as a felony by the convicting jurisdiction, the guidelines also should require that all prior offenses receive three points under §4B1.1(a), unless the only reason they receive three points is because of a sentence imposed on revocation pursuant to §4A1.2(k),<sup>55</sup> and that the defendant actually have served at least one year and one month in prison.

That said, the Commission’s proposed amendment, except for the bracketed language, is an important step in the right direction. The Commission’s proposal (a) would work toward

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<sup>54</sup> The Fifth Circuit recently took a broad approach to the meaning of “deadly weapon.” *United States v. Ucles*, 2015 WL 4480846 (5th Cir. 2015) (“for the purposes of the generic crime of ‘aggravated assault,’ the defendant’s hands and feet may constitute a ‘dangerous’ or ‘deadly weapon,’ provided they are used in a manner known to be capable of producing death or serious bodily injury.”). Other courts have ruled that a “deadly weapon” must be an object “extrinsic to the human body,” not hands or feet. *People v. Aguilar*, 945 P.2d 1204 (Cal. 1997). See generally Christopher Vaeth, *Kicking as Aggravated Assault, or Assault With Dangerous or Deadly Weapon*, 19 A.L.R.5th 823 (originally published in 1994) (collecting cases that reach different conclusions).

<sup>55</sup> Revocation sentences for new conduct are not a good measure of whether the original offense was serious enough to warrant the extreme enhancement of the career offender guideline, or enhancements to offense levels, such as in §2K2.1 and §2L1.2, in addition to criminal history. To the extent a revocation sentence is for *new* conduct, it is not relevant to the seriousness of the original offense – and it is the seriousness of the potentially qualifying offense that is being measured for career offender and Chapter Two enhancements.

better limiting the application of significant sentence enhancements of the career offender guideline and offense level enhancements in Chapter Two to situations where there are serious offenses in a person's past, (b) would help alleviate unwarranted disparity arising from the current definition of felony, and (c) is consistent with congressional intent.

The current definition of felony – which looks to the maximum allowable penalty, rather than sentence imposed, sentence actually served, or even whether the convicting jurisdiction classifies the offense as a felony – allows defendants to be classified as career offenders even when they have never, before their current federal offense, been charged, let alone convicted, of a felony. This is because in many states, including Colorado,<sup>56</sup> Iowa,<sup>57</sup> Maryland,<sup>58</sup> Massachusetts,<sup>59</sup> Michigan,<sup>60</sup> Pennsylvania,<sup>61</sup> South Carolina<sup>62</sup> and Vermont,<sup>63</sup> the maximum punishment is more than one year for many garden variety misdemeanors. The current definition, by looking at the maximum penalty and ignoring how the offense is classified by the state, calls for overly severe punishment for defendants with prior convictions that the convicting

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<sup>56</sup> Colo. Rev. Stat. Ann. § 18-1.3-501 (maximum sentence for certain misdemeanors is 18 months imprisonment).

<sup>57</sup> The maximum penalty for aggravated misdemeanors is “imprisonment not to exceed two years.” Iowa Code Ann. § 903.1(2).

<sup>58</sup> Assault in the second degree is a misdemeanor and carries a maximum sentence of 10 years. Md. Code Ann., Crim. Law § 3-203.

<sup>59</sup> Many Massachusetts misdemeanors are punishable by imprisonment for more than one year in a house of correction including simple assault, which under Massachusetts common law means “attempted battery” or “putting another in fear of an immediately threatened battery”. See Mass. Gen. Laws Ann. ch. 265, § 13A (“Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 ½ years in a house of correction.”); *Commonwealth v. Gorassi*, 733 N.E.2d 106, 109 (Mass. 2000). Other misdemeanors punishable by more than one year in a house of correction include resisting arrest. Mass. Gen. Laws Ann. ch. 268, § 32B (maximum term of imprisonment for resisting arrest is 2 ½ years in a house of correction).

<sup>60</sup> Michigan has “high court” misdemeanors that are punishable by a maximum of two years imprisonment. See, e.g., Mich. Comp. Laws Ann. § 750.92 (Attempt to commit crime).

<sup>61</sup> Pennsylvania has misdemeanors with five, two and one year maximum terms of imprisonment. 18 Pa. Cons. Stat. Ann. § 106.

<sup>62</sup> S.C. Code Ann. § 16-1-100 (listing Class A misdemeanors with maximum terms of three years, including assault and battery in the second degree, S.C. Code Ann. § 16-3-600(D)).

<sup>63</sup> Vt. Stat. Ann. tit. 13, § 1 (“[A]ny offense whose maximum term of imprisonment is more than two years, for life or which may be punished by death is a felony. Any other offense is a misdemeanor.”).

jurisdiction have deemed to be minor.<sup>64</sup> The Commission's proposal would alleviate this problem.

Looking, as the Commission proposes, to how the convicting jurisdiction classifies the offense, would provide better information on the seriousness of the prior offenses. As Judge Sessions, former Chair of the Sentencing Commission has noted: “[A]lthough [the defendant’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.” *United States v. Colon*, 2007 WL 4246470, at \*6 (D. Vt. Nov. 29, 2007). Even the Armed Career Criminal Act, from which the Commission asserts the current definition of “crime of violence” was “derived,”<sup>65</sup> looks to how the prior offenses are classified by the convicting jurisdiction. See 18 U.S.C. § 921(a)(20)(B) (defining “crime punishable by imprisonment for a term exceeding one year” – as used in § 924(e)(2)(B) – to exclude “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of two years or less”).

Adding the requirement that the convicting jurisdiction classify the prior offense as a felony would also help to relieve unwarranted disparity arising from the current definition. 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. See, e.g., *United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006) (noting that while “assault and battery is a misdemeanor in the overwhelming majority of states,” because of how it is punishable in Massachusetts, “more Massachusetts offenders convicted of this – and another qualifying offense – may be put in the career offender category than elsewhere”).

The Commission's proposed amendment is consistent with the intent of Congress. When Congress enacted 28 U.S.C. § 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.

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<sup>64</sup> See, e.g., *United States v. Thompson*, 88 Fed. App'x 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); *United States v. Malloy*, 614 F.3d 852 (8th Cir. 2010) (aggravated misdemeanor conviction for interference with official acts causing bodily injury is a crime of violence under §4B1.2(a)(1)).

<sup>65</sup> USSG App. C, Amed. 268 (Nov. 1, 1989).



While we encourage the Commission to adopt its proposal to consider how the convicting jurisdiction classifies the prior offenses, we urge the Commission to reject the bracketed language “at the time the defendant was initially sentenced.” We see no benefit to the bracketed language and fear it introduces unnecessary complexity that could create confusion and unwarranted disparity. Defenders are particularly concerned about how this language might affect two specific situations: (1) state felony convictions that are deemed to be or converted to misdemeanors at some point in the state process, but not always when the defendant was “initially sentenced”; and (2) state-wide reclassifications of whole categories of offenses as a matter of law, such as occurred with California’s Proposition 47 (“Prop. 47”).

Some states authorize sentencing courts to convert a felony conviction to a misdemeanor at a point in time after a felony conviction, but not when the defendant is “initially sentenced.” For example, in North Dakota, “[a] person who is convicted of a felony and sentenced to imprisonment for not more than one year is deemed to have been convicted of a misdemeanor upon successful completion of the term of imprisonment and a term of probation imposed as a part of the sentence. N.D. Cent. Code Ann. § 12.1-32-02(9).<sup>66</sup> Others authorize conversions at different points in time. For example, in Minnesota, a felony conviction can be deemed to be a misdemeanor at the initial sentencing. Minn. Stat. Ann. § 609.13, subdivision 1(1) (“the conviction is deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor”). A felony in Minnesota can also be “deemed to be a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.” Minn. Stat. Ann. § 609.13, subdivision 1(2).<sup>67</sup>

The Minnesota example highlights how the bracketed language adds unnecessary complexity, as questions may arise about what “initially sentenced” means in light of the different sentencing options in different states. The term may create confusion about whether a defendant is “initially sentenced” when the “prison sentence is stayed,” Minn. Stat. Ann.

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<sup>66</sup> Indiana also allows some felonies to be converted to misdemeanors in certain circumstances after sentencing. *See* Ind. Code Ann. § 35-50-2-7(d).

<sup>67</sup> The Eighth Circuit has held that a Minnesota conviction that is deemed to be a misdemeanor under this subsection is still a felony for purposes of the career offender guideline. *See Hirman v. United States*, 613 F.3d 773, 776 (8th Cir. 2010) (“The fact remains that Hirman was convicted of crimes that were ‘punishable by ... imprisonment for a term exceeding one year,’ U.S.S.G. § 4B1.2, comment. (n.1), thereby exposing him to an enhanced sentence. The Minnesota courts’ application of section 609.13 does nothing to alter this analysis.”). While we believe this conclusion to be incorrect because Minnesota defines a misdemeanor as a “crime for which a sentence of not more than 90 days... may be imposed,” Minn. Stat. Ann. § 609.13, it is nonetheless the current law in the Eighth Circuit.

§ 609.13, subdivision 1(2), or when the defendant is “discharged without a prison sentence,” *id.*, or if a defendant is ever sentenced in such circumstances.<sup>68</sup>

The bracketed language also holds the potential to add confusion to the analysis of whether a California wobbler is a crime of violence under the guidelines.<sup>69</sup> While the bracketed language modifies only the proposed new requirement that the state court classify the prior offense as a felony, and does not alter the other requirement that the prior offense be “punishable by imprisonment for a term exceeding one year,” and thus would not directly disrupt settled law on the “punishable” prong, it, nonetheless, could cause unnecessary confusion regarding whether a California wobbler is a crime of violence under the guidelines. The Ninth Circuit has held that to determine whether a prior California wobbler was “punishable by imprisonment for a term exceeding one year” for purposes of the career offender guideline, federal courts must consider “a state court’s subsequent treatment of a wobbler.” *United States v. Bridgeforth*, 441 F.3d 864 (2006). In *Bridgeforth*, the defendant had previously been convicted in California for assault. The state court initially suspended the sentence, placed the defendant on probation, and later terminated probation and sentenced him to 365 days in the county jail. Later still, the state court declared the offense a misdemeanor. 441 F.3d at 867. Citing Cal. Penal Code §17(b), that deemed the conviction to be a misdemeanor for all purposes (based on the sentence of 365 days in county jail), the Ninth Circuit held that the “conviction does not qualify as an offense ‘punishable by imprisonment for a term exceeding one year,’” and therefore did not qualify as a crime of violence under the career offender guideline. *Id.* at 872. Although the Commission’s bracketed language should not affect the Ninth Circuit’s holding in *Bridgeforth* regarding the “punishable” requirement, it could cause confusion by adding perplexity to an already complex issue.

Critically, also unclear is whether “initially sentenced” would include state-wide mandatory reclassifications of felonies as misdemeanors, such as happened in California with Prop. 47. While it is still too early to determine what impact Prop. 47 may have on federal

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<sup>68</sup> See also Utah Code Ann. § 76-3-402(2) (allowing conviction to a lower degree of offense after the court has “suspend[ed] the execution of the sentence and place[d] the defendant on probation,” “the defendant has been successfully discharged from probation” and other conditions have been satisfied); Ariz. Rev. Stat. § 13-604(A) (The court may place defendant convicted of certain class 6 felonies on probation and “refrain from designating the offenses as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor.”).

<sup>69</sup> “Under California law, a wobbler ‘is a misdemeanor for all purposes’ when the judgment results in a punishment ‘other than imprisonment in the state prison’ or when, after a grant of probation without imposition of sentence, the state court ‘declares the offense to be a misdemeanor.’” *United States v. Bridgeforth*, 441 F.3d 864, 870 (9th Cir. 2006) (citing Cal. Penal Code § 17(b)(1), (3)).

sentence enhancements, we mention it here because, given the wide-spread interest among the states in reducing prison populations and being smart on crime, there may be more state-wide reclassifications in other states in the future. In California, in November 2014, voters enacted the Safe Neighborhood and Schools Act, also known as Prop. 47. Prop 47 enacted California Penal Code § 1170.18, which explicitly makes the Act retroactive. It also provides that a person who has completed his sentence for a conviction of a felony may file an application with the court to have the felony conviction designated as a misdemeanor. Section 1170.18(g) provides that if the application satisfies the criteria in subsection (f) – that is, if the person would have been guilty of a misdemeanor if Prop 47 had been in effect at the time of the offense – then the court shall designate the felony offense as a misdemeanor (i.e., it is a non-discretionary re-designation), so long as the applicant does not have any disqualifying prior convictions. By retroactively re-designating certain offenses as misdemeanors, California effectively has said that these offenses have always been misdemeanors. But it is unclear whether these re-designated offenses would satisfy the “initially sentenced” requirement in the Commission’s bracketed language.

## **VII. Defining a “Crime of Violence” by Reference to the Elements Clause Captures Many Serious Crimes and Helps Simplify the Analysis.**

Defenders have long taken the position that the elements clause presents the most workable definition of a crime of violence. While many courts have not decided on the reach of the elements clause because they often relied on the residual clause instead, numerous offenses have been held to satisfy the elements clause.

For example, the Fifth Circuit has held that an offense requiring use of a deadly weapon has “as an element the requisite intentional use of physical force.” *United States v. Tavaréz-Grado*, 2015 WL 5674959 (5th Cir. 2015).<sup>70</sup> In the same vein, the court has ruled that merely touching a person with a deadly weapon in a “rude, insulting, or angry manner,” involves at the least the “threatened use of physical force.” *United States v. Dominguez*, 479 F.3d 345, 347 (5th

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<sup>70</sup> Colorado’s crime of menacing at the time of Tavaréz–Grado’s conviction was defined as follows:

A person commits the crime of menacing if, by any threat or physical action, he knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 3 misdemeanor, but, if committed by the use of a deadly weapon, it is a class 5 felony.

Colo. Rev. Stat. § 18-3-206 (1999). The court concluded that because the defendant pled guilty to felony menacing, the conviction necessarily includes as an element “use of a deadly weapon.” The court relied upon its earlier decision in *United States v. Velasco*, 465 F.3d 633, 640 (5th Cir. 2006), which held that an Illinois aggravated battery that required the “use” of a deadly weapon (as opposed to mere possession) had as an element the requisite intentional use of physical force to constitute a crime of violence under §2L1.2. See also *United States v. Melchor-Meceno*, 620 F.3d 1180, 1185 (9th Cir. 2010) (Colorado menacing requires threat of force).

Cir. 2007) (Florida aggravated battery). The Tenth Circuit has followed the same rationale in finding that a Kansas conviction for aggravated battery against a police officer qualified as a violent crime. *United States v. Treto-Martinez*, 421 F.3d 1156, 1159 (10th Cir. 2005) (“all intentional physical contact with a deadly weapon done in a rude, insulting or angry manner does constitute physical force”). *See also United States v. Silva*, 608 F.3d 663, 670 (10th Cir. 2010) (New Mexico aggravated assault of engaging in conduct with a deadly weapon that causes the victim to believe he or she was about to receive a battery includes an element of violent force).

The “threatened use of physical force against the person of another” also has been held to cover statutes that prohibit the use of a “fear of unlawful injury.” *United States v. De La Fuente*, 353 F.3d 766, 770 (9th Cir. 2003). This rationale has been used to cover robbery, brandishing a firearm in a threatening manner, as well as mailing a threat to injure with anthrax poisoning. *See United States v. Melchor-Meceno*, 620 F.3d 1180, 1186 (9th Cir. 2010); *Bolanos v. Holder*, 734 F.3d 875, 877 (9th Cir. 2013) (collecting cases).

The Sixth Circuit has held that an intentional crime that requires “proof of physical injury or serious physical injury” satisfies the elements clause. *United States v. Collins*, 799 F.3d 554, 597 (6th Cir. 2015) (Kentucky second degree assault qualified as crime of violence under elements clause);<sup>71</sup> *United States v. Anderson*, 695 F.3d 690 (6th Cir. 2012) (Ohio aggravated assault).<sup>72</sup> Similarly, the Third Circuit ruled that New Jersey third-degree aggravated assault statute qualified under the elements clause because it required proof that defendant “knowingly caused bodily injury to another” even though physical force was not a standalone element). *United States v. Horton*, 461 F. App’x 179, 184 (3d Cir. 2012). While courts have not uniformly interpreted the elements clause,<sup>73</sup> many have found that numerous other offenses fall within it.<sup>74</sup>

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<sup>71</sup> A person is guilty of second degree assault under Kentucky law if: (a) he intentionally causes serious physical injury to another person; or (b) he intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or (c) he wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument. Ky. Rev. Stat. Ann. § 508.020(1)(a)-(c).

<sup>72</sup> Under Ohio law, aggravated assault is committed when a person “while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force ... knowingly: (1) [c]ause[s] serious physical harm to another ... [or] (2) [c]ause[s] or attempt[s] to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Ohio Rev. Code Ann. § 2903.12(A).

<sup>73</sup> For example, the Fifth Circuit seems to have misread the ruling in *Horton* by overlooking how the Third Circuit relied both on the fact that bodily injury was caused, and that the defendant acted purposefully or knowingly. *United States v. Martinez-Flores*, 720 F.3d 293, 299 n.9 (5th Cir. 2013).

<sup>74</sup> *See, e.g., De Leon Castellanos v. Holder*, 652 F.3d 762, 764 (7th Cir. 2011) (Illinois domestic battery conviction, which required that defendant knowingly or intentionally cause bodily harm, even if it resulted from nonviolent “intellectual force,” met elements clause; concluding that “degree of injury has

While the analysis under the elements clause still requires research into how state courts construe their statutes, the analysis is less complex than it would be for the proposed enumerated offenses because it focuses only on discrete elements. The only complication that may arise is when the statute at issue has multiple elements, some of which satisfy the force clause and some of which do not. In those cases, the court must determine whether the statute is divisible and if so, use the modified categorical approach to decide if the conviction qualifies. But because courts will have to conduct that analysis with only one set of elements rather than seven or eight more, the process will be streamlined and less likely to generate circuit conflicts and inconsistent application.

That some state statutes do not satisfy the elements clause because they are too loosely worded to be considered divisible and reach a broad range of conduct does not justify the Commission expanding definitions to encompass more state statutes. The “anomaly” of having statutes with “names connoting violence” that are “sometimes deemed not to be crimes of violence,” “arises largely because many states have stretched these violence-connoting rubrics to encompass” a wide range of conduct.<sup>75</sup> As the First Circuit observed, “driving under the influence and accidentally causing serious injury thus gets grouped together with pistol-whipping a bank teller.”<sup>76</sup> That states choose to define crimes so broadly should not result in treating everyone convicted under a broad state statute as a violent criminal subject to a lengthy period of incarceration upon committing a federal offense.

Defining crimes of violence by reference to the elements clause is also consistent with Congress’s intent in directing the Commission to promulgate the career offender guideline.

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‘a logical relation to the “use of physical force”’); *United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010) (second-degree home invasion, Mich. Comp. Laws § 750.110(a)(3)); *United States v. Soto-Sanchez*, 623 F.3d 317 (6th Cir. 2010) (Michigan conviction for attempted kidnapping is a crime of violence under 18 U.S.C.A. § 16(a)); *Lloyd v. United States*, 2015 WL 5918380 (M.D. N.C. 2015) (North Carolina robbery has as an element the use, attempted use, or threatened use of physical force against the person of another); *United States v. Presley*, 52 F.3d 64, 69 (4th Cir. 1995) (Virginia robbery qualified under elements clause); *Dixon v. United States*, 588 F. App’x 918, 922-24 (11th Cir. 2014) (Florida aggravated battery, Fla. Stat. Ann. § 784.045 – whoever in committing a battery “intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement” or “uses a deadly weapon”); *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012) (resisting officer with violence under Fla. Stat. § 843.01 satisfies elements clause); *United States v. Curtis*, 645 F.3d 937, 940 (7th Cir. 2011) (“discharg[ing] a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person” under 720 Ill. Comp. Stat. 5/24-1.2(a)(2)); *United States v. Villavicencio-Burruel*, 608 F.3d 556, 562-63 (9th Cir. 2010) (making criminal threats under Cal. Pen. Code § 422, which requires a threatened use of violent physical force against another person).

<sup>75</sup> *United States v. Fish*, 758 F.3d 1, 17 (1st Cir. 2014).

<sup>76</sup> *Id.*

Nothing in the legislative history of the statute shows that Congress envisioned an expansive definition of crimes of violence. Instead, Congress had in mind 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.” 128 Cong. Rec. 26512, 26518 (daily ed. Sept. 30, 1982).

**VIII. Principles of Proportionality Call for a Narrower Range of Offenses to Qualify as Crimes of Violence.**

For the guidelines to set forth a list of enumerated offenses with broad definitions undercuts the principle of proportionality. Proportionality requires that “appropriately different sentences” are imposed for “criminal conduct of differing severity.” USSG, Ch. 1, Pt. A (1), p.s. While uniformity and proportionality often work against each other, the use of enumerated offenses, particularly those with broad definitions, would result in extreme disproportionality.

As the table below shows, the base offense levels in the guidelines show that the proposed enumerated offenses vary significantly in offense severity.

2A1.1 First Degree Murder	43
2A1.2 Second Degree Murder	38
2A1.3 Voluntary Manslaughter	29
2A1.5 Conspiracy or Solicitation to Commit Murder	33
2A2.1 Assault with Intent to Commit Murder; Attempted Murder	33, 27
2A2.2 Aggravated Assault	14
2A3.1 Criminal Sexual Abuse; Attempt	38, 30
2A3.2 Statutory Rape	18
2A3.4 Abusive Sexual Contact; Attempt	20, 16, 12
2A4.1 Kidnapping, Abduction, Unlawful Restraint	32
2B21.1 Burglary of a Residence or Other Structure	17, 12
2B3.1 Robbery	20
2B3.2 Extortion by Force or Threat of Injury or Serious Damage	18
2K1.4 Arson: Property Damage by Use of Explosives	24, 20, 16

By treating rape the same as statutory rape; aggravated assault with a deadly weapon the same as a simple assault; robbery the same as burglary; arson of an occupied house the same as arson of an unoccupied vehicle; all such offenses the same as a drug offense, the enumerated offenses undercut proportionality.<sup>77</sup>

Disproportionate guideline calculations are what we see on a regular basis. Here are three examples of cases where the career offender guideline produced a range of 188-235 months:

- Conviction for manufacturing 3.4 grams of a mixture or substance containing methamphetamine; prior convictions for a nine-year-old aggravated robbery in which no one was hurt, burglary of a commercial building closed for business, and arson of an unoccupied vehicle in an open field.
- Conviction for selling 1/2 to 2kg of cocaine to a confidential informant; two prior drug distribution cases that occurred eleven and thirteen years before – one was for the sale of 2.9 grams of cocaine for \$220; the other was for the sale of 1 gram of cocaine for \$100.
- Conviction for armed bank robbery; prior convictions for burglary of dwellings, robbery of a gasoline station, robbery of a woman, escape from the county jail.

These are different offenses committed by individuals with notably different criminal histories. Most people would likely believe these individuals, based only on their current offense and criminal history, warrant different punishment. Under the current career offender guideline, however, proportionate punishment is elusive. The time is ripe for the Commission to take responsibility for “rationally implement[ing]”<sup>78</sup> a career offender guideline as Congress envisioned. If the Commission believes it does not have the authority to make all the necessary

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<sup>77</sup> Nor is the answer to the proportionality problem to abandon the categorical approach. The primary statutes that led the Commission to increase sentences for crimes of violence, 18 U.S.C. § 924(e) and 28 U.S.C. § 994(h), require that the defendant have a prior “conviction” for a specified offense, not that he committed such a crime. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683 (2013) (categorical approach applies because “[C]onviction” is “the relevant statutory hook.” (quoting *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2588 (2010))); *Shepard v. United States*, 544 U.S. 13, 17 (2005) (explaining rationale behind the categorical approach in *Taylor*). Moreover, the Supreme Court has ruled unequivocally that an “elements-based inquiry” rather an “evidence-based one” “averts ‘the practical difficulties and potential unfairness of a factual approach.’” *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013). The Court noted that state court documents may contain information that is “downright wrong” because defendants frequently have no incentive to challenge factual allegations that are not relevant to the elements and how an evidence-based approach would “deprive some defendants of the benefits of their negotiated plea deals.” *Id.* at 2289.

<sup>78</sup> S. Rep. No. 98-225, at 175.

changes, then it should ask Congress to amend 28 U.S.C. § 994(h). The Commission can no longer remain silent about the unnecessary and unreasonably long prison sentences produced by the career offender guideline.

**IX. Intentional Conduct, not Recklessness, Should be an Essential Element of any Crime Classified as a Crime of Violence.**

**A. Including reckless offenses in the definition of crimes of violence expands the definition beyond what Congress intended and what can fairly be characterized as violent.**

If the Commission desires to use prior convictions to raise both offense levels and the criminal history category, and use a list of enumerated offenses in doing so, it should at least limit the convictions to those that involve the most dangerous intentional conduct and exclude crimes that require only recklessness. The reason is simple: the subjective awareness of the risk of an injury, followed by an injury, is not the same as intentionally causing injury to a person, so that individuals who commit violent offenses intentionally are more blameworthy than those who act recklessly. Indeed, “American criminal law has long considered a defendant's intention-and therefore his moral guilt-to be critical to ‘the degree of [his] criminal culpability.’”<sup>79</sup> Moreover, if the Commission were to classify reckless crimes as violent, it would “blur the distinction between the ‘violent’ crimes Congress sought to distinguish for heightened punishment and other crimes.” *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

Just as the Supreme Court took note of the context of the statutory definition of “crime of violence” and “violent felony” in *Leocal* and *Johnson v. United States*, 559 U.S. 133 (2010) (“*Johnson I*”), the Commission should not forget that the “ordinary meaning of [the] term [crime of violence], combined with § 16’s emphasis on the use of physical force against another person (or the risk of having to use such force in commit a crime) suggests a category of violent, active crimes.”<sup>80</sup> Even common-law battery, which covered only offensive touching, required the “intentional application of unlawful force against the person of another.”<sup>81</sup>

The Commission’s proposed definition of aggravated assault is also contrary to the Supreme Court’s interpretation of the meaning of crime of violence under 18 U.S.C. § 16 - and its interpretation of the “otherwise” clause in 18 U.S.C. § 924(e). In *Leocal*, the Court held that driving under the influence of alcohol and causing serious bodily injury was not a crime of

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<sup>79</sup> *Enmund*, 458 U.S. at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

<sup>80</sup> *Leocal*, 543 U.S. at 11.

<sup>81</sup> *Johnson I*, 559 U.S. at 139.



violence under either 18 U.S.C. §§ 16(a) or 16(b).<sup>82</sup> The Court determined that the residual clause in § 16(b) covered “offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense,” but made clear that “reckless disregard . . . relates not to the general conduct of the possibility that harm will result from a person’s conduct, but to the risk that the use of physical force against another might be required in committing a crime.”<sup>83</sup>

Enumerated offense definitions that include recklessness are also not consistent with the Supreme Court’s earlier interpretation of the otherwise clause in 18 U.S.C. § 924(e). In *Begay v. United States*, 553 U.S. 137 (2008), the Court held that driving under the influence of alcohol was not a violent felony because it did not involve purposeful, violent, or aggressive conduct. While the Court has since held that the residual clause in § 924(e) is unconstitutional, *Begay*’s reasoning as to the limits that should be placed on the definitions of violence is sound.

Because many courts have followed the analysis in *Leocal* and/or *Begay* in concluding that recklessly causing injury is insufficient to define a crime of violence or violent felony, the Commission should not ignore that precedent and sweep in offenses that have not previously counted as crimes of violence. See *Jimenez–Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008) (collecting cases).<sup>84</sup> If the Commission were to adopt definitions that have a lesser standard than set forth in *Leocal* and *Begay*, the guidelines would be more expansive than necessary and not consistent with what Congress intended in the career offender provision or elsewhere. Over twenty years ago, the Third Circuit recognized that the residual clause in § 16(b), which focuses on a substantial risk that physical force may be used rather than the risk of physical injury as set forth in §4B1.2, refers to the risk of having to use intentional force. *United States v. Parson*, 955 F.2d 858, 866, 874 (3d Cir. 1992). Because §4B1.2 adopted broader language, the court, joined by then-Circuit Court of Appeals Judge Alito, noted that 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.” *Id.*<sup>85</sup> The court also encouraged the

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<sup>82</sup> 543 U.S. at 11.

<sup>83</sup> *Id.* at 10.

<sup>84</sup> *United States v. Fish*, 758 F.3d 1, 9 (1st Cir. 2014) (“§ 16(b) does not reach recklessness offenses”); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005); *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011) (recklessly causing serious bodily injury to another is not a violent felony under either the force clause or otherwise clause); *United States v. Torres-Villalobos*, 487 F.3d 607, 612 (8th Cir. 2007); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005).

<sup>85</sup> Writing separately, then-Circuit Judge Alito specifically noted: “I fully agree that the broad definition of a ‘crime of violence’ in USSG § 4B1.2(1) merits reexamination by the Sentencing Commission.” 955 F.2d at 875 (Alito, J., concurring).

Commission to “reconsider its career offender Guidelines to the extent that they cover such ‘pure recklessness’ crimes.” *Id.* The Commission would be taking a major step backwards if it were to include recklessness in the definition of crime of violence.

**B. The proposed definition of aggravated assault, which includes mere recklessness, is particularly troubling because it would call for harsh sanctions for the less blameworthy and upset existing law in many Circuits.**

We do not understand the rationale behind the Commission’s proposal to adopt the Fifth Circuit’s view of aggravated assault<sup>86</sup> by expanding the definition beyond that followed in the Model Penal Code and several circuits, but to not request comment on an existing circuit conflict over the generic definition of aggravated assault.

The Commission’s proposed definition of aggravated assault differs from the Model Penal Code in two significant ways. First, the proposed definition covers offenses where the actor causes injury purposely, knowingly, or recklessly, but the Model Penal Code requires that the actor cause the injury “purposely, knowingly or recklessly under circumstances manifesting *extreme indifference to the value of human life.*”<sup>87</sup> Second, the proposed definition includes “purposely, knowingly, or recklessly causing bodily injury to another through use of a deadly weapon,” but the Model Penal Code includes only “purposely or knowingly” causing bodily injury to another with a deadly weapon.<sup>88</sup> The language “extreme indifference to the value of human life” has caused a Circuit split about whether certain state statutes fit within the generic definition of aggravated assault.<sup>89</sup> *See generally United States v. Ocampo-Cruz*, 561 F. App’x

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<sup>86</sup> *United States v. Mungia-Portillo*, 484 F.3d 813, 816-17 (5th Cir. 2007) (Tennessee aggravated assault statute, Tenn. Code, § 39-13-102, that requires only ordinary reckless conduct qualifies as an aggravated assault; “fact that the Tennessee statute defines ‘reckless’ differently than the Model Penal Code is not fatal, and we find this difference in definition to be sufficiently minor”).

<sup>87</sup> Model Penal Code, § 211.1(2), Aggravated Assault.

<sup>88</sup> *Id.*

<sup>89</sup> *Compare Mungia-Portillo*, 484 F.3d at 816-17 with *United States v. Castro-Martinez*, 2015 WL 4939656 \*6 (6th Cir. 2015) (“generic crime of aggravated assault requires a mens rea ‘of at least recklessness under circumstances manifesting extreme indifference to the value of human life’”; Arizona assault statute, Ariz. Rev. Stat. § 13–1203(A)(1), “encompassed conduct beyond the generic crime because it can be committed with a mens rea of ordinary recklessness.”); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009) (rejecting Fifth Circuit’s approach in *Mungia-Portillo* and concluding that “ordinary recklessness is a broader mens rea requirement for aggravated assault than is ‘recklessness under circumstances manifesting extreme indifference to human life’”; noting that 33 states require a heightened form of recklessness; and finding that Arizona aggravated assault statute that covers simple assault with a simulated weapon, Ariz. Rev. Stat. § 13-1204(A)(11) was not a generic aggravated assault that qualified as a crime of violence). *See also United States v. McMurray*, 653 F.3d 367, 377 (6th Cir. 2011) (“Because recklessly causing serious bodily injury to another does not qualify as a ‘violent

361, 364 (5th Cir. 2014) (noting that several circuits “have held that any offense with a mens rea lesser than the extreme recklessness required for Model Penal Code aggravated assault does not meet the generic, contemporary meaning of ‘aggravated assault,’” but the Fifth Circuit has held “a statute requiring mere recklessness falls within ‘the plain, ordinary meaning of the enumerated offense of aggravated assault’”).

**X. The Commission Should Revise the Definition of Controlled Substance Offense in §4B1.2.**

For many years, Defenders have shared with the Commission our concern that the guideline’s definition of controlled substance offense is unduly broad and sweeps in far more offenses than Congress intended under 28 U.S.C. § 994(h). To be classified as a controlled substance offense, only prior offenses with the following elements should be counted:

- 21 USC § 841 (manufacture, distribute, or dispense, or possessed with intent to manufacture, distribute or dispense a controlled substance; create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance)
- 21 USC § 952(a) (importation of specific controlled substances)
- 21 USC § 955 (possession of specific controlled substances on board vessels arriving in or departing from the United States)
- 21 USC § 959 (manufacture or distribution outside the United States)
- 46 USC § 70503 (manufacture, distribution or possession of controlled substances on vessels).

Courts have held that the Commission’s interpretation of 29 U.S.C. § 994(h) to also include state offenses was not unreasonable, but have not ruled that an alternative interpretation would be incorrect.<sup>90</sup> Section 994(h) cannot reasonably be interpreted as requiring the

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felony’ under either the ‘use of force’ clause or the ‘otherwise’ clause, Tennessee’s aggravated-assault statute, § 39–13–102 (1991), is not categorically a ‘violent felony.’”); *United States v. Ossana*, 638 F.3d 895, 900-03 (8th Cir. 2011) (Arizona aggravated assault statute of recklessly causing physical injury to another, which encompassed “reckless driving where the defendant’s actions caused an injury” does not qualify as a crime of violence).

<sup>90</sup> Early on, the Ninth Circuit observed: “because it is not at all clear that Congress intended to exclude state convictions from the definition of ‘prior felony conviction,’ we cannot say the Commission’s interpretation is unreasonable.” *United States v. Rivera*, 996 F.2d 993, 996 (9th Cir. 1993). Notably, the Court did not rule that prior state convictions must be included.

Commission to include state drug offenses. Unlike 8 U.S.C. § 1101(a)(43), which defines aggravated felony and expressly states that the term “applies to an offense described in this paragraph whether in violation of Federal or State law,” § 994(h) contains no reference to state offenses. Accordingly, it is within the Commission’s authority to count only the federal convictions described in § 994(h) rather than state convictions. Alternatively, the Commission should identify controlled substances offenses as state or federal felony offenses that have the elements of the offenses set forth in § 994(h): (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. To ensure that only serious drug offenses are counted, Defenders also recommend that the offense be punishable by imprisonment of ten years or more.<sup>91</sup>

In addition to removing state drug offenses from the reach of the career offender guideline or at least requiring that they have the same elements of the federal offenses expressly mentioned in § 994(h) and be punishable by imprisonment of ten years or more, the Commission should remove other federal offenses not mentioned in § 994(h). Section 994(h) does not cover conspiracy to commit a controlled substance offense. It makes no reference to any offense described in 21 U.S.C. § 846 or other inchoate offenses. The Commission originally provided no justification for expanding the definition to include conspiracies, attempts, or aiding and abetting. But then when courts found that the Commission exceeded its authority under § 994(h) by including such crimes,<sup>92</sup> the Commission relied on its general authority under 28 U.S.C. § 994(a)-(f). USSG App. C, Amend. 528 (Nov. 1, 1995). That same general authority allows the Commission to narrow the career offender guideline by omitting conspiracies, attempts, and aiding and abetting.

## **XI. Burglary is not a Crime of Violence.**

The Commission should exclude burglary altogether from the guidelines’ definition of “crime of violence,” and recommend to Congress that burglary should not be classified as a violent crime.

Strong empirical evidence shows that burglary is not a crime of violence. A federally-funded study released earlier this year of nearly 38 million attempted and completed burglaries during the 10-year period ending in 2007, found that physical injury was reported in only 2.7% of all burglaries.<sup>93</sup> Even when threatened violence is considered, it, together with actual injury,

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<sup>91</sup> See 18 U.S.C. § 924(e)(2)(A)(ii).

<sup>92</sup> See, e.g., *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993).

<sup>93</sup> Richard S. Culp, Ph.D., et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at 29 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf>.

occurred in only 7.6% of all burglaries.<sup>94</sup> And the rate of violence was lower in rural areas and small to medium sized cities where “fewer than .9% (NIBRS estimate) of burglaries involve violence.”<sup>95</sup> In only 2.4% of all burglaries did “victims report[ ] the offender was armed with a weapon.”<sup>96</sup> An earlier study found that even in household burglaries that involved violence, the perpetrators infrequently armed themselves with firearms; only 12.4% possessed a firearm.<sup>97</sup>

The research shows that “burglars go to great lengths to avoid occupied targets.”<sup>98</sup> And, the vast majority – 74% – of burglaries are “committed against an unoccupied structure.”<sup>99</sup> When violence occurs, serious injury is rare: information from one database revealed that “simple assault accounts for half of all violent burglaries.”<sup>100</sup> Another study found that between 2003 and 2007, household burglaries ending in homicide made up only 0.0004% of all burglaries.<sup>101</sup>

While one study found, based on information from one database, that “residential burglaries were significantly more likely to result in violence than were non-residential burglaries,” it also found that “[v]iolence occurred in only 1.2% (N=27,293) of residential burglaries, compared to an even lower number of .17% in non-residential (N=1,559) offenses” and “violent residential burglaries accounted for only .8% (N=27,293) of all burglaries that occurred over the [ten-year] study period.”<sup>102</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 34.

<sup>96</sup> *Id.* at 30. Another study of inmates in state and federal correctional facilities in 1997 found that only 1 in 25 individuals serving a state sentence for burglary possessed a firearm during the offense. Caroline Harlow, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Firearms Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities* 3, tbl. 4 (2001).

<sup>97</sup> See Shannan Catalano, U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglary* 8 (2010), <http://www.bjs.gov/content/pub/pdf/vdhh.pdf>.

<sup>98</sup> Culp, *supra* note 93, at 38. See also Deborah Weisel, U.S. Dep’t of Justice, Office of Community Oriented Policing Services, *Burglary of Single Family Homes* 8 (2002) (Most burglars “tak[e] great care to avoid” “occupied homes.”), <http://www.cops.usdoj.gov/pdf/e07021611.pdf>.

<sup>99</sup> Culp, *supra* note 93, at 38. An earlier study, looking at five, instead of ten, years of data reached a similar conclusion, finding that in 72.4% of household burglaries between 2003 and 2007 no one was home. See Catalano, *supra* note 97, at 1.

<sup>100</sup> Culp, *supra* note 93, at 34.

<sup>101</sup> Catalano, *supra* note 97, at 10.

<sup>102</sup> Culp, *supra* note 93, at 39-40.

This evidence supports the conclusion that burglary is a property offense, not a violent offense, and should not be treated on par with a violent offense against a person..

Indeed, burglary was not a crime of violence until tough-on-crime politics and politicians cast it as such, despite the absence of any empirical evidence to justify the decision.<sup>103</sup> Prior to crime reform efforts in the mid-1980s, burglary was viewed as a non-violent property offense.<sup>104</sup> For example, around the same time Congress deemed burglary to be a violent crime, the Supreme Court twice reached the opposite conclusion. In *Solem v. Helm*, 463 U.S. 277 (1983), the defendant challenged his life sentence, prescribed by a recidivist statute, under the Eighth Amendment. The Court found Mr. Helm’s current offense – “uttering a ‘no account’ check for \$100 – and all of his prior offenses – including three third degree burglary convictions – were “nonviolent and none was a crime against a person.”<sup>105</sup> Less than two years later, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court held that “the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force” by the police officer who shot and killed the unarmed Mr. Garner while he was fleeing.<sup>106</sup> The Court reasoned:

While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a ‘property’ rather than a ‘violent crime....

Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. In fact, the available statistics demonstrate that burglaries only rarely involve physical violence.

During the 10-year period from 1973-1982, only 3.8% of all burglaries involved violent crime.<sup>107</sup>

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<sup>103</sup> For a discussion on this political, rather than empirical, decision, see Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 12- 15 (July 23, 2012).

<sup>104</sup> Even today, burglary is often – and rightly – classified as a property offense, not a violent offense. See, e.g., Harlow, *supra* note 96, at 3, tbl. 4 (classifying burglary as a property offense, and not as a violent offense); Federal Bureau of Investigation, *Crime in the United States 2014* (classifying burglary as a property crime, and not as a violent crime), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/property-crime>.

<sup>105</sup> 463 U.S. at 297 & nn. 22-23. The Court noted that “the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread.” *Id.* at 297 n.23.

<sup>106</sup> 471 U.S. at 21.

<sup>107</sup> *Id.*

The Commission should lead the way in righting the wrong that has been committed since the mid-1980s of punishing people who committed burglary without violence as if they committed a violent crime.<sup>108</sup> Because of the powerful evidence about the non-violent nature of the vast majority of burglaries – residential and otherwise – and the compelling need for the country to be smarter about who we put in prison and for how long, we urge the Commission to fully exclude burglary from the guidelines’ violent felony provisions, and to call on Congress to do the same with statutory definitions.<sup>109</sup>

The proposal to remove burglary from the list of violent offenses that work to dramatically increase punishment for new offenses is “not to denigrate the experience of burglary victimization.”<sup>110</sup> The victim’s perception of violence can be taken into account “without regarding the offense as violent.”<sup>111</sup> Treating what are predominantly non-violent offenses as violent offenses for purposes of the guidelines’ significant recidivist enhancements results in unwarranted, disproportionately lengthy and expensive incarceration.<sup>112</sup> And when a

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<sup>108</sup> Even though the ACCA has been interpreted to sweep in burglaries of all buildings or other structures, *Taylor v. United States*, 495 U.S. 575, 598 (1990), the Commission – rightly – has never endorsed recidivist guideline enhancements for prior burglaries of non-dwellings. The original guidelines included in the commentary, a definition of crime of violence, which referenced 18 U.S.C. § 16, and specified: “The Commission interprets [§ 16] as follows.... Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.” §4B1.2, comment. (n.1) (1987). In 1989, the Commission amended the guidelines to include in the text of §4B1.2 a new definition of “crime of violence,” “derived from 18 U.S.C. § 924(e).” USSG App. C, Amend. 268 (reason for amendment) (Nov. 1, 1989). With this amendment, the Commission specified in both the text and the commentary that crime of violence includes “burglary of a dwelling.” USSG App. C, Amend. 268 (Nov. 1, 1989). Later, in 2001, when the Commission amended §2L1.2, it added to the commentary that a crime of violence includes “burglary of a dwelling.” USSG App. C, Amend. 632 (Nov. 1, 2001). In 2012, the Commission considered and rejected the idea of expanding the definition of crime of violence in §4B1.2 beyond burglary of a dwelling.” 77 Fed. Reg. 2778, 2791-2792 (Jan. 19, 2012). The Commission should now go one step further, and based on the strong empirical evidence, exclude burglary from the guidelines’ definitions of violent crimes.

<sup>109</sup> Not all statutes defining violent felonies include burglary. *See* 18 U.S.C. § 3559(c)(2)(F) (defining “serious violent felony” to include many crimes such as murder and assault to commit rape, but not burglary).

<sup>110</sup> Culp, *supra* note 93, 58.

<sup>111</sup> *Id.* at 59 (noting that “victims are often reassured when they learn who the offender is, why they committed the crime, why they chose that target, and to know they will not be able to return. Considering that in approximately 40% of these cases, it turns out that the victim was personally acquainted with the offender in some way, this approach is more helpful to victims than simply assuring them that punishment will be severe.”).

<sup>112</sup> Insofar as any particular burglary features unusually aggravated circumstances, a district court can always account for that fact by selecting a higher point within a guideline range, finding that the

burglary also involves a violent offense, such conduct can be charged as a separate offense, and any conviction for a violent felony would then be subject to any relevant recidivist enhancements.

The mistake of classifying burglary as a crime of violence is an expensive one with grave consequences not only for individuals convicted of these offenses, and over-punished as if they had committed a violent felony instead of a non-violent property offense, but also on the prison population and society as a whole. More defendants are convicted each year of burglary than of murder, manslaughter, sexual assault, and robbery – combined.<sup>113</sup> This is not surprising because of the broad scope of so many state burglary statutes.<sup>114</sup> And enhancing sentences on the basis of these burglaries is an expensive proposition, with each additional year in prison currently costing \$30,621,<sup>115</sup> and federal prisons still well over capacity despite recent efforts to reduce the federal prison population.<sup>116</sup> Appropriations to the Bureau of Prison have grown exponentially

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defendant's criminal history score is underrepresented and departing upward pursuant to §4A1.3, or varying upward in the exercise of discretion under 18 U.S.C. § 3553(a).

<sup>113</sup> See U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts* tbl.1.1 (Dec. 2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2152>. The Justice Department survey estimated that in 2006 there were just shy of 100,000 burglary convictions entered in state courts, whereas there were about 42,000 robbery convictions, 33,000 sexual assault convictions, and far fewer murder and manslaughter convictions. *Id.*

<sup>114</sup> See, e.g., *Taylor*, 496 U.S. at 591 (noting that Texas defines burglary so broadly that it includes theft from coin-operated vending machine or automobile (citing Tex. Penal Code Ann. §§ 30.01-30.05), and California includes entry through unsecured window on an unoccupied auto as well as entry of a store open to the public with intent to commit theft); *United States v. Wilson*, 168 F.3d 916, 927 (6th Cir. 1999) (noting that burglary in Illinois includes “when without authority [a person] knowingly enters or without authority remains within a building, house trailer, water craft, aircraft, motor vehicle..., railroad car, or any part thereof, with intent to commit therein a felony or theft” (citing 720 Ill. Comp. Stat. Ann. 5/19-1)); *Illinois v. Beauchamp*, 944 N.E.2d 319 (Ill. 2011) (upholding burglary conviction for theft of rear hatchback window from SUV); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (describing Oregon burglary statute reaching “any booth, vehicle, boat, aircraft or other structure adapted for carrying on business therein”); *United States v. Stymiest*, 581 F.3d 759, 768 (8th Cir. 2009) (describing South Dakota statute, which defines “structure” to include “motor vehicles, watercraft, aircraft, railroad cars, trailers, and tents”); *United States v. McFalls*, 592 F.3d 707, 715 (6th Cir. 2010) (describing South Carolina statute reaching “uninhabitable sheds up to 200 yards from a generic dwelling”); *United States v. Giggey*, 551 F.3d 27 (1st Cir. 2008) (Defendant was convicted in Maine for burglarizing The Pit Stop Redemption bottle redemption center in an effort to collect “empties” that could be “re-redeemed” for five-cents each.).

<sup>115</sup> Memorandum from Matthew G. Rowland, Chief, Probation and Pretrial Services Office, to Chief U.S. Pretrial Services Officers and Chief U.S. Probation Officers, regarding Costs of Community Supervision, Detention and Imprisonment (Information) (June 16, 2015).

<sup>116</sup> *Oversight of the Bureau of Prisons: First Hand Accounts of Challenges Facing the System, Hearing before the Committee on Homeland Security and Governmental Affairs, United States Senate*, 114th



from \$330.0 *million* FY 1980 to \$6. 859 *billion* in FY 2014.<sup>117</sup> Compared with 1980, In FY 2014, the BOP population was “750% higher and spending is 645% higher (in inflation adjusted terms).”<sup>118</sup> And despite recent efforts to reduce the size of the federal prison population, “the budget request for FY 2016 asks for over \$400 million in additional spending.”<sup>119</sup>

If the Commission insists on enumerating burglary, but is interested in capturing only the violent offenses, the way to do that is define burglary to include, at most, unprivileged entry into or remaining in an *occupied dwelling* with the intent to commit a *felony that involved the “use, attempted use, or threatened use of physical force against the person of another.”*

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Cong. (Aug. 4, 2015) (Statement of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, U.S. Department of Justice), at 4 (“[C]rowding levels are at 26% above rated capacity, and crowding remains a problem. Crowding at high security institutions is 51%, while crowding at medium and low security facilities is 35% and 25% respectively.”).

<sup>117</sup> Nathan James, Congressional Research Service, *The Bureau of Prisons (BOP): Operations and Budget 1* (Mar. 4, 2014), 592 F.3d 707.

<sup>118</sup> Charles Colson Task Force on Federal Corrections, *Consequences of Growth in the Federal Prison Population 2* (May 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000221-Consequences-of-Growth-in-the-Federal-Prison-Population.pdf>.

<sup>119</sup> *Id.*