Practice Guide to Proposed Amendments to the Definition of "Crime of Violence" at USSG § 4B1.2(a)

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The Commission has sent to Congress the official version of the amendments to the definition of "crime of violence" at § 4B1.2(a), effective August 1, 2016. *See* 81 Fed. Reg. 4741 (Jan. 27, 2016). The Commission (1) deleted the residual clause; (2) removed "burglary of a dwelling" from the list of enumerated offenses; (3) moved murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, and unlawful possession of a firearm described in 26 U.S.C. § 5845(a) from the commentary to the text, while eliminating extortionate extension of credit and involuntary manslaughter (previously in the commentary); (4) added "use" of a firearm described in 26 U.S.C. § 5845(a) and "unlawful possession" of explosive material as defined in 18 U.S.C. § 841(c).

USSG § 4B1.2(a) will be changed as follows:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, ~~burglary of a dwelling,~~ arson, ~~or~~ extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)~~involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another~~.

The commentary defines "extortion" and partially defines "forcible sex offense." The other enumerated offenses will be defined by their generic definitions.

Although these amendments do not go into effect until August 1, 2016, if they would mean your client is not a career offender, you can ask now for a policy-based variance down to the non-career offender range, relying on the Commission's lengthy Reason for Amendment.

If the defendant committed the instant offense before August 1, 2016 and his status as a career offender depends on an offense that is now listed in the commentary but will be moved to the guideline as of August 1, 2016, *see* Commentary Offenses.

Regarding the deletion of the **residual clause**, the Commission explained that it "determined that the residual clause at § 4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*," so it struck the clause "as a matter of policy." The Commission previously stated that "the statutory language the Court found unconstitutionally vague" in *Johnson* is "identical" to the career offender guideline's residual clause, and that its proposed amendments would "make the guideline consistent with . . . *Johnson*."[1]

[1] U.S. Sent'g Comm'n, *News Release: U.S. Sentencing Commission Seeks Comment on Revisuions to Definition of Crime of Violence* (Aug. 7, 2015), http://www.ussc.gov/news/press-releases-and-news-

Regarding the removal of "**burglary of a dwelling**," the Commission cited a mass of empirical evidence showing that "(1) burglary offenses rarely result in physical violence, (2) 'burglary of a dwelling' is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release."

Use this information to show the judge that a variance to the non-career offender range would reflect the Commission's policy decision that these priors should no longer count as "crimes of violence." (Your argument for a policy-based variance will obviously be most effective if your client's prior burglary conviction did not involve any actual or threatened violence. As shown by the study cited above, most won't. If it did involve actual violence, the Commission now invites an upward departure from the non-career offender range for any prior burglary involving violence, not just burglary of a dwelling.) Of course, a variance to the non-career offender range based on these policy reasons would be just the first step. The court may vary further under § 3553(a) based on your client's individualized circumstances.

The Commission also made a few other good changes that you should be aware of now.

- The Commission deleted "**extortionate extension of credit**" and **involuntary manslaughter** from the commentary so that they no longer qualify as "crimes of violence." In deleting involuntary manslaughter, the Commission recognized that the offense generally would have previously qualified only under the residual clause, if at all.

- The Commission narrowed the definition of generic "**extortion**" to "obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury." This amendment "limit[s] the offense to those having an element of fear or threats 'of physical injury,' as opposed to non-violent threats such as injury to reputation." The Commission explains that this change is "[c]onsistent with [its] goal of focusing the career offender and related enhancements on the most dangerous offenders."

In addition, the Commission now invites **downward departure** at § 4B1.1 if one or both of the qualifying priors "is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense." The Commission explains, "application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted **without regard to the limitation in § 4A1.3(b)(3)(A)**."

These good changes come with some not so good changes, however:

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advisories/august-7-2015; *see also* Notice of Proposed Amendments to the Sentencing Guidelines and Commentary at 6, 8-9, http://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20150811_FR_Proposed.pdf.

- The Commission moved the following offenses from the commentary to the text of the guideline, as enumerated offenses**: murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, and possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., sawed-off shotgun, silencer, bomb, or machine gun)**.

- The fact that a defendant's prior offense of conviction carries one of these labels does not mean that it is a "crime of violence." The elements of the offense of conviction must satisfy the generic definition of the offense.

- Regarding the latter **firearms offenses**, the Commission says that the move "maintains the status quo" and that the Commission "continues to believe that possession of these types of weapons [] inherently presents a serious potential risk of physical injury to another person." The Commission continues to provide no data or other empirical evidence to support this statement, however.

Finally, the Commission partially defined the term "**forcible sex offense.**" It includes offenses with an element that "consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced." But sexual abuse of a minor and statutory rape are included "only if":

- the "sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States."

- The effect of this reference to § 2241(c) is that sexual abuse of a minor or statutory rape will count only if the elements of the offense require that the defendant "knowingly engage[d] in a sexual act" (defined at 18 U.S.C. § 2246(2)) with

- a person under age 12, or

- a person age 12 or over and less than age 16, and at least 4 years younger than the defendant under the circumstances in § 2241(a) or (b).

    - (a) "knowingly cause[d]" another person to engage in a sexual act by using force against that person, or by threatening or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping, 18 U.S.C. § 2241(a); or

    - (b) "knowingly" rendered another person unconscious and thereby engaged in a sexual act with that person, or administered to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and "thereby substantially impair[ed] the ability of that other person to appraise or control conduct" and "engage[d] in a sexual act with that other person," 18 U.S.C. § 2241 (b)(1)-(2).

- Some circuits have held that statutory rape based on age alone, with no additional aggravating circumstances or elements, does not qualify as a "forcible sex offense" under § 4B1.2. *See, e.g., United States v. Wray*, 776 F.3d 1182 (10th Cir. 2015). This new definition will change the law in those circuits so that a conviction for statutory rape under a state statute that, by its elements, criminalizes sexual acts with a person under the age of 12 will qualify as a "crime of violence." While it would have been better had the Commission not counted statutory rape at all (it provided no data or other empirical support for counting it), there are likely few statutes that meet that test. For example, in Oklahoma, first degree statutory rape based on age alone requires that the person be under 14 years old while the defendant was over 18 years old. *See* 21 Okla. Stat. § 1114(A)(1). Because this offense is thus broader than the new definition at § 4B1.2, it will not count as a "crime of violence."

- Courts have generally been inclined to count statutory rape when it requires proof of elements in addition to age, such as incapacitation or mental coercion, so this new definition incorporates that general trend. But many state statutes define those types of statutory rape more broadly than § 2241(c), so convictions under those state statutes will not qualify under this new definition of "forcible sex offense. For example, unlike § 2241(c), to be convicted of second degree rape in Oklahoma where the person is unconscious or is otherwise unable to consent, age is not an element at all. *See, e.g., id.* § 1111(A)(2),(4), (5). Because this offense is broader than the new definition at § 4B1.2, it will not count as a "crime of violence."

Here is a link to final version of the proposed amendments.

http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121_Amendments.pdf