



U.S. Department of Justice
Criminal Division

February 19, 2019

Hon. Charles R. Breyer &
Hon. Danny C. Reeves, Commissioners,
U.S. Sentencing Commission
One Columbus Circle, N.E., Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Commissioners Breyer & Reeves:

On December 20, 2018, the Commission published proposed amendments¹ and issues for public comment to, among other things, repair the definition of “crime of violence,” which is used to identify repeat violent offenders for purposes of the guidelines. Critically, the amendments also address the shortcomings of the categorical approach. The categorical approach as applied to the guidelines requires courts to ignore the facts of an offense, generates extensive litigation, consumes vast amounts of court resources, and produces disparate and unfair sentencing outcomes. The Department of Justice has long sought amendments of this nature, which do not raise or lower guidelines ranges, and which will make sentencing outcomes fairer and more predictable. We are grateful to the Commission for taking up this important issue and for proposing helpful, practical, “good government” fixes.

The Commission has also published draft amendments concerning: §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) in light of *Koons v. United States*;² implementation of the FDA Reauthorization Act of 2017;³ implementation of the FAA Reauthorization Act of 2018;⁴ and implementation of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017.⁵ The Department is pleased to submit its views on these matters.

¹ U.S. SENTENCING COMMISSION, FEDERAL REGISTER NOTICE OF PROPOSED 2019 AMENDMENTS (Dec. 20, 2018) (“AMENDMENTS”).

² 138 S. Ct. 1783 (2018).

³ Pub. L. 115–52 (Aug. 18, 2017).

⁴ Pub. L. 115–254 (Oct. 8, 2018).

⁵ Pub. L. 115–164 (Apr. 11, 2018).

Amendments Related to the Categorical Approach, Crime of Violence, Robbery, Controlled Substance Offenses, Inchoate Offenses, and Extortion

1. The Categorical Approach

a. The Department agrees that the guidelines do not require use of the categorical approach and should instead use a conduct-based inquiry.

The definition of crime of violence in the guidelines is not working as it should. As a result, the guidelines are failing to distinguish repeat violent offenders from other offenders, needlessly exposing the public to violent victimization. As noted by an increasing number of courts, the problem is the categorical approach.⁶ Courts use the categorical approach to distinguish violent from non-violent offenses⁷ and in the process deliberately ignore the facts involved in the particular offense.⁸ Many recent cases illustrate the problem.⁹

In addressing these problems, the Commission has very helpfully published its legal assessment that the categorical approach is not required under the guidelines.¹⁰ We thank the Commission for its legal analysis and we hope that courts begin to take note of this assessment immediately. Some judges already have.¹¹

Next, the Commission proposes to amend §4B1.2, Application Note 2 (Offense of Conviction as Focus of Inquiry), to instruct courts that the categorical approach and modified categorical approach no longer apply in determining whether a conviction is a “crime of violence” or a “controlled substance offense” under the guidelines.¹² The Commission proposes renaming Application Note 2, striking “Offense of Conviction as Focus of Inquiry” and inserting in its place “Conduct-Based Inquiry.”¹³ Additionally, new guidance is proposed which would provide that “in determining whether the defendant was convicted of a ‘crime of violence’ or a

⁶ See, e.g., *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (“It is high time for this court to take a mulligan on [crimes of violence]. The well-intentioned experiment that launched fifteen years ago has crashed and burned. By requiring sentencing courts and this court to ignore the specifics of prior convictions well beyond what the categorical approach and Supreme Court precedent instruct, our jurisprudence has proven unworkable and unwise. By employing the term ‘crime of violence,’ Congress and the U.S. Sentencing Commission obviously meant to implement a policy of penalizing felons for past crimes that are, by any reasonable reckoning, ‘violent,’ hence the term.”).

⁷ *United States v. Burris*, 912 F.3d 386, 388 (6th Cir. 2019) (en banc) (citing *United States v. Ford*, 560 F.3d 420, 421-22 (6th Cir. 2009) (“We apply a ‘categorical’ approach” in the Guidelines context.”)).

⁸ *Id.*

⁹ See, e.g., *United States v. Edling*, 891 F.3d 1190 (9th Cir.), *amended and superseded by* 895 F.3d 1153 (9th Cir. 2018); *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018); *United States v. Schneider*, 2018 WL 4653433, at *3 (8th Cir. 2018); *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018).

¹⁰ AMENDMENTS at 23 (“The Supreme Court cases adopting and applying the categorical approach have involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guidelines. However, courts have applied the categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis.”).

¹¹ *Burris*, 912 F.3d at 410 (Thapar, J., concurring) (“But whatever the difficulty of those problems under the ACCA, the Sixth Amendment presents no obstacle under the advisory Sentencing Guidelines.”).

¹² AMENDMENTS at 26.

¹³ *Id.*

‘controlled substance offense,’ the court shall consider the conduct that formed the basis of the conviction, i.e., only the conduct that met one or more elements.”¹⁴

We thank the Commission for suggesting these changes, which would significantly move the analysis toward the facts of each case. A similar solution was proposed for the definition of a violent felony in the Armed Career Criminal Act (“ACCA”) by Justice Alito in *Mathis v. United States*: “A real-world approach would avoid the mess that today’s decision will produce. Allow a sentencing court to take a look at the record in the earlier case.”¹⁵ We urge the Commission to adopt this important change, which will allow courts to perform a more meaningful analysis. By permitting the court to inquire as to the actual conduct of the defendant, the court will be able to consider whether the defendant’s conduct was in fact violent, even if another defendant could have committed the same offense without involving violence. To do otherwise perpetuates an analysis that categorizes many defendants with convictions for crimes involving violence as non-violent crimes.

b. The Commission should clarify the amendment provision addressing elements or alternative means.

To implement its new conduct-based approach, the Commission proposes that the range of inquiry permitted under the modified categorical approach apply in all circumstances. Specifically, the amendments provide that, in determining whether a previous conviction is a crime of violence or a controlled substance offense, “a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction.”¹⁶ The rationale for these amendments is to maintain a connection to the elements of the offense, or of the means of satisfying an element of the offense, for which the defendant was convicted, but without requiring an overly narrow legal analysis imposed by the categorical approach.

Again, the Department thanks the Commission for the significant improvement these amendments embody. In our assessment, however, to get beyond the categorical approach entirely, the Commission should also clarify that the guidelines definition applies to the elements or means as committed by the defendant, regardless of whether it is possible for another person

¹⁴ *Id.*

¹⁵ 136 S. Ct. 2243, 2269-70 (2016) (Alito, J., dissenting).

¹⁶ Currently, *Descamps* and *Mathis* prohibit such an inquiry in the ACCA context.

to commit the same crime without violence. Otherwise, courts may simply elect to continue the misbegotten matching game the categorical approach demands.

c. The Commission should clarify that any information with sufficient indicia of reliability to support its probable accuracy may be used in the conduct-based inquiry.

Finally, the Commission proposes an expanded list of sources and documents that the court may consult. These include:

- the charging document (or a comparable record);
- “the jury instructions, in a case tried to a jury; the judge’s formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant” (or any comparable document);
- “any explicit factual finding by the trial judge to which the defendant assented”; and
- any information comparable to the above.

Unfortunately, such documents may be limited in cases where a defendant has plead guilty and there is only a scant judicial record. The Commission characterizes the proposal as allowing “courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction.”¹⁷ However, the list proposed by the Commission is equivalent to the sources listed in *Shepard*.¹⁸

Although the Commission maintains that the amendments represent an abandonment of the categorical approach, the Department is concerned that, in practice, the documents described often do not set forth in sufficient factual detail the conduct actually involved in an offense. In many state-court cases, the charging document simply lists the elements of the offense by reciting statutory language. Just as often, particular *Shepard* documents—like transcribed pleas—are unavailable, even when other descriptions of the criminal conduct are readily available. Moreover, there is no reason for the Commission to be confined to the limitations *Shepard* imposes, given that the Court’s holding concerned a federal statute, not the guidelines, and given that the Court’s rationale was a practical one: the “avoidance of collateral trials.”¹⁹

In contrast, the Department welcomes the opportunity to put on evidence not limited to a judicial record—subject to objection and challenge by the defense—to prove that the conduct giving rise to the prior conviction was, in fact, violent. If the Commission is concerned that courts will consult unreliable evidence, the guidelines already provide the mechanism to limit

¹⁷ AMENDMENTS at 20.

¹⁸ *Shepard v. United States*, 544 U.S. 13, 16 (2005).

¹⁹ *Id.* at 23.

such evidence where it is unreliable: §6A1.3 (Resolution of Disputed Factors), which allows both parties to present information to the court and permits the court to consider “any information that has sufficient indicia of reliability to support its probable accuracy.”²⁰ Rather than restricting the information courts may consider for purposes of identifying crimes of violence or drug offenses, the Commission should address the threat of unreliable evidence in this context by reiterating how courts deal with this issue in all other guidelines contexts, namely by noting that the court may consult any information as long as it has sufficient indicia of reliability to support its probable accuracy.

2. Robbery

a. The Commission should adopt a slightly modified definition of robbery that defines the specific level of force necessary.

As noted by the Commission, some federal circuits have held that certain robbery offenses—including state robbery offenses and, importantly, federal Hobbs Act robbery—no longer qualify as crimes of violence. These courts have so held, in part, because the robbery conviction at issue did not fit within the procrustean, generic definition of robbery or the revised definition of extortion.²¹ This problem is enormous in scope: similar holdings can be found in the First, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits, and address robbery in Maine, Massachusetts, Pennsylvania, Virginia, North Carolina, Georgia, Wisconsin, Nevada, and California.²² In response, the Commission proposes defining robbery either by explicit reference to the Hobbs Act, 18 U.S.C. § 1951(b)(1), or by adopting the text of that statute. Further, the Commission, having presciently anticipated the Supreme Court’s holding in *Stokeling*,²³ proposes to define the level of force that must be satisfied by the robbery statute in question.

The Department appreciates these critical changes. We suggest that the Commission adopt the formulation set forth below, which is similar to the Commission’s proposal, but based more closely on common-law robbery. The Court in *Stokeling* relied heavily on the proposition that physical force under the ACCA encompasses the degree of force necessary to commit common-law robbery.²⁴ Since 1989, the guidelines definition of crime of violence has also been

²⁰ §6A1.3 (Resolution of Disputed Factors) (“When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.”).

²¹ AMENDMENTS at 17.

²² See, e.g., *United States v. Peppers*, 899 F.3d 211, 233 (3d Cir. 2018); *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018); *United States v. O’Connor*, 874 F.3d 1147, 1153 (10th Cir. 2017); *United States v. Edling*, 895 F.3d 1153, 1157 (9th Cir. 2018); *United States v. Yates*, 866 F.3d 723, 729 (6th Cir. 2017); *United States v. Fluker*, 891 F.3d 541, 543 (4th Cir. 2018); *United States v. Mulkern*, 854 F.3d 87, 93 (1st Cir. 2017); *United States v. Starks*, 861 F.3d 306, 317-24 (1st Cir. 2017); *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016); *United States v. Winston*, 850 F.3d 677, 684-85 (4th Cir. 2017); *United States v. Nickles*, 249 F. Supp. 3d 1162, 1163 (N.D. Cal. 2017).

²³ *Stokeling v. United States*, Slip. Op. No. 17-5554, 586 U. S. __ (Jan. 16, 2019).

²⁴ *Id.* at 6, 10 (“Finding this definition difficult to square with his position, Stokeling urges us to adopt a new, heightened reading of physical force: force that is ‘reasonably expected to cause pain or injury.’ For the reasons

based on the ACCA.²⁵ As a result, the Commission should apply the Supreme Court’s most recent interpretation of the ACCA, i.e., “force sufficient to overcome resistance.”²⁶ We thus propose the following definition: “Robbery is the taking of personal property from the person, custody, or presence of another, by use of force sufficient to overcome resistance or fear of injury to person or property.”

Adding language defining the requisite level of force will be useful to courts, provide certainty to the parties, and reduce the likelihood of continued litigation concerning the meaning of guidelines terms. If robbery were defined as proposed by the Commission in option 1—“the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force”—without providing a requisite level of force, more litigation may follow as to the appropriate level of “force.” Courts may apply the categorical approach and inquire as to whether the level of force required to be convicted of robbery under a certain state statute, given applicable caselaw, matches the level of force required for a robbery conviction under the new definition. The Commission should avoid such an outcome.

3. Conspiracy, Attempt, and Other Inchoate Offenses

The Commission has proposed amendments to address two problems concerning the application of the definition of crime of violence and controlled substance offense to inchoate offenses.

a. The Department agrees that language regarding inchoate offenses should be added to the guidelines language.

First, some courts have begun to exclude inchoate offenses like attempt because they are included in the guidelines commentary. For example, in the D.C. Circuit, a previous conviction in any State for attempted drug distribution no longer qualifies as a controlled substance offense under the guidelines because the application note appears under the section titled “Commentary.”²⁷ The court reasoned that

[i]f the Commission wishes to expand the definition of “controlled substance offenses” to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review. [...] But surely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive authority via commentary—as it did following our decision in

already explained, that definition is inconsistent with the degree of force necessary to commit robbery at common law.”).

²⁵ Appendix C, Amd. 268 (Nov. 1, 1989) (“The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).”).

²⁶ *Stokeling* at *12 (“force is ‘capable of causing physical injury’ within the meaning of *Johnson* when it is sufficient to overcome a victim’s resistance. Such force satisfies ACCA’s elements clause”).

²⁷ *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018); see also *United States v. Havis*, 907 F.3d 439 (6th Cir. 2018).

Price—to impose such a massive impact on a defendant with no grounding in the guidelines themselves.²⁸

The Commission's amendment suggests that, although a change is unnecessary, the prudent course of action is to "alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision."²⁹ As a result, the primary inchoate language from the commentary could be moved to the substantive guideline.

The Department supports this change, though we also agree that this change should not have been necessary. In contrast to the view expressed by the court in *Winstead*, Congress *did* have an opportunity to modify or reject the amendments made by the Commission in 1989, including the amendments to the commentary. The Commission delivered the final amendments to Congress on May 1, 1989, and the amendments provided new commentary to §4B1.2, which expressly provided that "the terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."³⁰ Congress did not disapprove or modify these amendments and they took effect as required by statute.³¹

b. The Department agrees with the Commission's approach not to consider elements of inchoate offenses.

The second problem regarding inchoate offenses is that courts, guided by the categorical approach, have begun to apply a two-step process separately considering: (1) whether the substantive offense is a controlled substance offense or crime of violence; and (2) whether the inchoate offense fits the applicable generic definition at issue, *e.g.*, for conspiracy.³²

The Commission proposes to eliminate the need for this two-step analysis in evaluating inchoate offenses by instructing courts that, "to determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability."³³

The Department supports this helpful change. Rather than look to a complicated series of questions dealing with the generic definition of one or more inchoate offenses, the court should ask whether the underlying offense fits the generic definition of the applicable crime of violence

²⁸ *Winstead*, 890 F.3d at 1092.

²⁹ AMENDMENTS at 43.

³⁰ On file with U.S.S.C.; *see also* U.S.S.G. App. C, Amend. 268 (Nov. 1, 1989).

³¹ Chapter II, Sentencing Reform Act of 1984, Title II, Comprehensive Crime Control Act of 1984, PL 98-473 (H.J. Res. 648), PL 98-473, October 12, 1984, 98 Stat 1837; 28 U.S.C. § 994(p) ("(o) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons thereof, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.")

³² AMENDMENTS at 43.

³³ *Id.*

or controlled substance offense. The Commission's proposed language would ensure that courts focus on the object of the inchoate offense—*i.e.*, was the object of the aiding and abetting, attempt, conspiracy, or solicitation a violent offense or a controlled substance offense.

c. The Department does not support adoption of an overt-act requirement.

The Commission also has published alternative language that would require an overt act be committed for a conspiracy to qualify as a crime of violence or controlled substance offense, as well as alternative language that would require an overt act only for conspiracies to commit controlled substance offenses, among other things.

We urge the Commission not to adopt either of these alternatives. Imposing any overt-act requirement is not the majority view of the federal appellate courts.³⁴ Moreover, critical federal conspiracy statutes addressing violent crime and drug trafficking—conspiracy to commit violent crimes in aid of racketeering³⁵ and federal drug conspiracy³⁶—do not require overt acts. Similarly, in nearly every circuit, conspiracy to commit Hobbs Act extortion or robbery does not require an overt act.³⁷

The proposed alternatives would yield counterintuitive and absurd results. Why, for example, should the guidelines provide that conspiracies to commit controlled substance offenses under state statutes are career offender predicates, but that conspiracies to commit controlled substance offenses under 21 U.S.C. § 846 are not? The Ninth Circuit described such an outcome as “downright absurd” in applying §2L1.2(b)(1): “Congress has decided not to require an overt act as an element of federal drug conspiracy, and we have no reason to conclude that the Sentencing Commission intended to abrogate that decision. Indeed, to adopt such an interpretation would run counter to basic notions of common sense.”³⁸ Indeed, “the overwhelming majority of federal conspiracy offenses [do] not require proof of ‘any overt acts in furtherance of the conspiracy.’”³⁹

The Commission's amendment—not the alternatives—will result in the most logical outcome: if a defendant is convicted of aiding and abetting, attempt, conspiracy, or solicitation to commit a crime of violence or a controlled substance offense, the offense is a crime of violence

³⁴ Compare *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018) (requiring conspiracies to have an overt act) and *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016) with *United States v. Rivera-Constantino*, 798 F.3d 900 (9th Cir. 2015) and with *United States v. Sanbria-Bueno*, 549 Fed. App'x 434, 439 (6th Cir. 2013) (unpublished).

³⁵ 18 U.S.C. § 1959

³⁶ 21 U.S.C. § 846

³⁷ See, e.g., *United States v. Jett*, 908 F.3d 252, 265 (7th Cir. 2018) (“We therefore hold that an overt act is not an element of a Hobbs Act conspiracy. In so doing, we join every other court of appeals to have directly addressed the question after *Shabani*.”); *United States v. Salahuddin*, 765 F.3d 329, 338 (3d Cir. 2014); *United States v. Palmer*, 203 F.3d 55, 63 (1st Cir. 2000); *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999) (per curiam); see also *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994) (“Only one court of appeals, the Fifth Circuit, continues to state that the Hobbs Act contains an overt-act requirement....Like us before today, however, the Fifth Circuit has not considered the effect of *Shabani* and *Whitfield* on this formulation.”).

³⁸ *Rivera-Constantino*, 798 F.3d at 905.

³⁹ *Id.* at 903 (internal quotation marks omitted).

or controlled substance offense because the object of the crime was violent or involved controlled substances.

4. *Controlled Substance Offenses*

The Commission proposes to amend the definition of “controlled substance offense” in §4B1.2(b) to include an offer to sell a controlled substance. The Department supports this straightforward, commonsense adoption. We note, however, that this change will not put an end to the larger problem. For example, a New York State conviction for sale of a controlled substance still may not qualify as a controlled substance offense in the Second Circuit, for a different but related reason: even if the conviction was for selling heroin, because N.Y. Penal Law § 220.31 is not divisible,⁴⁰ it does not qualify as a “controlled substance offense” under §4B1.2 of the guidelines if, at the time of the previous conviction, the New York State statute prohibited the sale of HCG, which was not controlled under the federal Controlled Substances Act.⁴¹ As discussed above, more fundamental changes to the categorical approach will be necessary to fully address this recurring problem.

5. *Extortion*

In 2016, the Commission amended the guidelines definition of extortion with the intent to exclude “non-violent threats such as injury to reputation.”⁴² The Commission explained it had previously relied on the Supreme Court’s interpretation of Hobbs Act extortion⁴³ but that it was now limiting the scope of the guidelines definition to refocus the career offender guideline “on the most dangerous offenders.”⁴⁴ As a result, the Commission amended the definition of extortion to include only those offenses “having an element of force or an element of fear or threats ‘of physical injury,’ as opposed to non-violent threats such as injury to reputation.”⁴⁵ Notwithstanding the Commission’s clear intent, two federal circuit courts have interpreted the new definition to exclude all extortionate threats to physically injure or damage property.⁴⁶

In the Department’s assessment, a definition of extortion that excludes threats to property effectively excludes the offense of extortion as defined in nearly every State. The Department believes that just as arson, which involves damage to property, is included in the definition of crime of violence and violent felony, so too should extortion involving threats of property damage. Moreover, perhaps the quintessential example of what constitutes of extortion—“nice store you have here...it would be a shame if anything happened to it”⁴⁷—involves threats to

⁴⁰ *United States v. Townsend*, __ F.3d __, 2018 WL 3520251, *7 (2d Cir. 2018).

⁴¹ *Id.* at 7 (“[S]ection 3306 of the New York Public Health Law, included HCG as a Schedule III controlled substance. See N.Y. Pub. Health Law § 3306, Schedule III(7)(g) (listing Chorionic gonadotropin). HCG is not a controlled substance under the CSA.”)

⁴² U.S.S.G. App. C, Amend. 798 at 125-32 (Supp. Aug. 2016).

⁴³ See *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining “extortion” for purposes of the Hobbs Act).

⁴⁴ U.S.S.G. App. C, Amend. 798.

⁴⁵ *Id.*

⁴⁶ See *United States v. Edling*, 891 F.3d 1190 (9th Cir.), *amended and superseded by* 895 F.3d 1153 (9th Cir. 2018); *United States v. O’Connor*, 874 F.3d 1147, 1153 (10th Cir. 2017).

⁴⁷ See e.g., *United States v. Ausbie*, C.A. No. 18-10053 (9th Cir. 2018) (unpublished) (after woman stole defendant’s money, defendant threatened to burn down parents’ store and then conspired to burn down store).

property excluded under the Ninth and Tenth Circuit's interpretation of the Commission's amendments.

The Department recommends that the Commission take this opportunity to remedy the problem. We suggest that the Commission amend the definition of extortion to read as follows (proposed additional language italicized):

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury *to persons or property*, or (C) threat of physical injury *to persons or property*.

If the Commission remains concerned that such a definition could capture a non-violent offense, we again suggest that the Commission can provide for a downward departure where the defendant's previous conviction for extortion did not involve violent conduct.

Thank you for considering our views on these important matters. We thank you for devoting considerable resources to considering and publishing thoughtful, thorough, and helpful amendments concerning the categorical approach and other recurring application issues concerning the guidelines definition of a crime of violence and of a controlled substance offense.

* * *

Amendment of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) in Light of *Koons v. United States*

The Commission has requested comment on two issues related to §1B1.10. The first question concerns the treatment of offenders whose original guidelines range fell above or "straddled" a statutory mandatory minimum. The second concerns whether, when granting a departure below the amended guidelines range based on substantial assistance, the court may also consider the additional grounds for departure or variance that animated the original sentence.

First, with regard to the application of a mandatory minimum, the Department suggests that an offender who was subject to a guidelines range above the mandatory minimum should be eligible for a sentencing reduction when the range is altered, but to a term no lower than the mandatory minimum (unless the government filed a motion under 18 U.S.C. § 3553(e) permitting a sentence below the minimum). A "straddler," in contrast, should not be eligible for relief.

Turning to the question of substantial-assistance departures, the Department believes that a comparable departure below the amended guidelines range may take into account all bases for the original reduction. This position is most faithful to the language of the pertinent guideline, §1B1.10, and the application note, which allow a term of imprisonment comparably below the new guidelines range for any defendant for whom the government made a substantial assistance motion. Further, our position is consistent with the express policy stated by the Commission to

favor for reduced sentences on a retroactive guidelines amendment those defendants who provided substantial assistance. The Ninth Circuit agrees with the government's view.⁴⁸

Acknowledging that these “mixed” cases are eligible for Section 3582(c) relief does not guarantee such relief. The government may argue that, even though the defendant is eligible, no reduction or only a limited reduction is appropriate because the court's original sentence was based in part on ordinary departure or variance factors and thus reflected the appropriate non-guidelines sentence that was sufficient, but not greater than necessary, to achieve the purposes of sentencing. The government may also advocate—or negotiate with defendants to agree to—Section 3582(c) relief only to the extent of a new sentence comparably below the amended range, with the basis of comparison being the number of departure levels originally attributed to substantial assistance.

Finally, we note that it is often the case that a court, upon granting a substantial assistance motion and articulating other grounds for a reduction as well, does not specify the numerical extent to which the final sentence rested on one ground or another. The Commission's Option 1, which would permit a reduction only to the extent granted earlier for substantial assistance, presents draft commentary that includes the example of a case in which the court departed 10% below the original range for substantial assistance and varied an additional 10% based on the history and characteristics of the defendant. But, in reality, a court's explanation may not be that precise, meaning that, under Option 1, disparate treatment of defendants will inevitably result. A defendant who received a reduction without a clear explanation of the degree attributed to different bases will fare better than a defendant who appeared before a more precise judge. Or, if the court is required to specify after the fact the numerical degree of each ground of the original reduction, that will invite additional litigation and may not be reliable if the original sentencing judge is no longer on the bench. This is another reason to support the government's current view, which would be adopted through Option 2.

* * *

Amendments to Implement FDA Reauthorization Act of 2017

The manufacture and sale of counterfeit drugs continues to represent an alarming and growing problem that can pose serious and life-threatening health and safety risks, as well as undermine consumer confidence. More sophisticated methods of manufacturing, packaging, and distribution facilitated by worldwide Internet access have created unprecedented opportunities for criminals to traffic in dangerous fake drugs, including opioids. These drugs may look real but often contain little or none of the active ingredients of genuine drugs, different active ingredients, or may contain harmful ingredients such as fentanyl, at the expense of the health and safety of consumers. Indeed, there have been instances of significant physical harm and even death to consumers as a result of drug counterfeiters' actions.

The problem is compounded by a variety of factors. Production costs are low, facsimiles of genuine drugs are inexpensive to manufacture, as are high-quality counterfeit labels and packaging. Counterfeit drugs are also hard to detect, and the small physical size of

⁴⁸ See *United States v. D.M.*, 869 F.3d 1133, 1139-45 (9th Cir. 2017).

pharmaceuticals makes them easy to ship and import through express consignments, making interdiction difficult. Moreover, without sophisticated chemical analysis, some counterfeits are indistinguishable from genuine drugs and may be undetected for long periods of time. Profit margins are high, and many genuine name-brand drugs are expensive, particularly certain physician-administered and orphan drugs,⁴⁹ which can cost hundreds of dollars per dose. As a result, there is significant room for counterfeiters to offer fakes well below the cost of genuine drugs while still turning a hefty profit. Some potential purchasers of counterfeit drugs are often susceptible to offers of drugs through nontraditional or untrusted sources—particularly over the Internet, including the darkweb—through which fake drugs can be easily sold. Consumers in need of critical, expensive pharmaceuticals for health maintenance, for example, may seek out discounted drugs for financial reasons, especially if they lack full insurance coverage. And while some consumers may understand that there is a risk associated with obtaining drugs outside approved or reputable sources, many are easily duped by professional-looking websites and the high-quality packaging and appearance of the counterfeit drugs. While the federal government has mounted campaigns to educate consumers of the dangers of Internet “pharmacies,” much work needs to be done, and in the meantime, purveyors of fakes—often located overseas—are able to prey on the unwary.

Section 2320 of Title 18 (trafficking in counterfeit goods) applies where a counterfeit mark is used on or in connection with trafficking in the drugs, such as where a counterfeit trademark is reflected in a pill through a logo or a pill’s shape and color, or the trademark appears on packaging for the drugs. In 2012, Congress amended this statute in Section 717 of the Food and Drug Administration Safety and Innovation Act,⁵⁰ and enhanced the penalties for individuals for using a counterfeit mark on or in connection with a drug from up to ten years imprisonment and a \$2 million fine for a first offense (penalties applicable to most offenses under the statute), to not more than 20 years imprisonment and a \$5 million fine. Terms of imprisonment for corporations and second offenders were also increased.⁵¹

The Act also directed the Commission to “review and amend, if appropriate,” the guidelines and policy statements to “reflect the serious nature” of a counterfeit drug offense.⁵² After notice and comment, §2B5.3, the guideline applicable to Section 2320 of Title 18, was amended to add a 2-level enhancement where the offense involved a counterfeit drug.⁵³

The Federal Food, Drug, and Cosmetic Act (“FDCA”)⁵⁴ provides criminal penalties for a wider variety of conduct related to the manufacture and distribution of counterfeit drugs, including sales of adulterated, misbranded, mislabeled, or counterfeit drugs. The term “counterfeit” in the FDCA is broader than in Section 2320 in that it is not limited to the use of counterfeit trademarks in association with a drug.

⁴⁹ “Orphan drugs” are drugs intended to treat a rare disease or condition such that they affect fewer than 200,000 persons in the United States, or they are not expected to be profitable within seven years of FDA approval. *See* 21 U.S.C. § 360bb(a)(2).

⁵⁰ Pub. L. 112-144 (enacted July 9, 2012) (“FDASIA”).

⁵¹ *See* 18 U.S.C. § 2320(b)(3).

⁵² FDASIA § 717.

⁵³ *See* USSG § 2B5.3(b)(5); USSG App. C, Amend. 773 (Nov. 1, 2013).

⁵⁴ 21 U.S.C. §301 *et seq.*

As part of the FDA Reauthorization Act of 2017,⁵⁵ Congress added a new penalty provision at Section 333(b)(8) to provide for a 10-year maximum term of imprisonment for offenses involving the manufacture, sale, or dispensing of counterfeit drugs. While there are other FDCA offenses that call for a 10-year maximum term, the bread-and-butter misbranding and adulteration offenses are limited to a 3-year maximum term for offenses committed “with an intent to defraud or mislead.” Prior to enactment of the new penalty provision, the maximum penalty for all counterfeit drug offenses under the FDCA, including the manufacture, sale, or dispensing of a counterfeit drug, was also limited to a 3-year maximum.

Unlike the legislation that amended Section 2320 of Title 18, in 2017 Congress did not specifically direct the Commission to review the guidelines for the new counterfeit drug offense. While most FDCA offenses look to §2N2.1,⁵⁶ that section cross-references §2B1.1, the fraud guideline, for offenses involving fraud.

We believe the same reasoning set forth in Amendment 773 to enhance guidelines computations for Section 2320 counterfeit drug offenses applies to the enhanced penalty for counterfeit drug offenses brought under the FDCA and warrants a change to the fraud guideline at §2B1.1. As noted in Amendment 773, “counterfeit drugs involve a threat to public safety and undermine the public’s confidence in the drug supply chain.” While the FDA assesses the drug supply in the United States to be far safer than that in many other countries, constant vigilance and deterrence of this activity through meaningful penalties is the only way to ensure that the significant level of counterfeit medicines found in other countries does not make its way here, and that those responsible for making and selling counterfeit medicines are appropriately punished.

Specifically, we propose that the Commission reference Section 333(b)(8) of Title 21 under the statutory provisions listed for §2N2.1 so that §2B1.1 may be applied to offenses involving fraud.

We also suggest that the Commission add a 2-level enhancement to §2B1.1 for offenses involving the making, selling or dispensing, or holding for sale or dispensing, of a counterfeit drug to reflect the inherent dangers posed where a defendant knowingly traffics in counterfeit drugs. Because the enhanced penalty in 21 U.S.C. § 333(b)(8) is limited to those specific counterfeit drug offenses—there are other offenses related to counterfeiting drugs found in at Section 331(i) of Title 21, such as possessing or making a punch or die used to imprint a trade name on a drug container—this would ensure that Congress’s concern with the manufacture and sale of counterfeit drugs is commensurately addressed with the enhancement for counterfeit drug offenses charged under Section 2320 of Title 18.

* * *

⁵⁵ Pub. L. 115-52, Sec. 604(b) (2017).

⁵⁶ Product tampering offenses under 21 U.S.C. § 333(b)(7) reference §2N1.1.

Amendments to Implement the Allow States and Victims to Fight Online Sex Trafficking Act of 2017

The Department recommends adopting a higher base offense level than provided for under the preliminary guidelines for aggravated offenses involving adult victims. The aggravated violation under Section 2421A(b)(2) involves violations committed in “reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of [18 U.S.C. §] 1591(a).” Violations involving an adult victim would result in a base offense level of only 18 under §2G1.1, compared to a base offense level of 30 or 34 for conduct involving similar culpability under Section 1591(a). Both statutes target conduct involving reckless disregard of the fact that force, fraud, or coercion was used to cause an adult victim to engage in a commercial sex act. Neither statute requires that the defendant be directly engaged in causing the adult victim’s commercial sex act. Therefore, the two statutes could involve similarly culpable conduct, but would carry vastly different sentences. Accordingly, the Department recommends a base offense level of 28 for aggravated violations under Section 2421A(b)(2)—slightly lower than for Section 1591(a) to account for the fact that Section 2421A does not carry a mandatory minimum sentence, unlike Section 1591(a).

This approach would also make violations of Section 2421A(b)(2) involving adult and minor victims commensurate just like they are for violations involving adult and minor victims under Section 1591. For reference, violations of Section 1591(a) involving adult and minor victims are commensurate under §§ 2G1.1 and 2G1.3, in both cases resulting in a base offense level of 34—or 30 if the victim was between the ages of 14 and 17 and there was no proof of force, fraud, or coercion. Under the proposed amendments, aggravated violations of Section 2421A(b)(2) involving minor victims would result in a base offense level of 28 under §2G1.3. With the change the Department is proposing, the sentences for violations of Section 2421A(b)(2) involving adult or minor victims would now be consistent.

The Commission also asks about newly-enacted 18 U.S.C. § 2421A, codified in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of Title 18, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. Various guidelines refer to Chapter 117, including §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and §5D1.2 (Term of Supervised Release). The Commission seeks comment on whether it should amend those guidelines to account for Section 2421A.

With respect to §4B1.5, the Department recommends that Section 2421A(b)(2) be added to the definition of “covered sex crime.” Currently, the definition of covered sex crime includes violations of Section 1591 (sex trafficking) involving child victims. Section 2421A(b)(2) is an aggravated felony involving the facilitation of sex trafficking. Adding Section 2421A(b)(2) to §4B1.5’s definition of covered sex crime will ensure consistent treatment of both sex trafficking offenses. To ensure that it is clear that all violations of Section 2421A(b)(2) are included in the definition of covered sex crime, regardless of the underlying facts of the specific case, we recommend editing Application Note 2 to replace “not including transmitting information about a minor or filing a factual statement about an alien individual” with “not including violations of 18 U.S.C. §§ 2424 and 2425.” The Department does not recommend adding any other offenses set forth in Section 2421A to §4B1.5’s definition of covered sex crime.

With respect to §5D1.2, the Department recommends including offenses under Section 2421A in the definition of sex offense in Application Note 1. The conduct prohibited by Section 2421A is similar to other crimes also included in the definition of sex offense, such as Title 18 Section 2421 (which prohibits transportation for purposes of prostitution). As noted above, we recommend amending the definition of a sex offense in Application Note 1 to replace “not including transmitting information about a minor or filing a factual statement about an alien individual” with “not including violations of 18 U.S.C. §§ 2424 and 2425.” We note that the maximum term of supervised release for violations of Section 2421A(a) is three years, and for violations of section 2421A(b) is five years.⁵⁷ In contrast, the term of supervised release for many offenses against children is five years to life.⁵⁸

* * *

Thank you very much for considering the Department’s perspective on these matters.

Respectfully submitted,



David Rybicki
Commissioner, *ex officio*,
U.S. Sentencing Commission &
Deputy Assistant Attorney General,
Criminal Division

cc: Patricia K. Cushwa, Commissioner, *ex officio*, U.S. Sentencing Commission
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel

⁵⁷ See 18 U.S.C. §§ 3581(b), 3583(b).

⁵⁸ See 18 U.S.C. § 3583(k).