



Written Statement of

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on behalf of the
National Association of Criminal Defense Lawyers

before the
United States Sentencing Commission

Re: Proposed Amendments to the United States Sentencing Guidelines
Relating to the Definition of Crimes of Violence and Related Changes to the
Career Offender Guidelines

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INTRODUCTION

Chair Saris and Members of the Commission:

Thank you for inviting the National Association of Criminal Defense Lawyers (NACDL) to participate in this important public hearing. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for individuals accused of crimes. Founded as a professional bar association in 1958, NACDL has more than 10,000 direct members in 28 countries—and 90 state, provincial and local affiliate organizations totaling approximately 40,000 attorneys. Our members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. I am a life-member of NACDL, vice-chair of NACDL's sentencing committee, an attorney in private practice in New York City, and a member of the Criminal Justice Act panels for both the Southern and Eastern Districts of New York. Like me, a large proportion of NACDL members practice before both state and federal courts and are on the front lines analyzing the interplay between federal law and the laws of our local jurisdictions.

JOHNSON AND THE RESIDUAL CLAUSE

Let me begin by stating the obvious: NACDL strongly supports the elimination of the “residual clause” from the Guidelines’ definition of crime of violence found at USSG § 4B1.2. Our Association filed an *amicus* brief in the *Johnson* case in conjunction with other organizations committed to fairness in criminal justice. We advocated for the outcome in *Johnson* because it had long since become clear that the words “or otherwise involves conduct that presents a serious potential risk of physical injury to another” were not capable of being understood or applied in any consistent or meaningful way.¹ The use of these words to dramatically increase criminal liability therefore violated the due process clause of the Fifth Amendment of the Constitution.

As defense lawyers, our members know that our clients’ lives—and those of their families—have been irreparably damaged by these mysterious words. The same vague standard used to trigger high mandatory minimum sentences under the Armed Career Criminal Act causes enormous and unwarranted increases in Guidelines sentences. These sentences are almost universally considered too high in borderline cases where the prior crime of violence may be uncertain. As a result, the Guidelines are often not

¹ The brief is available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=36526&libID=36496>. It was filed on behalf of NACDL as well as Families Against Mandatory Minimums and the Cato Institute.

followed.² Deleting the residual clause, therefore, is not only mandated by the Due Process clause, but would promote respect for the Guidelines and fairer sentences as a whole.

RETROACTIVITY

The most important open question before the Commission appears to be whether elimination of the residual clause will apply retroactively under USSG § 1B1.10. NACDL strongly supports retroactivity of the proposed amendment. As noted in the Proposed Amendment published on August 12, 2015, in determining whether an amendment should apply retroactively, the Commission considers “the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range[.]” USSG § 1B1.10 Commentary.

Retroactive application is consistent with the purpose of the amendment, which is to ensure that enhanced sentences are imposed solely on individuals who clearly merit them consistently with the U.S. Constitution. Retroactive application of the amendment is also consistent with the broad-based, bipartisan movement to address the problem of mass

² See *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, Part C: Analysis of Career Offenders (U.S. Sentenc’g Comm’n 2012) (hereinafter “*Booker Report*”) (“rate of within range sentences for career offenders has decreased...to a low of 36.1 percent during the *Gall* period”); see also U.S. Sentencing Commission Quick Facts: Career Offenders (within range sentences for career offenders at 30.2 percent in 2012).

incarceration in the United States. In particular, retroactive elimination of the residual clause would parallel President Obama's clemency initiative, which is limited to non-violent, low-level, federal inmates whose sentences would be lower today by operation of law or policy. Retroactivity would grant judges discretion to provide similar relief to those sentenced under the residual clause but whose conduct or actual criminal history may not have warranted the staggeringly high sentences the clause triggers.

While the magnitude of the effect on Guideline ranges will be substantial, our experience shows that the effect on actual sentences imposed will be less dramatic since roughly two-thirds of career offender sentences fall outside the Guidelines range.³

The difficulty of applying the Guideline range absent the residual clause will be minimal: in any case where a defendant was sentenced under the residual clause, the court need only mechanically re-calculate the sentence without the enhancements triggered by the additional predicate crime of violence. As the Commission's studies demonstrate, experience with prior retroactive amendments—specifically, the 2007 Crack Cocaine Amendment, the 2010 amendment implementing the Fair Sentencing Act, and the recent “Drugs Minus Two” amendment—reveals that our federal

³ See *Booker Report* Part C at 2.

courts have the capacity to implement such amendments retroactively in an orderly and individualized manner, despite the many cases they impact. Most significantly, the Commission’s analyses reveal there is no evidence of a higher incidence of recidivism among those whose sentence lengths were reduced based on retroactive application of the 2007 Crack Cocaine Amendment. *See Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (U.S. Sentenc’g Comm’n 2012) (finding that “overall recidivism rate for the offenders who received retroactive application of the 2007 Crack Cocaine Amendment...was similar to the recidivism rate for offenders who ... had ... served their full sentence”).

All three factors militate toward retroactive application of the change. We suspect that in many cases where an enhanced sentence was based only on the residual clause—and not on the other parts of the definition of crime of violence—the underlying sentence will be a below-Guidelines variance to begin with, because judges recognize that prior offenses based on the residual clause are by and large less severe than prior offenses based on the “elements” and “enumerated” clauses. The impact on older sentences imposed pre-*Booker* will be greater since judges at that time were more wedded to the Guidelines and less likely to downwardly depart based solely

on the fact that mechanical application of an overly broad career offender Guideline yielded a sentence that was too high. Those extraordinarily long sentences, still being served a decade later, cry out for the kind of discretionary relief triggered by USSG § 1B1.10.

Let me conclude with an example from my own practice that illustrates with how important retroactivity is in these cases. A client of mine was arrested in 2006 and sentenced in 2008 for possession of various weapons after having committed a felony. He was 38 at the time and had known nothing but violence, petty crime, and drug addiction since he was a child. The sentencing court was constrained under Second Circuit precedent to apply the crime-of-violence enhancements under the residual clause based on a prior conviction for attempted burglary of a closed bodega at 2:30 a.m. The resulting range was 168 to 210 months. Without the residual clause, his sentencing range would have substantially lower. The court varied, imposing a sentence of 120 months. Had he been sentenced before Booker, he almost certainly would have received the full 168 months and retroactivity would be essential to give him a chance to be sentenced with respect to a range that is lawful under *Johnson* and—as the judge’s variance acknowledges—more consistent with his actual culpability.

OTHER ISSUES FOR COMMENT

Enumerated Offenses. NACDL generally agrees that specifying the enumerated offenses in the body of the Guideline rather than in the commentary is clearer. However, we continue to be gravely concerned that the list of enumerated offenses is too broad. We believe that the Commission should adopt the suggestion in the proposed amendment's second issue for comment, that a conviction should only be counted as a crime of violence if it meets the common law definition of an offense against the person and if the defendant acted as principal. Accordingly, we would eliminate the inclusion in § 4B1.2(a)(2) of extortion, arson, generic burglary (as opposed to burglary of a dwelling), and offenses involving explosives.

A narrower definition of “crime of violence” would have the effect of limiting the offenders impacted by the resulting increases to those who have actually engaged in violence as it is commonly understood. It would remove the burden from the courts of speculating whether conduct described in a particular statute creates a risk of harm. Dramatic increases in Guidelines sentences—like the 74-month difference in the example given above—would be limited to verifiably violent offenders. Such large increases only make sense if applied to such offenders.

Felony Classification. In the same vein, we agree that it is sensible to limit offenses that qualify as crimes of violence to those that are defined in their jurisdictions as felonies or some similar classification, as proposed in the amendment to Application Note 1. In addition, we believe that it makes more sense to specify the designation of the crime at the time of the ultimate conviction (including post-dated reclassifications), since that is the point when the jurisdiction's evaluation of the conduct itself is established. In any event, the time of the designation should be specified to avoid ambiguity.

However, this somewhat confusing limitation may be superfluous if our approach of limiting crimes of violence to actual crimes against the person (and residential burglary) is adopted, as these offenses are felonies in virtually every jurisdiction.

Definitions of Enumerated Offenses. We also generally agree that it is valuable to define the minimum elements of specific offenses that constitute crimes of violence, as set forth in the new proposed Application Note 2. However, several of the proposed definitions are too broad and will encompass conduct that is not typically thought of as violent in itself. In addition, the introduction to the new Application Note 2 should specify that the definitions set forth minimum elements that must be contained in the respective statute in order to qualify as a crime of violence.

Our comments on the specific proposed definitions of enumerated offenses are as follows:

NACDL opposes the inclusion of both mere attempts and reckless conduct in the definition of “aggravated assault.”

We believe that forcible sex offenses should only include offenses in which physical force is an element in order to exclude strict-liability statutory rape offenses and offenses charged against individuals who are close in age to their putative victims. This definition should include an express exclusion for statutory rape offenses, i.e., offenses where lack of consent is based solely on the age of the victim. While we recognize that some extreme cases of sexual acts against children may be charged solely as statutory rape or sexual abuse, we are more concerned that the definition of “forcible sex offense” not be over-inclusive. Without an express exclusion for statutory rape, courts may interpret sexual contact between individuals close in age as crimes of violence, which would defeat the purpose of the amendment. In cases involving prior crimes against young children, courts would be free to exercise discretion under 18 U.S.C. § 3553(a).

NACDL believes that the definition of “robbery” must include the use or threatened use of force against another.

NACDL believes that the crime of burglary should be omitted altogether because it is fundamentally a crime against property and in many jurisdictions can be committed entirely without violence. In the event that burglary is retained, it should be limited to nighttime residential burglaries. The definition proposed is far too broad because it captures the manifestly non-violent conduct of remaining unlawfully in a commercial space with intent to commit a crime. Much conduct that is non-violent—such as breaking into or remaining in a pharmacy to steal addictive prescription drugs—would be captured by such a definition.

Definitions for arson and extortion should be omitted because they do not necessarily involve actual violence.

Vicarious and Inchoate Conduct. NACDL believes that the purposes of the crime-of-violence enhancements are undermined by the Commentary's inclusion of attempt, aiding-and-abetting, and conspiracy. While we believe that the huge increases in sentences triggered by the enhancements are rarely warranted, if they are to be used, their justification should be long-term incapacitation of violent repeat offenders—people who have repeatedly shown themselves capable of actually physically hurting others. By including inchoate and vicarious conduct, the crime-of-violence definitions capture not only the truly violent but also their associates who

may not personally be violent at all and, in many cases, though criminally culpable, are swept up in the conduct of others. By tightening the definition, the Commission can ensure that the large sentencing increases (and associated costs to the government and the offender) are reserved for individuals who have been proven to be actually violent themselves. Mere associates of violent individuals should not be treated in the same way as those who personally engage in repeated violent conduct.⁴

Illegal Re-Entry. NACDL believes that the same definition for felony crime-of-violence should be used in the unlawful re-entry Guideline, USSG § 2L1.2. However, under our preferred approach, the definition makes little sense with respect to USSG § 2L1.2(b)(1)(E), which references misdemeanor crimes of violence, since we submit that only felonies should operate as crimes of violence. Therefore, § 2L1.2(b)(1)(E) and its corresponding Application Note 4, should be eliminated. We agree with the amendment to Application Note 2 that would ensure only crimes of violence designated as felonies at the time of the underlying conviction are counted. We think it makes more sense to specify the designation of the crime at the

⁴ A similar, but distinct, analysis applies to inchoate and vicarious conduct relating to controlled substance offenses. However, NACDL believes that there is no legitimate rationale for equating controlled substance offenses with crimes of violence and that the Commission should carefully re-examine this connection as part of its normal amendment process. Details of this analysis exceed the scope of today's testimony.

time of the initial conviction, rather than sentencing, since that is the point when the conduct itself is established.

Again, on behalf of the National Association of Criminal Defense Lawyers, I am grateful to the Commission for promoting dialogue on these important issues and strongly urge retroactive adoption of the elimination of the residual clause.