

PRACTICE GUIDE

"Crime of Violence"

The Commission has sent to Congress the official version of the amendments to the definition of "crime of violence" under § 4B1.2, effective August 1, 2016. As you already know, the Commission (1) deleted the residual clause and (2) removed "burglary of a dwelling" from the list of enumerated offenses.

Although these amendments do not go into effect until August 1, 2016, if one or both 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.

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*," and so it struck the clause "as a matter of policy."

Regarding the removal of "burglary of a dwelling," the Commission cited a mass of empirical evidence (yes, it's true) 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 well-supported policy decision 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 for any prior burglary involving violence, not just burglary of a dwelling.) Of course, a variance to the non-CO guideline 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:

- 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 use or possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., sawed-off shotgun, silencer, bomb, or machine gun).
- 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. Here’s a sample argument that should be useful. https://www.fed.org/docs/Select-Topics---sentencing/Sent_Memo_semiauto_weapon.pdf
- In commentary, the Commission defined “forcible sex offense” to include offenses that have no element of force, i.e., “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.” (Again, the Commission provides no data or other empirical support in support.) In commentary, the Commission “makes clear” that sexual abuse of a minor and statutory rape count, but “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.”

Under the new definition of forcible sex offense, which now includes sexual abuse of a minor and statutory rape, that where the prior is based on conduct involving a minor between the ages of 12 and 15 (and at least 4 years younger than the other person), the text of 2241(c) requires proof that the defendant's conduct also violated 2241(a) or (b). Therefore, a state offense is only a generic forcible sex offense if the state statute requires proof that the minor was between the ages of 12 and 15 (and 4 years younger) AND the defendant used force, threats of force, rendered the minor unconscious, or drugged the minor, etc. The only pure stat rape cases that would count would be those involving someone 11 or under.

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