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Commentary Offenses,  
March 3, 2016, revised March 18, 2016

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Part I explains why offenses currently listed in the guideline’s commentary that do not satisfy the force clause, § 4B1.2(a)(1), and are not enumerated in § 4B1.2(a)(2) are not “crimes of violence” after Johnson. This is for sentencing, direct appeal and § 2255s for defendants who committed the instant offense before August 1, 2016, the effective date of the amendment deleting the residual clause and moving commentary offenses into the text.

Part II explains that the commentary offenses (that are not also enumerated in § 4B1.2(a)(2)) were intended to interpret the residual clause, in case this is useful.

Part III discusses inchoate crimes, which will remain in the commentary even after the August 1, 2016 amendment.

Part IV outlines the circuit line-up on whether commentary has freestanding definitional power.

Part V addresses a slightly different issue: whether courts may find that an instant (or prior) offense of conviction was unlawful possession of a firearm described in 26 U.S.C. § 5845(a), when the defendant was convicted only of unlawful possession of a firearm.

Background

On June 26, 2015, the Supreme Court held in Johnson v. United States, 135 S. Ct. 2551, 2559 (2015) that the residual clause in the ACCA is void for vagueness. The Court has since vacated and remanded fourteen lower court decisions in which defendants had been sentenced under the identical residual clause1 in the career offender guideline.2 The government has

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1 When the Commission adopted the current definition of “crime of violence” in the career offender guideline, the complete reason was that “[t]he definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e).” USSG, App. C, Amend. 268 (1989). The amendment was in “respon[se] to Congress’s enactment of the Armed Career Criminal Act,” and “the Commission amended the definition of the term ‘crime of violence’ based on the definition of the term ‘violent felony’ in the ACCA.” U.S. Sent’g Comm’n, Report on the Continuing Impact of United States v. Booker on Federal Sentencing, Pt. C (Career Offenders), at 4 (2012).

conceded, and all but one court to address the issue agree that Johnson’s constitutional holding applies to the residual clause in the career offender guideline, which is also used by several other guidelines. At the same time, the government is taking the position that offenses that would qualify as “crimes of violence” based only on the now-void residual clause -- because they do not have as an element the use, attempted use, or threatened use of “violent force” against the person of another, § 4B1.2(a)(1), and are not generic burglary of a dwelling, arson, extortion, or use of explosives, § 4B1.2(a)(2) -- qualify as “crimes of violence” simply because they are listed in the commentary.

The government is wrong. Commentary has no freestanding definitional power. The only valid function of commentary is to interpret or explain the text of a guideline. Commentary that does not interpret or explain any existing text of a guideline is invalid, and commentary that is inconsistent with or a plainly erroneous reading of the existing guideline’s text must be disregarded in favor of the text. With the residual clause gone, an offense listed in the commentary that could satisfy the definition of “crime of violence” only under the residual clause is not a “crime of violence.”

The offenses currently listed in the commentary (that are not also listed in the enumerated offense clause) are murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, extortionate extension of credit, “unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed off rifle, silencer, bomb, or machine gun),” and aiding and abetting, conspiring, or attempting to commit a “crime of violence.” USSG § 4B1.2 cmt. (n.1). Most of these offenses as defined by state statutes or state common law have been held, or can be shown, not to satisfy the force clause. If the crime of which the defendant


3 See USSG §§ 2K1.3 & cmt. n.2 (explosive materials); 2K2.1 & cmt. n.1 (firearms); 2S1.1 & cmt. n.1 (money laundering); 4A1.1(c), 4A1.2(p) (criminal history); 5K2.17 & cmt. n.1 (departure for semi-automatic firearms); and 7B1.1(a)(1) & cmt. n.2 (probation and supervised release).

4 Johnson v. United States, 559 U.S. 133, 140 (2010) (“violent force” means “strong physical force” that is “capable of causing physical injury or pain” to another person).

was convicted does not satisfy the force clause under the categorical approach, or the modified
categorical approach if it applies, the commentary listing the offense must be disregarded
because, as explained below, it does not interpret any existing text of the guideline after Johnson,
and is inconsistent with the remaining text.

An additional or alternative argument in some cases is that even if the commentary were
valid, an offense listed in the commentary does not satisfy the generic definition of the offense.
2015). This argument will become very important for defendants who committed the instant
offense after August 1, 2016, when all of the commentary offenses (except inchoate crimes) will
be moved to the text. We hope to distribute a memo regarding generic definitions for these
offenses sometime before the Advanced Defender Conference in June.

I. The commentary listing [OFFENSE] as a crime of violence must be disregarded
because it does not interpret or explain any text of the career offender guideline that
exists after Johnson, and is inconsistent with the remaining text of the guideline.

The Sentencing Reform Act requires the Sentencing Commission to “submit to Congress
amendments to the guidelines” at least six months before their effective date, and provides that
Congress may modify or disapprove such amendments before their effective date. 28 U.S.C. §
994(p). In upholding the Commission against a separation-of-powers challenge, the Supreme
Court emphasized that this requirement makes the Commission “fully accountable to Congress.”

But the Sentencing Reform Act says nothing about submitting commentary to Congress,
see 28 U.S.C. § 994(p), and indeed did not expressly authorize the issuance of commentary at all.
that commentary is valid and authoritative, but only if it interprets a guideline, and is not
inconsistent with or a plainly erroneous reading of that guideline and does not violate the
Constitution or a federal statute. Because the guidelines are promulgated pursuant to an express
delegation of rulemaking authority by Congress, they are “the equivalent of legislative rules
adopted by [other] federal agencies.” Id. at 44-45. Because the “functional purpose of
[guidelines] commentary (of the kind at issue here) is to assist in the interpretation and
application of those rules,” it “is akin to an agency’s interpretation of its own legislative rules.”
Id. at 45. Thus, as with other agencies’ interpretations of their own regulations, id.,

(4th Cir. 2009) (conspiracy to commit any offense); United States v. Fell, 511 F.3d 1035 (10th Cir. 2007)
(conspiracy to commit any offense); United States v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir.
2014) (Delaware attempt to commit any offense); James v. United States, 550 U.S. 192, 197 (2007)
(Florida attempted burglary “does not have ‘as an element the use, attempted use, or threatened use of
physical force against the person of another.’”), overruled on other grounds by Johnson v. United States,

6 See Descamps v. United States, 133 S. Ct. 2276 (2013) (holding that courts may not apply modified
categorical approach when the crime of which the defendant was convicted has a single, indivisible set of
elements).
“commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” *Id.* at 38. Where “commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.” *Id.* at 43.

In other words, because Congress did not expressly authorize the issuance of commentary and there is no requirement that Congress review it, commentary is valid and authoritative only if it in fact interprets or explains the text of a guideline, and is not inconsistent with that guideline. Otherwise, the Commission could issue commentary having nothing to do with a guideline or changing the meaning of a guideline, with the same force as a guideline but with no accountability to Congress. Thus, when commentary does not interpret the text of a guideline, or is inconsistent with or a plainly erroneous reading of the text of the guideline, the commentary is invalid and must be disregarded in favor of the guideline’s text.

As the Fourth Circuit has explained, guidelines commentary “does not have freestanding definitional power,” but is only valid and authoritative if it interprets a guideline’s text and is not inconsistent with that text. *United States v. Leshen*, 453 F. App’x 408, 413-15 (4th Cir. 2011) (prior state sex offenses did not qualify as crimes of violence under any part of the text and rejecting government’s argument that they nonetheless qualified under the commentary); accord *United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) (“[The government skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course, that takes precedence.”). The First Circuit has held that “in light of the government’s concession that *Johnson* invalidates the residual clause in Guidelines § 4B1.2(a)(2),” the commentary “has become inconsistent with the remaining text of the Guideline itself,” and thus “provides no basis” to conclude that felon in possession of a firearm described in 26 U.S.C. 5845(a) is a “crime of violence” under § 4B1.2(a)(2). *United States v. Soto-Rivera*, __ F.3d __, 2016 WL 279364 at *8 (Jan. 22, 2016). *See also United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (rejecting government’s argument that offense was listed in commentary, there was no need for it to qualify under the definitions set out in the text; “[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)”).

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7 *See also, e.g., United States v. Potes-Castillo*, 638 F.3d 106, 111 (2d Cir. 2011) (rejecting government’s reading of commentary that was “inconsistent with the Guidelines section it interprets”); *United States v. Cruz*, 106 F.3d 1134, 1139 (3d Cir. 1997) (relying on *Stinson* to disregard commentary that required greater scienter than text of guideline); *United States v. Dison*, 330 F. App’x 56, 61-62 (5th Cir. 2009) (“[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note.”); *United States v. Webster*, 615 F. App’x 362, 363 (6th Cir. 2015) (“[T]he text of a guideline trumps commentary about it.”); *United States v. Stolba*, 357 F.3d 850, 853 (8th Cir. 2004) (rejecting adjustment supported by commentary that conflicted with the guideline because “the proper application of the commentary depends upon the limits – or breadth – of authority found in the guideline”); *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (when a “conflict exists between the text and the commentary,” “the text of the guidelines governs”); *United States v. Fox*, 159 F.3d 637, at *2 (D.C. Cir. 1998) (declining to follow commentary that “substantially alters” the requirements of guideline’s text).
Accordingly, [OFFENSE] is not a “crime of violence” within the meaning of USSG § 4B1.2(a). [OFFENSE] does not have as an element the use, attempted use, or threatened use of violent force against the person of another, and so does not interpret or explain § 4B1.2(a)(1). [OFFENSE] is not one of the offenses enumerated in § 4B1.2(a)(2), and so does not interpret or explain that clause. [OFFENSE] could only qualify as a “crime of violence” if it interprets or explains the residual clause. That it cannot do because the residual clause is void. [OFFENSE] is inconsistent with the remaining text of the guideline because it does not have an element of force and is not enumerated in the guideline. Because the commentary is flatly inconsistent with the guideline “in that following [the commentary] will result in violating the dictates of [the guideline], the Sentencing Reform Act itself commands compliance with the guideline.” Stinson, 508 U.S. at 43.

II. The Commission’s actions after Johnson confirm that the offenses listed in the commentary (that are not also listed in the text) were the Commission’s interpretation of the now-void residual clause.

As noted above, you will need to show that a commentary offense could only qualify, if at all, under the now-void residual clause. In some cases, it may be useful to explain to the court that the Commission intended these offenses as its interpretation of the residual clause.

One of the offenses - “unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed off rifle, silencer, bomb, or machine gun)” – was expressly included because some courts at the time (before Begay v. United States, 553 U.S. 137 (2006) and subsequent decisions) had held that “possession of certain of these firearms, such as a sawed-off shotgun, is a ‘crime of violence’ due to the serious potential risk of physical injury to another person.” USSG App. C, amend. 674 (Nov. 1, 2004).

The Commission has now confirmed that the other offenses listed in the commentary as “crimes of violence” (and not listed in the guideline itself) were based on its determination that the offense “otherwise involves conduct that presents a serious risk of physical injury to another.” The Commission said that because “the statutory language the Court found unconstitutionally vague” in Johnson is “identical” to the career offender guideline’s residual clause, it proposed to “delete the residual clause” and to “move[] all enumerated offenses to the guideline,” in order “to make the guideline consistent with Johnson.” On January 21, 2016, the Commission adopted an amendment (effective Aug. 1, 2016 absent congressional disapproval) deleting the residual clause and moving the following offenses from the commentary to the text at § 4B1.2(a)(2): murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, and unlawful possession of a firearm described in 26 USC

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The movement of these offenses from the commentary to the text reflects the fact that they no longer interpret or explain any text in the guideline now that the residual clause has been deleted.

III. Inchoate Crimes.

The Commission has not proposed any change to the present commentary stating that the term “crime of violence” “include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” But for the reasons set forth above—and both before and after the 2016 amendment—these offenses cannot qualify as a “crime of violence” merely because they appear in the commentary. After Johnson, such an offense qualifies only if it satisfies the force clause or is listed as an enumerated offense, and even then only if it is not broader than the generic offense.

**Attempt.** Attempt offenses are included in the text of the force clause, so an attempt conviction may qualify as a “crime of violence” if the underlying crime attempted satisfies the force clause, and the attempt is generic attempt. Generic attempt requires a “substantial step” toward the completed crime. See United States v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir. 2014).

Attempt offenses are not included in the list of enumerated offenses, so an attempted enumerated offense does not qualify as a “crime of violence.” In James v. United States, the Supreme Court concluded that “attempted burglary” is not “burglary” because the enumerated offenses in the ACCA refer only to completed offenses. 550 U.S. 192, 198 (2007). The enumerated offenses at § 4B1.2 likewise refer only to completed offenses. While the Court held in James that an attempted enumerated offense could satisfy the residual clause, see id. (holding that attempted burglary counted because it satisfied the residual clause), that aspect of James has been overruled by Johnson.

**Conspiracy.** Conspiracy offenses are neither included in the text of the force clause nor listed as an enumerated offense, so they do not qualify as “crimes of violence.” See, e.g., United States v. Gonzalez-Ruiz, 794 F.3d 832, 836 (7th Cir. 2015) (finding post-Johnson that conspiracy to commit armed robbery does not satisfy the force clause and is not an enumerated offense under the ACCA, so is not a “violent felony”); United States v. Melvin, 2015 WL 6445433 (4th Cir. 2015) (finding post-Johnson that conspiracy to commit robbery with a dangerous weapon does not satisfy the force clause and is not an enumerated offense under the ACCA, so is not a “violent felony”); United States v. Edmundson, __ F. Supp. 3d __, 2015 WL 9582736 (D. Md. Dec. 30, 2015) (finding post-Johnson that Hobbs Act conspiracy not a “crime of violence” under the force clause or as an enumerated offense under 18 U.S.C. § 924(c)(3)); see also United States v. White, 571 F.3d 365 (4th Cir. 2009) (“[a]pplying a categorical analysis to the Conspiracy Offense, we observe that it does not have ‘as an element the use, attempted use, or threatened use of physical force against the person of another’” and concluding that it does not satisfy the force

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clause under the ACCA); United States v. Fell, 511 F.3d 1035 (10th Cir. 2007) (“Because Colorado law does not require proof of the use, attempted use, or threatened use of physical force to sustain a conviction for conspiracy to commit second degree burglary, Fell’s prior conviction does not qualify as a violent felony pursuant to § 924(e)(2)(B)(i). Neither does it qualify under the first clause of § 924(e)(2)(B)(ii), since it does not involve the use of explosives and it is not burglary, arson, or extortion.”); United States v. Gore, 636 F.3d 728, 731 (5th Cir. 2011) (holding that Texas conspiracy to commit aggravated robbery does not satisfy the force clause of the ACCA because the only elements that must be found by the jury to convict are that the defendant agreed to commit robbery and engaged in one of the acts enumerated in the robbery statute, which may or may not satisfy the force clause); United States v. Chandler, 743 F.3d 648 (9th Cir. 2014) (implying that Nevada conspiracy to commit robbery does not satisfy the force clause and is not an enumerated offense under the ACCA; holding that it qualified under the residual clause), vacated and remanded in light of Johnson, 135 S. Ct. 2926 (2015).

Aiding and Abetting. Aiding and abetting is not included in the force clause or listed as an enumerated offense. However, because a conviction on an aiding and abetting theory is considered the same as a conviction for the underlying offense, see Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190 (2007), a conviction for an offense as an aider and abettor may qualify as a “crime of violence” if it is generic aiding and abetting and the underlying offense either satisfies the force clause or is a generic enumerated offense. Cf. id. at 190-91. Generic aiding and abetting requires proof that the defendant (1) took an affirmative act in furtherance of the underlying offense (2) with the intent of facilitating the commission of the offense. See Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014). The intent requirement is satisfied only when the government proves the person “actively participate[d] in a criminal venture with full knowledge of the circumstances constituting the charged offense.” Id. at 1248-49. The required knowledge must be “advance knowledge,” which means “knowledge at a time the accomplice can do something with it—most notably, opt to walk away.” Id. at 1249-50.

IV. Circuit Line-up Regarding Whether Commentary Has Freestanding Definitional Power

Summary

You should preserve this issue even if you are in a circuit that has expressly held that offenses listed in the commentary of § 4B1.2 have freestanding definitional power. The issue is being raised in two petitions for certiorari that we know of.

1. For purposes of establishing a split for a petition for certiorari, the First, Fourth and Tenth Circuits have expressly held that offenses listed in the commentary of § 4B1.2 do not have freestanding definitional power, and the Fifth Circuit has required that commentary offenses satisfy one of the definitions in the text. See United States v. Soto-Rivera, __ F.3d __, 2016 WL 279364 at **5-8 (Jan. 22, 2016) (holding that in the absence of the residual clause after Johnson, an offense that does not satisfy § 4B1.2(a)(1) and is not enumerated in § 4B1.2(a)(2) does not interpret any text in the guideline and is thus not a “crime of violence”); United States v. Hood, 628 F.3d 669, 671 (4th Cir. 2010) (“Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a ‘crime of violence’ only if it falls under the
‘residual’ or ‘otherwise’ clause in § 4B1.2(a)(2). Thus, to qualify, it must ‘otherwise involve[] conduct that presents a serious potential risk of physical injury to another.’”); United States v. Leshen, 453 F. App’x 408, 415 (4th Cir. 2011) (“[F]orcible sex offenses’ does not have freestanding definitional power.”); United States v. Shell, 789 F.3d 335, 340 (4th Cir. 2015) (“[T]he government skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course, that takes precedence.”); United States v. Armijo, 651 F.3d 1226, 1234-37 (10th Cir. 2011) (rejecting the government’s argument that Colorado manslaughter qualifies as a crime of violence simply because it is listed in the commentary and need not qualify under the definitions set out in the text; “[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a).”); United States v. Lipscomb, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (possession of a sawed-off shotgun must satisfy the residual clause in the text, and noting that the commentary answers the question where neither party challenges the Commission’s classification).

The Third, Seventh and Eleventh Circuits have held that offenses listed in the commentary of § 4B1.2 do have freestanding definitional power, although the Seventh Circuit is likely to overrule Raupp in Rollins. See United States v. Marrero, 743 F.3d 389, 397-401 (3d Cir. 2014) (holding that Pennsylvania third-degree murder was a “crime of violence” because “murder” was listed in the commentary and the Pennsylvania offense corresponded to the third prong of the generic definition of murder; no analysis of whether the offense satisfied any definition in the text); United States v. Alfredrick Jones, No. 14-2882, Order (Nov. 9, 2015) (denying certificate of appealability because “whether or not Johnson invalidates the residual clause in U.S.S.G. § 4B1.2(a), appellant’s designation as a career offender did not rely on that clause,” but rather “relied on [commentary] list[ing] robbery as an enumerated predicate offense,” so Johnson “is not relevant in appellant’s case”); United States v. Raupp, 677 F.3d 756 (7th Cir. 2012) (split panel holding that commentary can say anything that the text does not expressly prohibit); United States v. Rollins, 800 F.3d 859 (7th Cir. 2015), reh’g granted, judgment vacated (Oct. 6, 2015); United States v. Hall, 714 F.3d 1270, 1272-74 (11th Cir. 2013) (wholly misunderstanding and relying on Stinson to hold that it is bound by commentary that does not interpret any text); Beckles v. United States, 616 F. Appx. 415, 416 (11th Cir. Sept. 29, 2015) (per curiam) (after Supreme Court GVR in light of Johnson, holding that “Johnson . . . does not control this appeal,” because “Beckles was sentenced as a career offender based not on the ACCA’s residual clause, but based on express language in the Sentencing Guidelines classifying Beckles’s offense as a ‘crime of violence,’” and “Johnson says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles’s status as a career-offender,” and “Hall remains good law and continues to control in this appeal”); Denson v. United States, 804 F.3d 1339, 1340-44 (11th Cir. 2015) (after Supreme Court GVR in light of Johnson, holding that “Johnson has no impact on the issues in this appeal,” relying on Hall and Stinson to reiterate that commentary that does not interpret text is binding, and Johnson does not apply to the guidelines under Matchett).

2. Note that the Fourth Circuit in Hood held that a commentary offense is a crime of violence so long as it satisfies the text of the residual clause, but need not satisfy the Supreme Court’s purposeful, violent and aggressive requirements for a violent felony. 628 F.3d at 671-73. This is consistent with Stinson.
The Sixth Circuit has done something different, paying lip service to *Stinson* while deferring to commentary that, under its own analysis, is inconsistent with the text. The court held in *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007) that possession of a sawed-off shotgun was not a violent felony because it did not present a serious potential risk of physical injury to another, that is, the offense did not satisfy the words of the residual clause without considering any Supreme Court gloss. *Id.* at 528-30. Then, in *United States v. Hawkins*, 554 F.3d 615 (6th Cir. 2009), it held that the same offense was a crime of violence under the guidelines. It recognized that “Guidelines commentary ‘that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’” *Id.* at 618 (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)). It then asserted, without citation to any authority, that its task was “not to independently interpret the language of” the guideline, thus allowing it to ignore its reasoning in *Amos*. *Id.* Rather, its task was to decide “whether the Sentencing Commission’s own interpretation of the Guideline in its official note is a ‘plainly erroneous reading,’” and concluded that the Commission’s interpretation could not be “plainly erroneous” because six other circuits had found that possession of a sawed-off shotgun satisfied the residual clause. *Id.*

Thus, the Sixth Circuit purported to comply with *Stinson*, but at the same time avoided it by asserting that its task was not to interpret the guideline, and by failing to use the test *Stinson* requires, i.e., where following the commentary results in violating the guideline, the Sentencing Reform Act itself commands compliance with the guideline. Yet, the *Hawkins* court expressly recognized that commentary must be consistent with some part of the text, here the residual clause. With the residual clause gone, the Sixth Circuit should hold that the commentary is a plainly erroneous reading of the guideline, and that because following the commentary will result in violating the dictates of the guideline, the Sentencing Reform Act itself commands compliance with the guideline.

3. The Second Circuit in *United States v. Walker*, 595 F.3d 441 (2d Cir. 2010) found that South Carolina strong arm robbery was a “crime of violence” because robbery is listed in the commentary and the definition of South Carolina strong arm robbery corresponds to the generic definition of robbery. *Id.* at 445-47. The court mentioned *Stinson* in passing but did not address its effect at all. The defendant argued only that South Carolina strong arm robbery did not satisfy the generic definition of robbery; he did not argue that the offense had to satisfy one of the definitions in the text. *Id.* at 446. So, this decision does not stand for the proposition that commentary has freestanding definitional power.

In other cases, the Second Circuit indicated that an offense listed in the commentary must satisfy a definition in the text. In *United States v. Garcia*, 57 F. Appx. 486 (2d Cir. 2003), the court made no mention of the commentary and held (before *Curtis Johnson v. United States*, 559 U.S. 133 (2010)) that the defendant’s convictions for attempted robbery in the second degree satisfied the force clause. *See also United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (analyzing the elements and concluding, before *Curtis Johnson v. United States*, 559 U.S. 133 (2010), that the defendant’s third degree robbery conviction fit within the force clause, no mention of the commentary); *United States v. Anderson*, 2009 WL 2171301, at *1 (2d Cir. July 21, 2009) (mentioning that robbery is listed in the commentary and concluding, before *Curtis
Johnson v. United States, 559 U.S. 133 (2010), that defendant’s third degree robbery conviction satisfied the force clause).

More recently, however, in United States v. Scott Avitto, No. 15-265 (E.D.N.Y.), the court held that neither New York robbery in the second degree nor New York robbery in the third degree satisfy the force clause under Curtis Johnson v. United States, 559 U.S. 133 (2010), which requires an element of violent physical force; Second Circuit cases previously holding New York robbery in the second or third degree either pre-dated Curtis Johnson or were summary orders that did not address that case and are non-precedential; Samuel Johnson v. United States, 135 S. Ct. 2551 (2015) invalidates the residual clause; and thus, the listing of robbery in the commentary is not authoritative under Stinson. See Sentencing Transcript (March 14, 2016).

See further discussion of Second Circuit cases under Details.

4. There does not appear to be any potentially bad (or on-point good) law in the Eighth, Ninth or D.C. Circuits.

Details

1st Circuit – rejects treating commentary as having freestanding definitional power

The First Circuit has long recognized that commentary that is inconsistent with the text carries no weight and must be disregarded. See United States v. Piper, 35 F.3d 611, 617 (1st Cir. 1994) (recognizing that “commentary carries no weight when [it is] inconsistent with the guideline’s text”); United States v. Chuong Van Duong, 665 F.3d 364, 368 (1st Cir. 2012) (disregarding application note that conflicted with text).

In United States v. Soto-Rivera, __ F.3d __, 2016 WL 279364 (Jan. 22, 2016), the court held that “in light of the government’s concession that Johnson invalidates the residual clause in Guidelines § 4B1.2(a)(2),” the commentary “has become inconsistent with the remaining text of the Guideline itself,” and thus “provides no basis” to conclude that felon in possession of a firearm described in 26 U.S.C. 5845(a) is a “crime of violence” under § 4B1.2(a)(2). Id. at *8. Commentary “‘interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.’” Id. at *5 (quoting Stinson v. United States, 508 U.S. 36, 38 (1993)). “‘[W]here commentary is inconsistent with [Guidelines] text, text controls.’” Id. at *6 (quoting United States v. Shell, 789 F.3d 335, 340 (4th Cir. 2015)). Passive possession of any kind of firearm does not satisfy the force clause under § 4B1.2(a)(1), and is not enumerated in § 4B1.2(a)(2). Id. Thus, “in the absence of the residual clause, there is nothing within § 4B1.2(a)’s text to serve as an anchor for Application Note 1’s inclusion of possession of a machinegun within the definition of crime of violence.” Id. To use the note as a basis independent of the guideline “would be inconsistent with the post-Johnson text of the Guideline itself.” Id. The government’s reliance on Beckles v. United States, 616 Fed. Appx. 415 (11th Cir.2015) (unpublished) is unavailing. Id. at *7. Beckles relied on United States v. Hall, 714 F.3d 1270 (11th Cir. 2013), which decided that possession of a sawed-off shotgun was a crime of violence when the residual clause was still
valid. “Beckles (like Hall before it) was grounded in the very language which the government itself now says must be excised from the Guidelines,” so its “reasoning and rationale are inapposite here.” *Id.*

### 2d Circuit – law is unsettled but question is open

In *United States v. Stevens*, 66 F.3d 431 (2d Cir. 1995), the court found that the district court erred by apportioning the sentence consistent with an example in the commentary to § 2J1.7 that “is inconsistent with that guideline.” *Id.* at 436 (relying on *Stinson*). In *United States v. Potes-Castillo*, 638 F.3d 106 (2d Cir. 2011), the court rejected the government’s reading of an application note to § 4A1.2(c) because it was “inconsistent with the Guideline section it interprets.” *Id.* at 111 (citing *Stinson*, 508 U.S. at 43).

In *United States v. Walker*, 595 F.3d 441 (2d Cir. 2010), the court found that South Carolina strong arm robbery was a “crime of violence” because robbery is listed in the commentary and the definition of South Carolina strong arm robbery corresponds to the generic definition of robbery. *Id.* at 445-47. The court mentioned *Stinson* in passing but did not address its effect at all. The defendant argued only that South Carolina strong arm robbery did not satisfy the generic definition of robbery; he did not argue that the offense had to qualify under one of the clauses in the text. *Id.* at 446. Thus, it cannot be said that the court held that commentary has freestanding definitional power.

In other cases, the Second Circuit indicated that an offense listed in the commentary must satisfy a definition in the text. In *United States v. Garcia*, 57 F. Appx. 486 (2d Cir. 2003), the court made no mention of the commentary and held (before *Curtis Johnson v. United States*, 559 U.S. 133 (2010)) that the defendant’s convictions for attempted robbery in the second degree satisfied the force clause. *See also United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (analyzing the elements and concluding, before *Curtis Johnson v. United States*, 559 U.S. 133 (2010), that the defendant’s third degree robbery conviction fit within the force clause, no mention of the commentary); *United States v. Anderson*, 2009 WL 2171301, at *1 (2d Cir. July 21, 2009) (mentioning that robbery is listed in the commentary and concluding, before *Curtis Johnson v. United States*, 559 U.S. 133 (2010), that defendant’s third degree robbery conviction satisfied the force clause).

In a recent unpublished and non-precedential decision, the Second Circuit said that the defendant’s two prior convictions for New York second degree robbery were “categorically crimes of violence under U.S.S.G. § 4B1.2(a)(1)” because the offense has an element of force. *United States v. Kornegay*, 2016 WL 877950, *4* (2d Cir. Mar. 8, 2016) (unpub.). The court added, “Moreover, robbery is specifically listed as a crime of violence in the Guidelines Commentary.” *Id.* The appellant did not argue, and the court did not address, that New York second degree robbery does not satisfy the force clause under *Curtis Johnson*, or that the commentary has no freestanding definitional power under *Stinson*.

More recently, in *United States v. Scott Avitto*, No. 15-265 (E.D.N.Y.), the district court held that neither New York robbery in the second degree nor New York robbery in the third degree satisfy the force clause under *Curtis Johnson v. United States*, 559 U.S. 133 (2010),
which requires an element of violent physical force; Second Circuit cases previously holding New York robbery in the second or third degree either pre-dated *Curtis Johnson* or were summary orders that did not address that case and are non-precedential; *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidates the residual clause; thus, the listing of robbery in the commentary is not authoritative under *Stinson*. See Sentencing Transcript (March 14, 2016).

**Lesson**: Raise the *Stinson* issue in the Second Circuit.

### 3d Circuit – holds commentary has freestanding definitional power

In *United States v. Cruz*, 106 F.3d 1134, 1138-39 (3d Cir. 1997), the Third Circuit relied on *Stinson* to disregard commentary that required greater scienter than the text of the guideline. In *United States v. Smith*, 751 F.3d 107 (3d Cir. 2014), the court said in passing: “Guidelines Commentary ‘that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’” *Id.* at 118 n.8 (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

In *United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014), the Third Circuit held that Pennsylvania third-degree murder was a “crime of violence” because “murder” was listed in the commentary and thus “enumerated,” and Pennsylvania third-degree murder corresponded to the third prong of the generic definition of murder. *Id.* at 397-401. It said that *Begay*’s prohibition against counting reckless crimes applied only in residual clause cases, not commentary offense cases. *Id.* at 398. While commentary must be consistent with the text of the guideline it interprets under *Stinson*, *id.*, “Application Note 1 . . . is not an erroneous reading of USSG § 4B1.2. It merely supplements the numbered provisions of § 4B1.2 and unambiguously states that ‘crime of violence’ includes’ ten specific crimes.” *Id.* This appears to mean that the commentary is freestanding; it could not mean that the commentary must interpret either the force clause or the residual clause because it never examines whether Pennsylvania third-degree murder satisfies either clause. It then cites cases that treated commentary offenses as having freestanding definitional power (if they met the generic definition) and said it was acting “consistent with these precedents” in treating commentary offenses as “enumerated offenses.” *Id.* at 399. This novel terminology apparently means that the commentary offenses are like offenses enumerated in 4B1.2(a)(2), i.e., freestanding. The court then went on to find that Pennsylvania third-degree murder corresponded to the third prong of the generic definition of murder. *Id.* at 399-401.

In *United States v. Alfrederick Jones*, the Third Circuit broke with *Stinson* without citation to any decision and without any briefing on the effect of *Johnson* in light of *Stinson*. The government argued simply that *Johnson* was irrelevant to this case because robbery is enumerated in the commentary. Jones was given no opportunity to respond before the COA was denied. In denying the certificate of appealability, the panel said: “With respect to the United States Supreme Court’s remand of this matter for consideration in light of *United States v. Johnson*, 135 S. Ct. 2551 (2015), . . . we conclude that, whether or not *Johnson* invalidates the residual clause in U.S.S.G. § 4B1.2(a), appellant’s designation as a career offender did not rely on that clause. Rather, the District Court relied on the part of Application Note 1 which lists

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robbery as an enumerated predicate offense. Id. at § 4B1.2(a), cmt. n.1. Accordingly, the 2015 Johnson decision is not relevant in appellant’s case and does not warrant a certificate of appealability.” United States v. Alfredrick Jones, No. 14-2882, Order (Nov. 9, 2015).

On January 7, 2016, Jones argued in a Petition for Rehearing With Suggestion for Rehearing En Banc that the commentary is not freestanding and was invalidated by Johnson’s invalidation of the residual clause, the text the commentary was intended to elucidate. On January 22, 2016, the petition for rehearing by the panel and the court en banc was denied without comment.

4th Circuit – rejects treating commentary as having freestanding definitional power

In United States v. Hood, 628 F.3d 669 (4th Cir. 2010), the Fourth Circuit held that North Carolina possession of a weapon “of mass death and destruction” (defined to include any shotgun with a barrel less than 18 inches or an overall length of less than 26 months) constitutes a crime of violence even though it does not meet Begay’s “violent” and “aggressive” requirements, because it is listed in the commentary, id. at 672-73, and the commentary is not “contrary to the guideline itself, or plainly erroneous,” id. at 672, because the offense “presents a serious potential risk of physical injury to another,” which the defendant did not dispute, id. at 671. The court expressly recognized that even if an offense is listed in the commentary, it must satisfy a definition in the text: “Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a ‘crime of violence’ only if it falls under the ‘residual’ or ‘otherwise’ clause in § 4B1.2(a)(2). Thus, to qualify, it must ‘otherwise involve[] conduct that presents a serious potential risk of physical injury to another.’” Id. at 671.

Thus, Hood held that a commentary offense is a crime of violence so long as it satisfies the text of the residual clause, but need not satisfy the Supreme Court’s purposeful, violent and aggressive requirements for a violent felony, which complies with Stinson. With the residual clause gone, the Fourth Circuit would reach the correct result, a conclusion that is bolstered by the next two decisions.

In United States v. Leshen, 453 F. App’x 408 (4th Cir. 2011), the defendant was convicted of being a felon in possession, and the court increased the base offense level under § 2K2.1(a)(1)(B) based on two or more prior crimes of violence. Id. at 411. On plain error, the court of appeals concluded that the larceny conviction was too old, id., and that two sex offenses were not crimes of violence, id. at 412-16. The sex offenses did not satisfy the force clause, id. at 412-13, the enumerated offense clause, id. at 413, or the residual clause, id. at 413-14. The government argued that the sex offenses are crimes of violence because the commentary lists “forcible sex offenses.” Id. at 414. Stinson holds that when commentary is “inconsistent with, or a plainly erroneous reading of that guideline,” “the Sentencing Reform Act itself commands compliance with the guideline.” Id. at 414-15. Thus, “the government cannot, simply by referring to the commentary . . . , escape the need to link the commentary (and Leshen’s convictions) to either prong of the definition.” Id. at 415. “[F]orcible sex offenses’ does not have freestanding definitional power.” Id.
In United States v. Shell, 789 F.3d 335, 340-41 (4th Cir. 2015), the defendant was convicted of being a felon in possession of a firearm and his base offense level was increased under § 2K2.1(a)(4)(A) based on a prior conviction for North Carolina second degree rape. Id. at 338. The court held that the offense did not satisfy the force clause or the residual clause, id. at 341, and rejected the government’s argument resting entirely on the listing of “forcible sex offense” in the commentary. Id. at 343. “[T]he government skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course, that takes precedence.” Id. at 340 (citing Stinson, 508 U.S. at 43). The commentary “serv[es] only to amplify that definition [in the text], and any inconsistency between the two [is] resolved in favor of the text.” Id. at 345.

For this argument, do not use United States v. Litzy, __ F. Supp.2d __ (S.D. W. Va. 2015). It recites Stinson and Shell but does no Stinson analysis related to the fact that the residual clause is gone. It assumes commentary offenses still stand after Johnson. It just does an analysis of whether Ohio robbery is generic robbery and concludes that it is not. It also mistakenly relies on Kosmes, a 2L1.2 case, for the idea that the commentary offenses still stand.

5th Circuit – requires commentary offenses to satisfy one of the definitions in the text

In United States v. Dison, 330 F. App’x 56 (5th Cir. 2009) (per curiam), the Fifth Circuit had to decide whether defendants who altered currency rather than manufacturing currency in its entirety should be sentenced under 2B1.1 as the defendants argued, or 2B5.1 as the government argued. The conflict was between commentary to 2B5.1 (which said defendants who altered currency should be sentenced under 2B1.1) and commentary to 2B1.1 (which said it did not apply to either). It ultimately decided on 2B1.1 under the rule of lenity. Although this was not a case of a conflict between text and commentary, the court said: “The commentary to a Guideline section is authoritative unless it is a plainly erroneous reading.” Id. at 61 (citing Stinson, 508 U.S. at 38). “[I]f the Guideline text and the commentary are inconsistent, the Guidelines language controls.” Id. “[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note.” Id. at 61-62.

In United States v. Ashburn, 20 F.3d 1336 (5th Cir. 1994), the Fifth Circuit rejected the defendant’s argument that he could not receive a two-level enhancement “if an express threat of death was made,” under § 2B3.1(b)(2)(F), because the commentary says the threat must be made to a victim and he only threatened bystanders. The court said that “we are bound to follow the Commentary unless it can be shown to be inconsistent with the Guidelines,” and “because we find such an inconsistency, we are not constrained by the Commentary’s interpretation of the Guidelines.” Id at 1340-41.

In United States v. Serna, 309 F.3d 859 (5th Cir. 2002), the court noted that possession of a sawed-off shotgun was listed in the commentary, but analyzed whether it satisfied any definition in the text, and concluded that it satisfied the residual clause. Id. at 862-64 & n.6.

In United States v. Lipscomb, 619 F.3d 474 (5th Cir. 2010), the Fifth Circuit again recognized that an offense listed in the commentary must satisfy a definition in the text. The instant offense was unlawful possession of a firearm under 18 U.S.C. § 922(g), and the indictment (which the court of appeals said the district court could consider because the
commentary says the court can consider “the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted” in determining whether an offense satisfies the residual clause, \textit{id. at 478 n.5}, alleged that the defendant “possessed a sawed-off shotgun.” \textit{Id. at 477}. The court recognized that the instant offense had to satisfy the residual clause. \textit{Id.} It said that the commentary answers that question where neither party challenged the Commission’s classification. \textit{Id. at 477 & n.3}.

The dispute in \textit{Lipscomb} was over whether the court had to use the categorical approach, using the indictment only to determine the statute of conviction, to determine whether the instant offense of conviction was a “crime of violence.” The majority said it did not because \textit{Taylor} and its progeny were decided under the ACCA and did not address the guidelines’ commentary, and requiring the defendant to have been convicted of possessing a sawed-off shotgun would render the commentary meaningless for § 922(g) offenses. (That’s right!) \textit{Id. at 477-78}. (This issue is addressed in Part V.)

\textbf{6th Circuit – purports to comply with \textit{Stinson} but gets around it}


In \textit{United States v. Hawkins}, 554 F.3d 615 (6th Cir. 2009), the court affirmed the use of a prior conviction for possessing a sawed-off shotgun to classify the defendant as a career offender. The court acknowledged that it had held in \textit{United States v. Amos}, 501 F.3d 524 (6th Cir. 2007) that possession of a sawed-off shotgun was not a violent felony under any of the three clauses of the ACCA. \textit{Id. at 616-17}. But, it said, the guidelines commentary lists the offense as a crime of violence. \textit{Id. at 617}. “The Supreme Court has made clear that Guidelines commentary ‘that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’” \textit{Id. at 618} (quoting \textit{Stinson v. United States}, 508 U.S. 36, 38 (1993)). The court got around this by saying that its task was “not to independently interpret the language of” the guideline, but to decide “whether the Sentencing Commission’s own interpretation of the Guideline in its official note is a ‘plainly erroneous reading,’” \textit{id.}, and the Commission’s interpretation could not be “plainly erroneous” because six other circuits had found that possession of a sawed-off shotgun satisfied the residual clause. \textit{Id.}

Thus, the Sixth Circuit purported to comply with \textit{Stinson} by asserting that its task was not to interpret the guideline so that it could ignore its analysis of the identical text in \textit{Amos}, and by distorting the test \textit{Stinson} requires, i.e., where following the commentary results in violating the guideline, the Sentencing Reform Act itself commands compliance with the guideline. But \textit{Hawkins} did expressly recognize that commentary must be consistent with some part of the text, here the residual clause. With the residual clause gone, the Sixth Circuit would be hard pressed to hold, even under its “plainly erroneous” test, that the commentary is not a plainly erroneous reading of the guideline.
Note that in response to nothing apparent in the opinion, the court claims that “this commentary was submitted to Congress,” relying solely on the Commission’s internal rule of procedure stating that it will “endeavor” to include commentary in submissions to Congress. *Id.* at 617 n.1. Whatever the Commission “endeavors” to do with any particular commentary and whether it does so or not, when “commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.” *Stinson*, 508 U.S. at 43.

7th Circuit – holds commentary has freestanding definitional power as long as the guideline does not affirmatively prohibit the commentary’s interpretation; likely to be overruled very soon

In *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012), the majority (Easterbrook and Posner) recognized that application notes are authoritative “unless the notes conflict with the text.” *Id.* at 759. The court claims that the listing of conspiracy in the note “cannot” conflict with the text “because the text . . . does not tell us, one way or another, whether inchoate offenses are included or excluded.” *Id.* “[T]he Commission is free to go its own way,” although “[i]t can’t do this by application notes that contradict the text of the Guideline,” but the note here only addresses a question “left open by the text,” *i.e.*, “the treatment of inchoate offenses.” *Id.* at 760. The gist of *Raupp* is that commentary can say anything that the text does not expressly prohibit. It does not in any way say that commentary cannot stand alone without text to interpret, and strongly indicates that it can do just that.

Judge Wood dissented. *Id.* at 761-66. She correctly states that conspiracy does not satisfy the elements or enumerated offense clauses, and cannot be used as a predicate unless it satisfies the residual clause, but that the majority “has concluded that it does not need to address” whether it does because it “plays a trump card” from the commentary. *Id.* at 762. “If the Sentencing Commission is entitled to broaden the Guideline so that it applies to non-violent crimes such as the version of conspiracy that Indiana has adopted, then my colleagues are correct that this language checks Raupp’s argument. In order to reach that result, they assume that the treatment of inchoate offenses is left open by § 4B1.2, and that all the Commission has done . . . is to fill in a blank. In my view, however, the inclusion of all conspiracy offenses is inconsistent with the language of the Guideline, and thus the expansion implicit in the Application Note is incorrect under established principles of administrative law.” *Id.* In *James* and *Sykes*, the Court held that attempts can be violent felonies *only if* they satisfy the residual clause. *Id.* at 763. The majority cites *Auer* and *Stinson* but “fails adequately to consider whether the ‘guideline which the commentary interprets will bear the construction.’” *Id.* at 764 (quoting *Stinson*, 508 U.S. at 46). “There is a significant difference between the procedures that the Sentencing Commission uses when it promulgates the Guidelines and those that it uses when it writes commentary or policy statements . . . When an agency like the Sentencing Commission uses a regulation as a springboard for an ‘interpretation’ that goes beyond the boundaries of the original regulation, *Auer* and *Stinson* tell us that it has gone too far. That is exactly what the Sentencing Commission did here, when it decided that the phrase ‘presents a serious potential risk of physical injury to another’ could be stretched to include Indiana's inchoate offense of conspiracy to commit robbery.” *Id.* at 766.
In United States v. McMillian, 777 F.3d 444 (7th Cir. 2015), the court (Posner, Easterbrook and Woods) rejected the defendant’s argument that he could not get two points for use of a computer under 2G1.3(b)(3)(B) because the commentary states that the increase is intended to apply only when a computer is used to communicate directly with a minor or a person who exercises custody, care or supervisory control of the minor. *Id.* at 449. “But the note is wrong,” because the guideline provides a 2-level enhancement whenever the defendant uses a computer to entice or encourage a person to engage in prohibited sexual conduct with the minor, which the defendant did when he advertised the minors on Craigslist. “When an application note clashes with the guideline, the guideline prevails.” *Id.* at 450.

United States v. Rollins, 800 F.3d 859 (7th Cir. 2015) (Sykes, Kanne and Gilbert), reh’g granted, judgment vacated (Oct. 6, 2015), was vacated for panel rehearing. The opinion is no longer available on westlaw but is available on PACER.

The court understood the parties to agree that Johnson had no effect on this case in light of Tichenor, and Rollins did not ask that Tichenor be overruled. Slip op. at 2. “Rollins’ conviction for possession of a short-barreled shotgun qualifies, if at all, only under [the residual clause].” *Id.* at 8. We previously held that possession of a short-barreled shotgun is not a violent felony under the residual clause of the ACCA. *Id.* at 8. That the same result should apply under the same clause in the guidelines “makes sense as a matter of law and logic.” *Id.* But the commentary says the offense is a crime of violence. *Id.* at 8-9. *Stinson* holds that commentary has controlling weight unless it is plainly erroneous or contradicts the text of the guideline itself. *Id.* at 9. Rollins maintains that “the application note necessarily conflicts with the career-offender guideline based on our holding in *Miller*, which interpreted the identical residual-clause language of the ACCA.” *Id.* But this argument is “foreclosed” by *Raupp*. *Id.* Raupp essentially says commentary has freestanding definitional power. *Id.* at 10-11. “Under existing law, the application note controls.” *Id.* at 12. But things might be different if Johnson applies to the guidelines and Tichenor is overruled. *Id.* at 12-13.

The Seventh Circuit heard oral argument in Rollins on December 2, 2015, and it looks good for us.

Note: The vacated Rollins decision cites five decisions from other circuits that it says “similarly deferred to the Sentencing Commission’s authority to interpret the career-offender guideline via application notes that depart from judicial interpretations of the ACCA.” Slip op. at 11 n.3. It cites Hall (11th), Hood (4th), Lipscomb (5th), Hawkins (6th), and Ankeny (9th). None but Hall gave commentary freestanding definitional power. See cases discussed elsewhere.

8th Circuit – have looked but found no case indicating commentary has freestanding definitional power

In United States v. Stolba, 357 F.3d 850 (8th Cir. 2004), the Eighth Circuit rejected an obstruction of justice adjustment invited by the commentary for “shredding a document or destroying ledgers upon learning that an official investigation . . . is about to commence,” where the guideline expressly limits the adjustment to conduct “during the course of the investigation, prosecution, or sentencing of the instant offense of conviction.” *Id.* at 853. “Commentary
which functions to ‘interpret [a] guideline or explain how it is to be applied’ controls . . . but if ‘commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.’”  

Id. at 852-53 (quoting Stinson, 508 U.S. at 42-43. “Furthermore, ‘the proper application of the commentary depends upon the limits—or breadth—of authority found in the guideline that the commentary modifies and seeks to clarify.’” Id. at 853 (quoting United States v. Clayton, 172 F.3d 347, 355 (5th Cir. 1999).

9th Circuit – have looked but found no case treating commentary as having freestanding definitional power

In United States v. Williams, 110 F.3d 50 (9th Cir. 1997), the court found that Oregon attempted second-degree kidnapping did not satisfy the force clause. Id. at 52. “We must therefore determine whether [it] ‘presents a serious potential risk of physical injury to another.’” Id. The court noted that it had previously held that “kidnapping” was a violent felony under the residual clause, and that other courts had followed that holding to find that “kidnapping” is a crime of violence. “Indeed, Application Note 2 specifically provides that kidnapping is a crime of violence.” Id. at 52-53. Earlier in the opinion, the court observed in a footnote that the note includes attempts. Id. at 52 n.1. We affirm, period.

Williams thus recognizes that an offense has to satisfy a definition in the text, even if it is listed in the commentary. It does not indicate in any way that the commentary is freestanding. True, it does zero analysis of whether attempted kidnapping also satisfies the residual clause, but this appears to be just because the case is so old. There is no indication whatsoever that an attempted kidnapping could be a crime of violence even if it did not satisfy the residual clause simply because attempt is included in the commentary.

In United States v. Ankeny, 502 F.3d 829 (9th Cir. 2007), the court of appeals reversed the district court for applying the career offender guideline to three felon-in-possession counts, but affirmed its application to one count under 26 U.S.C. § 5861(d) for possessing an unregistered firearm. Id. at 841. (The term “firearm” for purposes of the chapter in which 5861 appears is defined under § 5845(a), so Ankeny, unlike Lipscomb and Beckles, was convicted of possessing a firearm as defined under § 5845(a).) The court’s conclusion was based on its own previous decision finding that “possession of an unregistered firearm of the kind defined in [26 U.S.C.] § 5845” satisfies the residual clause. Id. The decision is not based on the commentary at all. The Commission had not yet listed possession of firearms described in 26 U.S.C. § 5845(a) in the commentary.

10th Circuit - most recent decision rejects treating commentary as having freestanding definitional power

In United States v. Armijo, 651 F.3d 1226 (10th Cir. 2011), a § 2K2.1 case, the Tenth Circuit rejected the government’s argument that Colorado manslaughter qualifies as a crime of violence simply because it is listed in the commentary and need not qualify under the definitions set out in the text. Id. at 1234-37. “To read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a).” Id. at 1236.
In *United States v. Traversa*, 2015 WL 6695662 (D. Utah Nov. 3, 2015), the district court allowed the defendant to withdraw his plea, which was based on his belief that he would be classified as a career offender. The court found it likely that *Johnson* invalidated the residual clause, and rejected the government’s argument that a robbery conviction that failed to satisfy the elements clause could be a crime of violence based solely on the commentary. “[W]here the commentary is inconsistent with the text of the Guidelines, the text of the Guidelines controls.” *Id.* at *4 n.3 (citing *Stinson v. United States*, 508 U.S. 36, 43 (1993) and *Armijo*, 651 F.3d at 1237).

In another § 2K2.1 case that predated *Armijo*, *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010), the court took a contrary approach regarding the defendant’s two prior Arizona attempted burglary convictions. The court concluded that they were not “violent felonies,” *id.* at 1168-73, but that they were “crimes of violence,” *id.* at 1173-75. The reasons are unpersuasive, internally inconsistent, and contrary to *Stinson*. The court begins by placing great emphasis on that fact that the Commission “chose to use a different term, crime of violence, rather than violent felony,” in its caption. *Id.* at 1173. So what? Congress directed the term “crime of violence,” see 28 U.S.C. § 994(h), and the Commission chose to adopt the definition of that term from the definition of “violent felony” in the ACCA, see USSG, App. C, Amend. 268 (1989). Following the court’s logic, once the Commission chose that definition, it was not free to define it differently in the commentary.

The court acknowledged that under *Stinson*, commentary is invalid when it is inconsistent with the text, but claimed that it could be “reconciled” in one of two ways. *Id.* at 1174. First, the note could be “viewed as a definitional provision” that tells us that the text includes attempts. *Id.* If so, the note has freestanding definitional power even when it is inconsistent with the text, contrary to *Stinson*.

Second, the note “may reflect the Sentencing Commission’s view” that attempted burglary satisfies the residual clause. *Id.* If so, that view is inconsistent with the Tenth Circuit’s own interpretation of the very same text in the ACCA in the very same opinion, and so again is contrary to *Stinson*.

Finally, the court says that the inclusion of attempted burglary “may be ‘wrong’ as a factual matter (if attempts do not actually present risks comparable to those created by completed offenses),” but “it is not the guideline language in itself that dictates a result different from what the application note prescribes.” *Id.* at 1175. But the court found in the same opinion that the very same “language” dictates a different result from the note. And now that they mention it, the Commission has now found that including even burglary in the text was factually wrong because “several recent studies demonstrate that most burglaries do not involve physical violence.”

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Not only does Martinez make no sense, it can no longer be good law after Armijo. No court of appeals, including the Tenth Circuit, has cited Martinez for the proposition that commentary has freestanding definitional power, except for the majority in Raupp (which relies on it), and the dissent in Raupp (which denigrates it). As noted above, Raupp will likely be overruled.

11th Circuit – treats commentary as having freestanding definitional power, and anyway, Johnson does not apply to the guidelines so residual clause remains

1) In United States v. Hall, 714 F.3d 1270 (11th Cir. 2013), the Eleventh Circuit wholly misunderstood Stinson and indeed gave the commentary freestanding power based on Stinson.

It held that Hall’s prior conviction for possessing an unregistered sawed-off shotgun on violation of 26 USC 5861(d) is a crime of violence under the following chain of reasoning:

- The text of the guideline has three clauses (elements, enumerated, residual). Id. at 1272.

- We rely on decisions interpreting the residual clause of the ACCA in deciding whether an offense is a crime of violence. Id. Under circuit precedent applying Begay, possession of a sawed-off shotgun is not a violent felony under the residual clause of the ACCA. Id. at 1273.

- “However, the Supreme Court has made clear that ‘commentary in the [Sentencing] Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.’” Id. at 1272 (quoting Stinson, 508 U.S. at 38).

- The government says the guideline commentary is “binding on us,” and that cases analyzing the ACCA are not controlling because ACCA says nothing about whether possession of a sawed-off shotgun is a violent felony, whereas the guideline commentary says it is.

- “We hold that Stinson controls, and that the definition of ‘crime of violence’ [in] the commentary is authoritative. Although we would traditionally apply the categorical approach to determine whether an offense qualifies as a ‘crime of violence,’ we are bound by the explicit statement in the commentary that ‘[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a ‘crime of violence.’” . . . [T]he commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself,” and “because ‘the commentary to § [4B1.2] defines ‘crime of violence’ very differently than the ACCA does, ... we cannot say that the definition of ‘crime of violence’ provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.’” Id. at 1274.

Under this “reasoning,” the commentary need not interpret any text, so Johnson’s elimination of the residual clause is irrelevant.

Two of the decisions the Supreme Court vacated in light of Johnson relied on Hall to hold that an offense listed in the commentary was a “crime of violence.” See Denson v. United States, 135

2) In *Beckles*, the defendant was classified as a career offender based on his instant offense under 18 USC 922(g) because the PSR found that the offense involved a firearm described in 26 USC 5845(a). On direct appeal, the Eleventh Circuit improperly (as later explained in *DesCamps*) applied the modified categorical approach to 922(g), an indivisible statute, and found that the offense was possession of a firearm described in 26 USC 5845(a) because the PSR found that the offense involved a firearm described in 26 USC 5845(a) and Beckles didn’t object to the PSR’s finding. *United States v. Beckles*, 565 F.3d 832, 841-45 (11th Cir. 2009). (See Part V for further discussion.)

The Eleventh Circuit later affirmed the denial of Beckles’ first § 2255 on a different ground. It had decided in *Hall* (four years after the direct appeal) that “commentary [is] controlling over *Begay* and [circuit precedent applying *Begay* to the ACCA], because the commentary did not violate the Constitution or a federal statute, and was not inconsistent with, or a plainly erroneous reading of, the guidelines text.” *Beckles v. United States*, 579 F. Appx. 833, 834 (11th Cir. 2014) (per curiam).


On remand, the Eleventh Circuit again affirmed, opining that “*Johnson* . . . does not control this appeal,” because “Beckles was sentenced as a career offender based not on the ACCA’s residual clause, but based on express language in the Sentencing Guidelines classifying Beckles’s offense as a ‘crime of violence,’” and “*Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles’s status as a career-offender.” *Beckles v. United States*, 616 F. Appx. 415, 416 (11th Cir. Sept. 29, 2015) (per curiam). “*Hall* remains good law and continues to control in this appeal.” *Id*.

On October 21, 2015, Beckles filed a petition for rehearing en banc, arguing that (1) Matchett’s directive that courts adhere to the reasoning of cases interpreting the ACCA abrogates commentary interpreting the guidelines residual clause to include possession of a sawed-off shotgun because commentary has no freestanding power and its only valid function is to interpret the text, circuit precedent holds that the ACCA residual clause does not include possession of a sawed-off shotgun, and the panel’s conclusion cannot be reconciled with *Matchett*; and (2) if the court rehearses *Matchett* and concludes that the guidelines residual clause is unconstitutionally vague, the court should consider whether an offense listed in commentary that is not enumerated in the text and does not satisfy the elements clause can qualify as a crime of violence.

Rehearing was denied on February 11, 2016.
3) In *Denson*, the Eleventh Circuit affirmed the denial of Denson’s § 2255 claiming that counsel was ineffective for failing to object to his classification as a career offender based on his prior Florida conviction for possessing a short-barreled shotgun. *Denson v. United States*, 569 F. Appx. 710 (11th Cir. June 17, 2014) (per curiam). Relying on *Hall*, the court said that “[b]ecause this guidelines commentary is authoritative and binding, possession of such a firearm qualifies as a ‘crime of violence’ without resort to the ‘categorical approach’ traditionally used to determine whether an offense falls within the residual clause of U.S.S.G. § 4B1.2(a)(2).” *Id.* at 711. It said that reliance on *Begay* and circuit precedent applying *Begay* to hold that the very same Florida offense was not a violent felony under the ACCA is foreclosed by *Hall*. *Id.* at 712. Repeating its misuse of *Stinson* and its failure to understand what “inconsistent with the guidelines text” means, the court said that in *Hall*, it “concluded that because ‘Stinson controls,’ and the guidelines commentary designating the possession of a short-barreled shotgun as a crime of violence is authoritative and binding, the usual ‘categorical approach’ used in *Begay* and *McGill* to determine if an offense falls within the residual clause does not apply,” and “the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself.” *Id.* at 712-13.


On remand, the court concluded that “*Johnson* has no impact on the issues in this appeal.” *Denson v. United States*, 804 F.3d 1339, 1340 (11th Cir. 2015). It reinstated and repeated the same opinion, and added a section on *Johnson*, in which it says that *Johnson* does not apply to the Guidelines per *Matchett*, and anyway, it was not ineffective to fail to anticipate *Johnson*. *Id.* at 1343-44.

Denson filed a petition for certiorari on December 23, 2015. It was distributed for the February 19th conference, but that conference was canceled because of Scalia’s death. The Court did not call for a response from the government, but it might in Monday’s orders (2/29/16).

**V. Can a Court Find That an Instant Offense of Conviction Was Unlawful Possession of a Firearm Described in 26 U.S.C. § 5845(a), When the Defendant was Convicted Only of Unlawful Possession of a Firearm under 18 U.S.C. § 922(g)?**
Some courts have found that an instant offense under § 922(g) was a “crime of violence” under § 4B1.2, i.e., unlawful possession of firearm described in 26 U.S.C. § 5845(a), by looking beyond the elements of the offense of conviction.\(^{11}\) They have done so by improperly applying the modified categorical approach, or by relying on commentary in Application Note 1 that is tied directly to the residual clause. Both approaches are no longer good law.

In its 2009 decision in United States v. Beckles, 565 F.3d 832 (11th Cir. 2009), the Eleventh Circuit found that the instant offense of conviction under § 922(g) was a conviction for possession of a sawed-off shotgun (a firearm described in 26 U.S.C. § 5845(a)) by applying what it believed to be the modified categorical approach authorized by Taylor and Shepherd. The court expressly noted that the same law applies to evaluating both prior and instant convictions, and clearly intended to apply Shepherd’s modified categorical approach when it decided that it could look beyond the elements of the offense of conviction (there, by looking to allegations in the PSR to which the defendant did not object) to determine that the instant offense was unlawful possession of a sawed-off shotgun. Id. at 843-44 & n.2. But like many courts before the Supreme Court decided Descamps in 2013, the court improperly applied the modified categorical approach to this indivisible statute based on a finding that the statute, here 18 U.S.C. § 922(g), was categorically overbroad. Id. at 843.\(^{12}\)

The Supreme Court later clarified in Descamps that the modified categorical approach may not be used merely because the statute of conviction is categorically overbroad; the statute must be divisible by its elements into alternative offenses, at least one of which qualifies as a predicate offense and one or more others that do not. See 133 S. Ct. 2276, 2285-86, 2293 (2013). Section § 922(g) is not divisible in that manner. Thus, after Descamps, it is clear that the Eleventh Circuit improperly applied the modified categorical approach in 2009 in Beckles to find that the instant conviction under § 922(g) was a conviction for possession of a sawed-off shotgun. The Eleventh Circuit has now declared that Beckles’ instant offense of conviction is a “crime of violence” based solely on the commentary listing unlawful possession of a firearm described in 26 U.S.C. § 5845(a) as a “crime of violence.” See Beckles v. United States, 616 F. Appx. 415, 416 (11th Cir. Sept. 29, 2015) (per curiam). However, under a properly applied categorical approach, which the Eleventh Circuit previously said applies, see Beckles, 565 F.3d at 843, a conviction under § 922(g) should never count as a conviction for possession of a firearm described in § 5845(a), and so should never be a “crime of violence” regardless of

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\(^{11}\) Courts do not appear to have done this with respect to prior convictions, at least since the Supreme Court confirmed in Begay that the categorical approach applied to the residual clause.

\(^{12}\) “Plainly, a violation of 18 U.S.C. § 922(g)(1) encompasses both conduct that the Sentencing Guidelines explicitly says is not a crime of violence and conduct that the Sentencing Guidelines explicitly denominates as a crime of violence. All that is required to violate 18 U.S.C. § 922(g) is that a convicted felon knowingly possess any firearm. Thus, this conviction encompasses conduct involving the possession of a standard firearm as well as the possession of a firearm that specifically meets the criteria of 26 U.S.C. § 5845(a). . . . Where an ambiguity exists and the underlying conviction may be examined, the district court can rely on the ‘charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.’ [United States v.] Aguilar-Ortiz, 450 F.3d [1271,] 1276 [11th Cir. 2006] (quoting Shepard v. United States, 544 U.S. 13, 16, [] (2005)).” Beckles, 565 F.3d at 843.
whether the Commission has declared, in commentary or the text of § 4B1.2, that unlawful possession of a firearm described in 26 U.S.C. § 5845(a) is a crime of violence.

Note: The situation is different when the instant offense of conviction is an offense for which the type of firearm is actually an element of the offense. Such an offense may be a “crime of violence” if possession of a firearm described at § 5845(a) is a valid predicate offense under the relevant recidivist provision. Cf. United States v. Amparo, 68 F.3d 1222, 1224-26 (9th Cir. 1995) (applying Taylor’s categorical approach to hold that an instant conviction for possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. § 5861(d), which defines “firearm” as a firearm described in 26 U.S.C. § 5845(a), is a “crime of violence” under the residual clause at 18 U.S.C. § 924(c)(3)(B), which at the time was believed to be valid). For the reasons set out in Part I, after Johnson invalidated the residual clause, possession of a firearm described at § 5845(a) cannot qualify simply because it is listed in the commentary. Effective August 1, 2016, it will be an enumerated offense in the text of § 4B1.2(a)(2). At that time, the elements of the defendant’s offense will have to satisfy the generic definition of possession of a firearm described in 26 U.S.C. § 5845(a), and a conviction under 18 U.S.C. § 922(g) will not.

Other courts have taken a different route to find that a conviction for unlawful possession of a firearm under § 922(g) is a conviction for unlawful possession of a firearm described in § 5845(a) for purposes of § 4B1.2—one that eschews the categorical approach altogether and depends on the existence of the residual clause.

In United States v. Lipscomb, the Fifth Circuit declined to apply the categorical approach in order to find that an instant conviction for unlawful possession of a firearm under § 922(g) is a “crime of violence” for purposes of the residual clause at § 4B1.2 because the indictment described the offense as a sawed-off shotgun. 619 F.3d 474, 479 (5th Cir. 2010). It reached this conclusion by relying on commentary in Application Note 1 to § 4B1.2, which currently states that an offense is a “crime of violence” if “the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another.”

The Tenth and Eighth Circuits have also directly or indirectly relied on this commentary to permit a conduct-specific inquiry for purposes of determining whether an instant offense of conviction satisfies the residual clause. See United States v. Riggans, 254 F.3d 1200, 1203-04 (10th Cir. 2001) (expressly rejecting the categorical approach when determining whether the instant offense of bank larceny qualified as a “crime of violence” under the residual clause in favor of “a conduct-specific inquiry” and further rejecting the suggestion in Note 1 that the inquiry was limited to the conduct alleged in the indictment: “As the government observes, to limit the court’s inquiry to the indictment would lead to absurd results where, as here, there is undisputed evidence that this criminal offense presented a serious risk of harm to others” (internal quotation marks omitted)); United States v. Williams, 690 F.3d 1056, 1069 (8th Cir. 2012) (rejecting the modified categorical approach and relying on Riggans to hold that court was permitted to “consider the readily available trial evidence” to assess whether the instant offense of conviction under 18 U.S.C. § 844(e) (conveying a threat in interstate commerce about the destruction of life and property by explosives) qualified as a “crime of violence”).
In contrast, the Ninth and Fourth Circuits have clearly held that the categorical approach applies equally to instant and prior offenses for purposes of determining whether a conviction satisfies the residual clause under § 4B1.2. See United States v. Piccolo, 441 F.3d 1084, 1087 (9th Cir. 2006) (prior circuit precedent applying Taylor to instant offense for purposes of determining whether it was a “crime of violence” under 18 U.S.C. § 924(c)(3)(B) “dictates that we do the same with respect to current offenses” under § 4B1.2, and holding that walkaway escape under 18 U.S.C. § 751(a) is categorically not a “crime of violence” because it criminalizes conduct that does not satisfy the residual clause); United States v. Martin, 215 F.3d 470, 474-75 (4th Cir. 2000) (holding that court may look only to the facts charged in the indictment that correspond to the elements of the offense of conviction for purposes of determining whether bank larceny categorically satisfies the residual clause, and finding that it does not).

Johnson effectively resolved this division by invalidating the residual clause, which dictates that the commentary that is explicitly tied to it at Application Note 1 is likewise invalidated. In any event, effective August 1, 2016, the residual clause and the commentary tied to it at Application Note 1 are deleted from § 4B1.2. Either way, courts may no longer rely on commentary in § 4B1.2 (referring to “conduct set forth (i.e., expressly charged)” as authorizing a conduct-specific inquiry for determining whether a conviction for unlawful possession of a firearm under 18 U.S.C. § 922(g) is a conviction for unlawful possession of a firearm described in § 5845(a).
Amendment to the Sentencing Guidelines

January 21, 2016

Effective Date
August 1, 2016

This document contains unofficial text of an amendment to the Guidelines Manual submitted to Congress, and is provided only for the convenience of the user. Official text of the amendment can be found on the Commission’s website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.
The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

The Commission specified an effective date of **August 1, 2016** for the amendment listed above and included in this document.
AMENDMENT: “CRIME OF VIOLENCE” AND RELATED ISSUES

Reason for Amendment: This amendment is a result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). As part of this study, the Commission considered feedback from the field, including conducting a roundtable discussion on these topics and considering the varying case law interpreting these statutory and guideline definitions. In particular, the Commission has received extensive comment, and is aware of numerous court opinions, expressing a view that the definition of “crime of violence” is complex and unclear. The amendment is informed by this public comment and case law, as well as the Supreme Court’s recent decision in Johnson v. United States, 135 S. Ct. 2551 (2015), regarding the statutory definition of “violent felony” in 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or “ACCA”). While not addressing the guidelines, that decision has given rise to significant litigation regarding the guideline definition of “crime of violence.” Finally, the Commission analyzed a range of sentencing data, including a study of the sentences relative to the guidelines for the career offender guidelines. See U.S. Sent’g Comm’n, Quick Facts: Career Offenders (Nov. 2015) (highlighting the decreasing rate of within range guideline sentences (27.5% in fiscal year 2014), which has been coupled with increasing rates of government (45.6%) and non-government sponsored below range sentences (25.9%)).

The amendment makes several changes to the definition of “crime of violence” at §4B1.2 (Definitions of Terms Used in Section 4B1.1), which, prior to this amendment, was defined as any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that

- has as an element the use, attempted use, or threatened use of physical force against the person of another (“force clause” or “elements clause”), see §4B1.2(a)(1);
- is murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or involves the use of explosives (“enumerated offenses”), see §4B1.2(a)(2) and comment. (n.1); or
- otherwise involves conduct that presents a serious potential risk of physical injury to another (“residual clause”), see §4B1.2(a)(2).

The “crime of violence” definition at §4B1.2 is used to trigger increased sentences under several provisions in the Guidelines Manual, the most significant of which is §4B1.1 (Career Offender). See also §§2K1.3, 2K2.1, 2S1.1, 4A1.1(e), 7B1.1. The career offender guideline implements a directive to the Commission set forth at 28 U.S.C. § 994(h), which in turn identifies offenders for whom the guidelines must provide increased punishment. Tracking the criteria set forth in section 994(h), the Commission implemented the directive by identifying a defendant as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Where these criteria are met, the directive at section 994(h), and therefore §4B1.1, provides for significantly higher sentences under the guidelines, such that the guideline range is “at or near the maximum term of imprisonment authorized.” Commission data shows that application of §4B1.1 resulted in an increased final offense level, an increased Criminal History Category, or both for 91.3 percent of defendants sentenced under the career offender guideline in fiscal year 2014. See U.S. Sent’g Comm’n, Quick Facts: Career Offenders (Nov. 2015) (46.3% of career offenders received an increase in both final offense level (from an average of 23 levels to 31 levels) and criminal history category (from an average of category IV
to category VI); 32.6% had just a higher final offense level (from an average of 23 levels to 30 levels); and 12.4% had just a higher Criminal History Category (from an average of category IV to category VI).

Residual Clause

First, the amendment deletes the “residual clause” at §4B1.2(a)(2). Prior to the amendment, the term “crime of violence” in §4B1.2 included any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” In Johnson, the Supreme Court considered an identical residual clause relating to the statutory definition of “violent felony” in the Armed Career Criminal Act. The Court held that using the “residual clause” to classify an offense as a “violent felony” violated due process because the clause was unconstitutionally vague. See Johnson, 135 S. Ct. at 2563. While the Supreme Court in Johnson did not consider or address the sentencing guidelines, significant litigation has ensued regarding whether the Supreme Court’s holding in Johnson should also apply to the residual clause in §4B1.2. Compare United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) (rejecting the argument that the residual clause in §4B1.2 is unconstitutionally vague in light of Johnson) and United States v. Wilson, 622 F. App’x 393, 405 n.51 (5th Cir. 2015) (considering the applicability of Johnson, noting “[o]ur case law indicates that a defendant cannot bring a vagueness challenge against a Sentencing Guideline”), with United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) (finding that previous circuit precedent holding that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after Johnson); United States v. Madrid, 805 F.3d 1204, 1211 (10th Cir. 2015) (holding that the residual clause of §4B1.2(a)(2) is void for vagueness); United States v. Harbin, 610 F. App’x 562 (6th Cir. 2015) (finding that defendant is entitled to the same relief as offenders sentenced under the residual clause of the ACCA); and United States v. Townsend, __ F. App’x __, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015) (remanding for resentencing in light of the government’s concession that, pursuant to Johnson, the defendant should not have been sentenced as a career offender).

The Commission determined that the residual clause at §4B1.2 implicates many of the same concerns cited by the Supreme Court in Johnson, and, as a matter of policy, amends §4B1.2(a)(2) to strike the clause. Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the Johnson decision.

List of Enumerated Offenses

With the deletion of the residual clause under subsection (a)(2), there are two remaining components of the “crime of violence” definition – the “elements clause” and the “enumerated offenses clause.” The “elements clause” set forth in subsection (a)(1) remains unchanged by the amendment. Thus, any offense under federal or state law, punishable by imprisonment for a term exceeding one year, qualifies as a “crime of violence” if it has as an element the use, attempted use, or threatened use of physical force against the person of another. Importantly, such an offense may, but need not, be specifically enumerated in subsection (a)(2) to qualify as a crime of violence.

The “enumerated offense clause” identifies specific offenses that qualify as crimes of violence. In applying this clause, courts compare the elements of the predicate offense of conviction with the elements of the enumerated offense in its “generic, contemporary definition.” As has always been the case, such offenses qualify as crimes of violence regardless of whether the offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another. While most of the offenses on the enumerated list under §4B1.2(a)(2) remain the same, the amendment does revise the list in a number of ways to focus on the most dangerous repeat offenders. The revised list is based on the
Commission’s consideration of public hearing testimony, a review of extensive public comment, and an examination of sentencing data relating to the risk of violence in these offenses and the recidivism rates of career offenders. Additionally, the Commission’s revisions to the enumerated list also consider and reflect the fact that offenses not specifically enumerated will continue to qualify as a crime of violence if they satisfy the elements clause.

As amended, the enumerated offenses include murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, 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). For easier application, all enumerated offenses are now included in the guideline at §4B1.2; prior to the amendment, the list was set forth in both §4B1.2(a)(2) and the commentary at Application Note 1.

Manslaughter, which is currently enumerated in Application Note 1, is revised to include only voluntary manslaughter. While Commission analysis indicates that it is rare for involuntary manslaughter to be identified as a predicate for the career offender guideline, this change provides that only voluntary manslaughter should be considered. This is also consistent with the fact that involuntary manslaughter generally would not have qualified as a crime of violence under the “residual clause.” See Begay v. United States, 553 U.S. 137 (2008) (limiting crimes covered by the ACCA residual clause to those roughly similar in kind and degree of risk posed as the enumerated offenses, which typically involve “purposeful, violent, and aggressive conduct”).

The amendment deletes “burglary of a dwelling” from the list of enumerated offenses. In implementing this change, the Commission considered 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. The Commission considered several studies and analyses in reaching these conclusions.

First, several recent studies demonstrate that most burglaries do not involve physical violence. See Bureau of Justice Statistics, National Crime Victimization Survey, Victimization During Household Burglary (Sept. 2010) (finding that a household member experienced some form of violent victimization in 7% of all household burglaries from 2003 to 2007); Richard S. Culp et al., Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007, at 29 (2015), available at https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (concluding that 7.6% of burglaries between 1998 and 2007 resulted in actual violence or threats of violence, while actual physical injury was reported in only 2.7% of all burglaries); see also United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Report, Crime in the United States (2014) (classifying burglary as a “property crime” rather than a “violent crime”). Second, based upon an analysis of offenders sentenced in fiscal year 2014, the Commission estimates that removing “burglary of a dwelling” as an enumerated offense in §4B1.2(a)(2) will reduce the overall proportion of offenders who qualify as a career offender by less than three percentage points. The Commission further estimates that removing the enumerated offense would result in only about five percent of offenders sentenced under USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) receiving a lower base offense level than would currently apply. Finally, a Commission analysis of recidivism rates for career offenders released during calendar years 2004 through 2006 indicates that about five percent of such offenders were rearrested for a burglary offense during the eight years after their release.

In reaching this conclusion, the Commission also considered that courts have struggled with identifying a uniform contemporary, generic definition of “burglary of dwelling.” In particular, circuits have disagreed regarding whether the requirement in Taylor v. United States, 495 U.S. 575, 598 (1990), that
the burglary be of a “building or other structure” applies in addition to the guidelines’ requirement that the burglary be of a “dwelling.” Compare United States v. Henriquez, 757 F.3d 144, 148-49 (4th Cir. 2014); United States v. McFalls, 592 F.3d 707 (6th Cir. 2010); United States v. Wenner, 351 F.3d 969 (9th Cir. 2003) with United States v. Ramirez, 708 F.3d 295, 301 (1st Cir. 2013); United States v. Murillo-Lopez, 444 F.3d 337, 340 (5th Cir. 2006); United States v. Rivera-Oros, 590 F.3d 1123 (10th Cir. 2009); United States v. McClenton, 53 F.3d 584 (3d Cir. 1995); United States v. Graham, 982 F.2d 315 (8th Cir. 1992).

Although “burglary of a dwelling” is deleted as an enumerated offense, the amendment adds an upward departure provision to §4B1.2 to address the unusual case in which the instant offense or a prior felony conviction was any burglary offense involving violence that did not otherwise qualify as a “crime of violence.” This departure provision allows courts to consider all burglary offenses, as opposed to just burglaries of a dwelling, and reflects the Commission’s determination that courts should consider an upward departure where a defendant would have received a higher offense level, higher Criminal History Category, or both (e.g., where the defendant would have been a career offender) if such burglary had qualified as a “crime of violence.”

Finally, the amendment adds offenses that involve the “use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or an explosive material as defined in 18 U.S.C. § 841(c)” to the enumerated list at §4B1.2(a)(2). This addition is consistent with long-standing commentary in §4B1.2 categorically identifying possession of a firearm described in 26 U.S.C. § 5845(a) as a “crime of violence,” and therefore maintains the status quo. The Commission continues to believe that possession of these types of weapons (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) inherently presents a serious potential risk of physical injury to another person. Additionally, inclusion as an enumerated offense reflects Congress’s determination that such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes. See also USSG App. C, amend. 674 (eff. Nov. 1, 2004) (expanding the definition of “crime of violence” in Application Note 1 to §4B1.2 to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a)).

Enumerated Offense Definitions

The amendment also adds definitions for the enumerated offenses of forcible sex offense and extortion. The amended guideline, however, continues to rely on existing case law for purposes of defining the remaining enumerated offenses. The Commission determined that adding several new definitions could result in new litigation, and that it was instead best not to disturb the case law that has developed over the years.

As amended, “forcible sex offense” 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. Consistent with the definition in §2L1.2 (Unlawfully Entering or Remaining in the United States), this addition reflects Congress’s determination that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute “crimes of violence” under §4B1.2. See also USSG App. C, amend. 722 (eff. Nov. 1, 2008) (clarifying the scope of the term “forcible sex offense” as that term is used in the definition of “crime of violence” in §2L1.2, Application Note 1(B)(iii)).

The new commentary also provides that the offenses of 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. This
addition makes clear that the term “forcible sex offense” in §4B1.2 includes sexual abuse of a minor and statutory rape where certain specified elements are present.

“Extortion” is defined 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.” Under case law existing at the time of this amendment, courts generally defined extortion as “obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats” based on the Supreme Court’s holding in United States v. Nardello, 393 U.S. 286, 290 (1969) (defining “extortion” for purposes of the Hobbs Act). Consistent with the Commission’s goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrows the generic definition of extortion by limiting the offense to those 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.

Department Provision at §4B1.1

Finally, the amendment adds a downward departure provision in §4B1.1 for cases in which one or both of the defendant’s “two prior felony convictions” is based on an offense that is classified as a misdemeanor at the time of sentencing for the instant federal offense.

An offense (whether a “crime of violence” or a “controlled substance offense”) is deemed to be a “felony” for purposes of the career offender guideline if it is punishable by imprisonment for a term exceeding one year. This definition captures some state offenses that are punishable by more than a year of imprisonment, but are in fact classified by the state as misdemeanors. Such statutes are found, for example, in Colorado, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont.

The Commission determined that the application of the career offender guideline where one or both of the defendant’s “two prior felony convictions” is an offense that is classified as a misdemeanor 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. While recognizing the importance of maintaining a uniform and consistent definition of the term “felony” in the guidelines, the Commission determined that it is also appropriate for a court to consider the seriousness of the prior offenses (as reflected in the classification assigned by the convicting jurisdiction) in deciding whether the significant increases under the career offender guideline are appropriate. Such consideration is consistent with the structure used by Congress in the context of the Armed Career Criminal Act. See 18 U.S.C. § 921(a)(20) (providing, for purposes of Chapter 44 of Title 18, that “crime punishable by imprisonment for a term exceeding one year” does not include a State offense classified as a misdemeanor and punishable by two years or less). It is also consistent with the court’s obligation to account for the “nature and circumstances of the offense and the history and characteristics of the defendant.” See 18 U.S.C. § 3553(a)(1).

Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(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.

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline—

   “Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

   “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of 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.

   “Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

   “Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.
“Crime of violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a “crime of violence”.

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a “crime of violence” as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a “crime of violence.” In such a case, an upward departure may be appropriate.

* * *

§4B1.1. **Career Offender**

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender’s criminal history category in every case under this subsection shall be Category VI.

<table>
<thead>
<tr>
<th>Offense Statutory Maximum</th>
<th>Offense Level*</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Life</td>
<td>37</td>
</tr>
<tr>
<td>(2) 25 years or more</td>
<td>34</td>
</tr>
<tr>
<td>(3) 20 years or more, but less than 25 years</td>
<td>32</td>
</tr>
<tr>
<td>(4) 15 years or more, but less than 20 years</td>
<td>29</td>
</tr>
<tr>
<td>(5) 10 years or more, but less than 15 years</td>
<td>24</td>
</tr>
<tr>
<td>(6) 5 years or more, but less than 10 years</td>
<td>17</td>
</tr>
<tr>
<td>(7) More than 1 year, but less than 5 years</td>
<td>12</td>
</tr>
</tbody>
</table>

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

1. If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

2. In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

   (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and
(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

<table>
<thead>
<tr>
<th>§3E1.1 Reduction</th>
<th>Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No reduction</td>
<td>360-life</td>
</tr>
<tr>
<td>2-level reduction</td>
<td>292-365</td>
</tr>
<tr>
<td>3-level reduction</td>
<td>262-327</td>
</tr>
</tbody>
</table>

Commentary

Application Notes:

1. **Definitions.**—“Crime of violence,” “controlled substance offense,” and “two prior felony convictions” are defined in §4B1.2.

2. **“Offense Statutory Maximum.”**—“Offense Statutory Maximum,” for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the “Offense Statutory Maximum” for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.

3. **Application of Subsection (c).**—

   (A) **In General.**—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).

   (B) **Subsection (c)(2).**—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.

   (C) **“Otherwise Applicable Guideline Range.”**—For purposes of subsection (c)(2)(A), “otherwise applicable guideline range” for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

   (i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).
(ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).

(D) **Imposition of Consecutive Term of Imprisonment**.—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) **Example**.—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e).

4. **Departure Provision for State Misdemeanors**.—In a case in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, 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).

**Background**: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .” 28 U.S.C. § 991(b)(1)(B). The Commission’s refinement of this definition over time is consistent with Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute (“The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee’s view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense
level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

* * *
Virginia Robbery Elements
(a common law offense)

- Taking
- With intent to steal
- Personal property of another
- From his person or in his presence
- Against his will
- By violence or intimidation
  (or by use of force, threat or intimidation)

Virginia Cases Defining Robbery

What is Intimidation?

- “Unlawful coercion; extortion; duress; putting in fear” – *Black’s Law Dictionary* 831 (6th ed. 1990)
- “Intimidation differs from threat in that it occurs without an express threat by the accused to do bodily harm.” *Id.* (emphasis added).
- “Threats of violence or bodily harm are not an indispensable ingredient of intimidation. It is only necessary that the victim actually be put in fear of bodily harm by the willful conduct or words of the accused.” *Fagan v. Commonwealth*, 63 Va. App. 395, 398, 758 S.E.2d 78, 80 (2014) (quoting *Harris v. Commonwealth*, 3 Va. App. 519, 521, 351 S.E.2d 356, 357 (1986)).

Does robbery necessarily have as an element the use, attempted use, or threatened use of physical force?

- Robbery in Virginia is a crime of violence having as an element the use or threatened use of physical force. *United States v. Presley*, 52 F.3d 64 (4th Cir. 1995) (“Violence is the use of force. Intimidation is the threat of the use of force.”); *see also United States v. McNeal*, ___ F.3d ___, 2016 WL 1178823 (4th Cir. 2016) (federal armed bank robbery is crime of violence, relies on *Presley*).
Unlawful/Malicious Wounding

Va. Code § 18.2-51:

If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall . . . Be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Elements under Virginia Law

- Shoot, stab, cut, wound, or by any means cause bodily injury
- Maliciously
  - this is the element that distinguishes malicious wounding from unlawful wounding; *Williams v. Comm.*, 64 Va. App. 240, 767 S.E.2d 252 (2015)
- With intent to maim, disfigure, disable, or kill
  - this is the element that elevates assault and battery to a wounding offense; *Boone v. Comm.*, 14 Va. App. 130, 415 S.E.2d 250 (1992)
Causing bodily injury “by any means”

- *Banovitch v. Commonwealth*, 196 Va. 210, 83 S.E.2d 369 (1954) (prescription or administration of harmful medication, *if done with requisite intent and malice*, would support conviction, proof of intent, other than act itself, would be required)
- Splashing acid in someone’s face (*Banovitch, supra*)
- Tampering with someone’s car (brakes, steering wheel)
- Other examples?

Federal conceptualization of Va. Law

Statute sets out 4 distinct offenses:
- Malicious wounding
- Maliciously causing bodily injury
- Unlawful wounding
- Unlawfully causing bodily injury

What does the 4th Circuit say?

- *Bushnell v. Attorney General of U.S.*, 527 Fed. Appx. 170 (4th Cir. 2013) (decided in immigration case deporting an alien for conviction of a “crime of violence” as defined in 18 U.S.C. § 16 – was a crime that had use, attempted use, or threatened use of physical force as an element AND was violent under residual clause).

- *United States v. Etheridge*, 932 F.2d 318 (4th Cir. 1991) (parties had stipulated that prior unlawful wounding was a violent crime)

- *United States v. Joyner*, 199 F.3d 1329 (4th Cir. 1999) (unpublished) (use of prior unlawful wounding conviction for ACCA enhancement was challenged because it was too old, not because it wasn’t a “violent felony”)

- *United States v. Candiloro*, 322 Fed. Appx. 332 (4th Cir. 2009) (unpublished) (“the phrase ‘by any means’ standing alone could possibly given the broad interpretation . . .[but] has been narrowed by established Virginia precedent”)

Important case!

- *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012)
Is unlawful or malicious wounding a “crime of violence”?

- **Cases saying No**

- **Cases saying Yes—under the residual clause**
  - *United States v. Carter*, 2013 WL 5353055 (E.D. Va. 2013) (distinguishing *Lopez-Reyes* because ACCA has residual clause, whereas illegal reentry guideline did not)

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Virginia rape (a statutory offense)

- Virginia § 18.2-61: If any person has sexual intercourse with a complaining witness, whether or not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness’s will, by force, threat or intimidation of or against the complaining witness or another person; or (ii) through the use of the complaining witness’s mental incapacity or physical helplessness; or (iii) with a child under age 13 as the victim, he or she shall be guilty of rape.

- So what are the elements of this offense? See Va. Model Jury Instructions, Criminal, G44.100 et seq.
Virginia rape elements

- That the defendant had sexual intercourse with a qualifying person or caused a qualifying person to engage in sexual intercourse with another person; and

Virginia rape elements cont’d

- That it was
  - against the qualifying person’s will and without her consent; and
  - That it was by force, threat or intimidation OR
- That at the time of the act, the qualifying person was under the age of 13, OR
- That at the time, the qualifying person was mentally incapacitated or physically helpless, and
  - the defendant knew or should have known as much, and
  - that the sexual intercourse was accomplished through the use of the complaining witness’s incapacity
One offense or three?

- Maybe three different offenses
  - Rape on a competent adult – against complainant’s will and using force, threats or intimidation
  - Rape of a child under 13
  - Rape of a mentally or physically incapacitated person
- If there are three offenses identified in this one statute, do any of the individual offenses proscribed categorically qualify as crimes of violence?

Do any of these rapes necessarily have as an element the use, attempted use, or threatened use of physical force?

- “Intimidation”: see discussion under Virginia robbery
- Neither rape of a child nor rape of an incapacitated person require proof of physical or violent force

- United States v. Shell, 789 F.3d 335 (4th Cir. 2015)
- United States v. Vann, 620 F.3d 431 (4th Cir. 2010)
- United States v. Thornton, 554 F.3d 443 (4th Cir. 2009)