Litigating Challenges to the Amended Definition of “Crime of Violence” in § 4B1.2(a)

Amy Baron-Evans, Jennifer Niles Coffin, Lex Coleman

On June 26, 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the “residual clause” in the Armed Career Criminal Act is void for vagueness.¹ Under that clause, a prior conviction counted as a “violent felony”—and thus as a predicate for the ACCA’s enhanced 15-year minimum sentence—if the court determined that the prior offense “involve[d] conduct that presents a serious potential risk of physical injury to another.”² Because this language “both denies fair notice to defendants and invites arbitrary enforcement by judges,” the Court held, “[i]ncreasing a defendant’s sentence under the clause denies due process of law.”³

For Samuel Johnson, this holding meant that his prior conviction for possession of a sawed-off shotgun—which was counted as a “violent felony” under the residual clause—is not an ACCA predicate. The same will be true for a wide variety of convictions for offenses previously deemed “violent felonies” under the residual clause, often only because judges “imagined” they presented a risk of injury in the hypothetical “ordinary case.”⁴ After *Johnson*, a conviction qualifies as a “violent felony” under the ACCA only if it “(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary, arson, or extortion, [or] involves use of explosives.”⁵

In 1989, the U.S. Sentencing Commission amended the definition of “crime of violence” in the career offender guideline at U.S.S.G. § 4B1.2(a) so that, other than replacing “burglary” with “burglary of a dwelling,” it repeated the definition of “violent felony” in the ACCA, including an identical residual clause.⁶ The term “crime of violence” as defined in § 4B1.2(a) is

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³ *Johnson*, 135 S. Ct. at 2557-58.
⁴ As the Supreme Court observed, “[t]wo features of the residual clause conspire to make it unconstitutionally vague”: (1) the clause “leaves grave uncertainty about how to estimate the risk posed by a crime” by tying “the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements”; and (2), the clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.*
also used in several other guidelines. All courts of appeals to address the issue but one have held or assumed that Johnson’s constitutional holding applies to the residual clause in the career offender guideline. The Supreme Court will resolve this circuit split in Beckles v. United States, 136 S. Ct. 2510 (cert. granted June 27, 2016) (No. 15-8544), in the upcoming Term, and we are optimistic that it will hold that Johnson applies to the guidelines.

Meanwhile, effective August 1, 2016, the Sentencing Commission has deleted the residual clause from § 4B1.2(a)(2) and made a number of other changes to the definition of “crime of violence.” The Commission said that its amendments would “make the guideline consistent with . . . Johnson.”

The amendment will be beneficial for some defendants and detrimental to others. The purpose of this article is to show when and how to use, challenge, or avoid the new definition of “crime of violence” in sentencings and resentencings on or after August 1, 2016, and on direct appeal for those already sentenced. It first provides an overview of the amendments to § 4B1.2(a)(2). It then discusses when to insist on using the pre-amendment version of the guideline as altered by Johnson’s constitutional holding and, alternatively, how to challenge the amended version to your client’s advantage.

I. Changes to the Definition of “Crime of Violence” in § 4B1.2(a)(2) Effective August 1, 2016

First, the Commission deleted “burglary of a dwelling” from the list of enumerated

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7 See USSG §§ 2K1.3 & cmt. n.2 (explosive materials); 2K2.1 & cmt. n.1 (firearms); 2S1.1 & cmt. n.1 (money laundering); 4A1.1(e), 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).

8 See United States v. Soto-Rivera, 811 F.3d 53 (1st Cir. 2016); United States v. Welch, 641 F. App’x (2d Cir. 2016); United States v. Calabretta, __ F.3d __, 2016 WL 3997215 (3d Cir. July 26, 2016); United States v. Tucker, 629 F. App’x 572 (4th Cir. 2016); Order, United States v. Estrada, No. 15-40264 (5th Cir. Oct. 27, 2015); United States v. Pavlak, 822 F.3d 902 (6th Cir. 2016); Ramirez v. United States, 799 F.3d 845 (7th Cir. 2015); United States v. Hurlburt, __ F.3d __, 2016 WL 4506717 (7th Cir. Aug. 29, 2016) (en banc); United States v. Taylor, 803 F.3d 931, 933 (8th Cir. 2015); United States v. Benavides, 617 F. App’x 790 (9th Cir. 2015); United States v. Madrid, 805 F.3d 1204, 1210-11 (10th Cir. 2015); United States v. Sheffield, __ F.3d __, 2016 WL 4254995, at *13 (D.C. Cir. Aug. 12, 2016) (No. 12-3013). But see United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) (holding post-Johnson that vagueness doctrine does not apply to advisory guidelines).


offenses in § 4B1.2(a)(2). The Commission cited a mass of empirical evidence showing that “(1) burglary offenses rarely result in physical violence, (2) ‘burglary of a dwelling’ is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release.”

Going forward, a prior burglary conviction may be used solely as a reason for upward departure, and even then only in the unusual case in which it involved physical injury. This change, combined with the elimination of the residual clause (under which most burglaries were counted because they were not generic “burglary of a dwelling”), will mean that one of the most common prior offenses that counted as a “crime of violence”, will now rarely if ever be a reason for a longer federal sentence.

Second, in addition to deleting the residual clause in light of Johnson, the Commission deleted guideline commentary that listed a number of offenses deemed by the Commission to be “crimes of violence” under the residual clause. With the residual clause deleted, the commentary no longer interprets or explains any remaining component of the definition in § 4B1.2. As explained in Part II.A, the only valid function of commentary is to interpret or explain the text of a guideline. Thus, “consistent with” and “related” to the deletion of the residual clause, the Commission moved most of these offenses—i.e., murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, and “unlawful[] possess[ion] of a firearm described in 26 U.S.C. § 5845(a)” to the text of § 4B1.2(a)(2), where they now join the three remaining original enumerated offenses, and eliminated “extortionate extension of credit” and involuntary manslaughter (previously listed in the commentary). The only “crimes of violence” that remain listed in commentary are the inchoate offenses of “aiding and abetting, conspiring, and attempting to commit” a “crime of violence.”

Third, the Commission added as enumerated offenses at § 4B1.2(a)(2) “use” of a “firearm described in 26 U.S.C. § 5845(a)” and “possession of explosive material,” and


expanded the term “use of explosives” in the text to “use of explosive material.”

Fourth, the Commission added a downward departure from the career offender guideline if a qualifying prior conviction “is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense.” This departure addresses the fact that some states make some misdemeanors punishable by more than one year, thus qualifying under the Commission’s definition of a “felony” (an offense “punishable by imprisonment for a term exceeding one year”), even though the convicting jurisdiction classifies the offense as a misdemeanor. In such a case, “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.” If so, “a downward departure may be warranted without regard to the [one criminal history category] limitation in § 4A1.3(b)(3)(A).”

The Commission made no change to the so-called “force clause” in § 4B1.2(a)(1), under which an offense qualifies as a “crime of violence” when it “has as an element the use, attempted use, or threatened use of physical force against the person of another.” The term “force” as used here means “violent force,” which means “strong physical force” that is “capable of causing physical injury or pain” to another person. The use, attempted use, or threatened use of that force must be intentional, not reckless or negligent.

As amended, the text of U.S.S.G. § 4B1.2(a) provides as follows (additions in bold, deletions in strikethrough):

(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 involves the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosives material as defined in 18 U.S.C. § 841(c) or otherwise


20 Id.

21 Id.

22 Johnson v. United States, 559 U.S. 133, 140 (2010). In this case, the Supreme Court construed the identical force clause in the Armed Career Criminal Act, and courts apply interchangeably decisions interpreting the ACCA and the career offender guideline’s identical terms. See, e.g., United States v. Shell, 789 F.3d 335, 341 (4th Cir. 2015); Ramirez v. United States, 799 F.3d 845, 856 (7th Cir. 2015).

23 See, e.g., United States v. McMurray, 653 F.3d 367, 374-75 (6th Cir. 2011); United States v. Dixon, 805 F.3d 1193 (9th Cir. 2015).
involves conduct that presents a serious potential risk of physical injury to another.

Before the amendment, the Commission did not define any of the offenses enumerated in the text of § 4B1.2(a)(2) or listed in commentary, except to define “firearm” as one “described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun, or sawed-off rifle, silencer, bomb, or machine gun).” The absence of definitions made little difference, however, as courts could avoid the task of determining the “generic” definition and whether the offense of conviction satisfied it by finding that the offense qualified under the broadly interpreted residual clause. Before issuing the recent amendment, the Commission considered defining each of the offenses now enumerated in § 4B1.2(a)(2), but decided not to do so because “adding several new definitions could result in new litigation,” and it was “best not to disturb the case law that has developed over the years.”

The Commission, however, defined “extortion,” partially defined “forcible sex offense,” and defined the new term “explosive material.” These definitions, as well as the “generic” definitions for the remaining offenses, are discussed in Part II.B.

II. When to Insist on Using the Old Definition of “Crime of Violence” and How to Challenge the New One

Take a client who has a prior state conviction for aggravated assault, one of the offenses that is now enumerated in § 4B1.2(a)(2) but before the amendment was listed only in commentary. After conducting careful research, you have determined that the aggravated assault offense of which the client was convicted does not have “as an element the use, attempted use, or threatened use of physical force against the person of another,” so the only way it could be a “crime of violence” under the amended version of the guideline is because “aggravated assault” is now enumerated in § 4B1.2(a)(2).

If the instant offense was committed before August 1, 2016, there are two ways to challenge the use of the state aggravated assault conviction as a “crime of violence.” First, because the client has a right under the Ex Post Facto Clause to be sentenced under the guideline in effect when the crime was committed if the result is less severe, insist that the court use the guideline in effect at the time the instant offense was committed with the residual clause voided by Johnson. Under that version of the guideline, the commentary listing “aggravated assault” must be disregarded. As explained in Part II.A, an offense that is listed in commentary is invalid when it does not interpret any text absent the residual clause and is inconsistent with the remaining text.

Second, an additional or alternative argument is that the state offense of conviction does not satisfy the “generic” definition of “aggravated assault,” using the required “categorical” or “modified categorical” approach. As described in Part II.B, a substantial body of existing caselaw defines this and other generic offenses, and the Commission has now defined


“extortion,” partially defined “forcible sex offense,” and defined the new term “explosive material.” With the Commission’s amendments, recent Supreme Court decisions, and the unsettled state of the law regarding the generic definition of at least one of the enumerated offenses, there is ample room for successful litigation under this approach.

*If the instant offense was committed after August 1, 2016,* there is a good chance that you can show that the aggravated assault conviction does not satisfy the “generic” definition of the offense.

**A. Under the guideline in effect before August 1, 2016, any offense that does not satisfy the force clause at § 4B1.2(a)(1) and was not enumerated in § 4B1.2(a)(2), but was listed in the commentary, is not a “crime of violence” after Johnson.**

Most of the offenses that were listed only in commentary before the amendment (murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, and “unlawful[] possess[ien] of a firearm described in 26 U.S.C. § 5845(a)”) have been held, or can be shown, not to have as an element the use, attempted use, or threatened use of “violent force” against the person of another, and so do not satisfy the force clause at § 4B1.2(a)(1).26 Nor do these offenses satisfy the enumerated offense clause at § 4B1.1(a)(2) as it existed before the amendment, as they are not generic burglary of a dwelling, arson, extortion, or use of explosives.

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And of course, none of them can qualify under the residual clause because that clause was voided by *Johnson*.

Under the Supreme Court’s decision in *Stinson v. United States*, an offense that is merely listed in commentary, but does not interpret or explain any existing text of the guideline is not a “crime of violence.”

The Sentencing Commission is an administrative agency with only delegated powers, and so must be accountable to Congress. Accordingly, 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. 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, and indeed did not expressly authorize the issuance of commentary at all. The Supreme Court nonetheless held in *Stinson* that commentary is valid and authoritative, but only if it interprets a guideline, 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.” Because the “functional purpose of [guideline] 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.” Thus, as with other agencies’ interpretations of their own regulations, “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.” 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.”

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31 *Id.* at 44-45.

32 *Id.* at 45.

33 *Id.* at 38.

34 *Id.* at 43.
In other words, commentary has no freestanding definitional power. The only valid function of commentary is to interpret or explain the text of a guideline. Otherwise, the Commission could issue commentary changing the meaning of a guideline, with the same force as a guideline, but with no accountability to Congress. Thus, 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. Because the residual clause is void after Johnson, 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.”

Most circuits have recognized and applied Stinson in a variety of contexts. The First, Fourth, Seventh, 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

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35 See, 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. Hawkins, 554 F.3d 615, 618 (6th Cir. 2009) (“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.’”); 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).

36 See United States v. Soto-Rivera, 811 F.3d 53, 58-62 (1st Cir. 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. Rollins, No. 13-1731, 2016 WL 4587028, at *5 (7th Cir. Aug. 29, 2016) (en banc) (“[T]he application notes are interpretations of, not additions to, Guidelines themselves; an application note has no independent force. Accordingly, the list of qualifying crimes in application note 1 to § 4B1.2 is enforceable only as an interpretation of the definition of the term “crime of violence” in the guideline itself.”). As a result, conviction for possession of a sawed-off shotgun does not qualify as a crime of violence in the absence of the residual clause after Johnson.; 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
commentary offenses satisfy one of the definitions in the text. In contrast, the Third and Eleventh Circuits have held that offenses listed in the commentary of § 4B1.2 do have freestanding definitional power. The Supreme Court will resolve this circuit split in Beckles v. United States as well, and we are optimistic that it will do so consistent with Stinson.

To sum up, whenever the instant offense was committed before August 1, 2016, and a qualifying instant or prior offense is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, or unlawful possession of a firearm described in 26 U.S.C. § 5845(a), apply the following analysis:

- The guideline in effect before August 1, 2016 must be applied under Peugh.
- [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.

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).”).

37 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).

38 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. Alfrederick 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. 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).
• Because [OFFENSE] 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.

• [OFFENSE] is therefore not “crime of violence” within meaning of § 4B1.2(a).

The same analysis applies if the instant or prior conviction is for any inchoate offense, except that it does not matter which version of the guideline is used. “[A]iding and abetting, conspiring, and attempting to commit a [crime of violence]” remain listed in commentary to § 4B1.2.39 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 definition of the offense.40 Thus, for an aiding and abetting conviction—considered the same as a conviction for the underlying offense41—the conviction may qualify as a “crime of violence” only if it is for generic aiding and abetting and the underlying offense either satisfies the force clause or is a generic enumerated offense.42 For an attempt conviction, which does not qualify as an enumerated offense,43 the conviction must both be generic attempt and satisfy the force clause.44 Because a conviction for conspiracy is neither listed as an enumerated offense and does not qualify under the force clause,45 it can never qualify as a “crime of violence.”

B. The offense of conviction does not satisfy the relevant definition under the “categorical” approach.

Regardless of whether the preceding argument is available because the instant offense was committed before August 1, 2016, it is quite possible that the instant or prior offense of conviction does not satisfy the relevant definition under the “categorical” approach first described in Taylor v. United States, 495 U.S. 575 (1990). Under this approach, the sentencing court compares the elements of the offense of conviction to the elements of the relevant generic or specified definition. Put very simply, if the elements match, then the conviction qualifies as a “crime of violence.” Figuring out whether the elements match, however, is not so simple.

40 See Part II.B.
42 Cf. id. at 190-91.
44 See United States v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir. 2014).
45 See note 25, supra (collecting cases).
For two decades, courts commonly misapplied Taylor’s elements-based approach. In Descamps v. United States then more recently in Mathis v. United States, the Supreme Court stepped in to emphasize the purpose of the categorical approach, and to clarify when a court may resort to the so-called “modified” categorical approach. The details of these decisions—which control the matching inquiry—are beyond the scope of this article. It is enough to say here that the key to the categorical approach “is elements, not facts.” A crime counts as a “crime of violence” if “its elements are the same as, or narrower than” those of the generic offense or the offense as defined by the Commission. If, on the other hand, the “crime of conviction covers any more conduct than the generic offense, then it is not a [crime of violence]—even if the defendant’ actual conduct (i.e., the facts of the crime) fits within the generic offense’s boundaries.”

Our focus is the first step—identifying the elements of the relevant definition to which the crime of conviction will be compared. That definition will either be the definition specified by the Commission in the amended version of § 4B1.2 for extortion, forcible sex offense, or explosive material, or the “generic” definition as determined by the courts for an offense not defined by the Commission. Set out first below are the Commission’s current definitions for four of the enumerated offenses. Next we collect existing and developing caselaw regarding the generic definitions for the remaining enumerated and inchoate offenses. While we provide some initial ideas for using these definitions to your client’s advantage, we expect that more ways to challenge them will be uncovered as the courts begin to scrutinize these definitions more carefully.

1. The Commission’s definitions

“Extortion.” The Commission has now defined the term “extortion” to mean “obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or

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46 133 S. Ct. 2276, 2292 (2013).
47 133 S. Ct. 2292 (2013).
48 See Mathis, 2016 WL 3434400, at *2 (“First, ACCA’s text, which asks only about a defendant’s ‘prior convictions,’ indicates that Congress meant for the sentencing judge to ask only whether ‘the defendant had been convicted of crimes falling within certain categories,’ not what he had done. Second, construing ACCA to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. And third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of ‘non-elemental fact[s]’ that are prone to error because their proof is unnecessary to a conviction.”) (quoting Descamps, 133 S. Ct. at 2289).
49 Descamps, 133 S. Ct. 2276.2292.
50 Mathis, 2016 WL 3434400, at *3.
51 Id. at *3.
(C) threat of physical injury,” thus “limiting the offense to those having an element of fear or threats ‘of physical injury,’ as opposed to non-violent threats such as injury to reputation.” The Commission explained that this change is “consistent with its goal of focusing the career offender and related enhancements on the most dangerous offenders.” Caselaw defining or relying on the broader generic definition of extortion—generally drawn from the Supreme Court’s definition set forth in United States v. Nardello—no longer applies, except if it interprets the same term in the Commission’s definition, such as “force” or “physical injury.”

“Forcible sex offense.” For purposes of determining whether a conviction for sexual abuse of a minor or statutory rape qualifies as a “crime of violence” (when it does not meet the force clause), the commentary now states that, “consistent with the definition in § 2L2.1,” the term “forcible sex offense” includes offenses that have as an element “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,” but that sexual abuse of a minor and statutory rape are included “only if” the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. The effect of this reference to federal aggravated sexual abuse at 18 U.S.C. § 2241(c) is that a prior or instant conviction for sexual abuse of a minor or statutory rape will count as a “crime of violence” only if the elements of the offense are the same as or more narrow than the elements of federal aggravated sexual abuse. Section 2241(c) requires that the defendant “knowingly engage[d] in a sexual act” (defined at 18 U.S.C. § 2246(2)) with

(1) a person under age 12, or

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

(a) “knowingly cause[d]” another person to engage in a sexual act by using force


54 Id.

55 393 U.S. 286, 290 (1969) (defining “extortion” as “obtaining something of value from another with his consent induced by the wrongful use of force, fear or threats”).


57 Id.
against that person, or by threatening or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping, 18 U.S.C. § 2241(a); or

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

Many state statutes sweep more broadly than this federal statute. For example, in Oklahoma, first degree statutory rape based on age alone requires that the person be under 14 years old while the defendant was over 18 years old, whereas under § 2241(c), the person must be under 12 years of age.

In addition, the terms used in § 2241(c) itself may be narrower than identical terms used in state statutes. For instance, the term “sexual act” for purposes of § 2241(c) excludes touching through clothing. And courts have held that the term “force” as used in § 2241(c) “envisions actual force,” which requires “restraint . . . sufficient that the other person could not escape the sexual contact.” At least one court has held that locking or barricading a door does not rise to meet the level of “force” required.

“Use or unlawful possession of explosive materials as defined in 18 U.S.C. § 841(c).” Before the amendment, the Commission used the term “use of explosives” as an enumerated offense (as the ACCA does still). At the same time, the commentary listing “unlawful[] possess[ion] of a firearm described in 26 U.S.C. § 5845(a)” as a “crime of violence” encompassed possession of a “destructive device,” which is defined by statute to include any “explosive.” By moving the firearm commentary offense to the text of the guideline, and adding “use” of that “firearm,” the Commission effectively rendered redundant the term “use of explosives” in the text. Rather than delete “use of explosives” from the list of enumerated offenses, the Commission expanded the term in the text to “explosive material,” which is defined at § 841(c) to include “explosives” as well as “blasting agents” and “detonators,” with each term


60 United States v. Fire Thunder, 908 F.2d 272 (8th Cir. 1990); see also, e.g., United States v. Lauck, 905 F.2d 15 (2d Cir. 1990) (the force requirement of § 2241(a)(1) is met when the “sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact”); United States v. H.B., 695 F.3d 931, 936 (9th Cir. 2012) (same).


62 26 U.S.C. § 5845(a), (f).

To the extent that “use or possession of explosive material” other than “use of explosives” was not previously enumerated in § 4B1.2, the only way it could have counted before the amendment was under the residual clause. If the instant or prior conviction is for such an offense and the instant offense occurred before August 1, 2016, insist on using the pre-amendment version of the guideline as narrowed by Johnson.

If the instant offense occurred after August 1, 2016, a conviction involving explosive materials may not qualify as “use or possession of explosive material” as that term is defined by the Commission. As authorized by § 841(c), the Attorney General publishes each year the list of “explosive materials” that are deemed to be within the coverage of that term.\footnote{See 27 C.F.R. §§ 555.11, .23; ATF, Notice of list of explosive materials, 80 Fed. Reg. 64,446 (Oct. 23, 2015).} The list is lengthy and includes such items as “flash powder” and “detonator cord,” as well as numerous chemicals. It is possible that a state statute criminalizing the use or possession of explosive materials could sweep more broadly than the Attorney General’s list so that it is not a categorical match for the definition used for purposes of § 4B1.2(a)(2). In that case, the issue will be whether, under Descamps and Mathis, the court may use the “modified categorical” approach to determine whether the crime of conviction involved an explosive material as defined by federal law.

Finally, the Commission gave no reason for this amendment, thereby inviting requests for a policy-based downward variance under Kimbrough v. United States on the ground that deeming use or possession of “explosive materials” a “crime of violence” was not based on empirical data or national experience, and results in a sentence greater than necessary to achieve sentencing purposes.\footnote{552 U.S. 85, 101-02, 109-10 (2007) (holding that courts may disagree and vary from a guideline that does “not exemplify the Commission’s exercise of its characteristic institutional role,” (i.e., is not based on empirical evidence and national experience), and that disagreement will be reviewed under a deferential abuse of discretion standard).}

“Use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a).” Not all convictions will be for an offense necessarily involving one of these specified types of firearms. The term “firearm described in 26 U.S.C. § 5845(a)” means a certain narrow list of firearms such as a sawed-off shotgun or short-barreled rifle, a machine-gun, a silencer, or “destructive device” (which is defined to include “explosives”). In contrast, the term “firearm” for purposes of 18 U.S.C. § 922(g) means any firearm. Thus, by its elements, § 922(g) sweeps more broadly than the offense of “possession of a firearm described in 26 U.S.C. § 5845(a).” Because § 922(g) is categorically overbroad,\footnote{See Mathis v. United States, __ S. Ct. __, 2016 WL 3434400 (2016).} courts may not look beyond the elements to determine the type of
firearm. As a result, no conviction under § 922(g) or any statute that defines “firearm” more broadly than 26 U.S.C. § 5845(a) can ever qualify as a “crime of violence.”67 Cases previously holding to the contrary either improperly applied the “modified categorical” approach68 or relied on commentary tied to the residual clause that was invalidated by Johnson and has now been deleted by the amendment.69

The decision to retain unlawful possession of a firearm described in § 5845(a) as an enumerated offense is also one that invites requests for a policy-based downward variance under Kimbrough. Several courts of appeals held before Johnson that possession of a sawed-off shotgun is not a “violent felony” for purposes of the ACCA.70 The Commission explained that the move “maintains the status quo” and that the Commission “continues to believe that possession of these types of weapons [] inherently presents a serious potential risk of physical injury to another person.”71 However, as before, the Commission provides no data or other empirical evidence to support this statement.

2. The “generic” definitions

The remaining terms, “murder,” “voluntary manslaughter,” “kidnapping,” “aggravated assault,” “forcible sex offense” (when not statutory rape or sexual abuse of a minor), “robbery,” “arson,” “attempt,” “conspiracy,” and “aiding and abetting” will continue to be defined by their “generic” definitions. Courts determine the “generic” definition of an offense by looking to “the contemporary usage of the term,”72—i.e., “the way the offense is defined by the criminal codes of most states.”73 To identify the “contemporary usage” of the term, courts survey the relevant definitions codified in state and federal statutes, as well as the definition adopted by the Model

67 Of course, this challenge will not work if the offense of conviction is an offense for which the type of firearm is actually an element. For example, a 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 an offense involving the “use or possession of a firearm described in 26 U.S.C. § 5845(a).”

68 See United States v. Beckles, 565 F.3d 832, 843 (11th Cir. 2009) (finding § 922(g) categorically overbroad, then improperly applying the modified categorical approach to determine the type of firearm), cert. granted on other grounds, ___ S. Ct. ___, 2016 WL 1029080 (June 27, 2016) (No. 15-8544).

69 See, e.g., United States v. Lipscomb, 619 F.3d 474, 479 (5th Cir. 2010) (relying on the residual clause and commentary explicitly addressing the residual clause to look beyond the elements to find that a conviction under § 922(g) involving a sawed-off shotgun was a “crime of violence”).

70 See, e.g., United States v. Amos, 501 F.3d 525 (6th Cir. 2007); United States v. Miller, 721 F.3d 435 (7th Cir. 2013); United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010); United States v. Haste, 292 Fed. App’x 249 (4th Cir. 2008); United States v. Ross, 416 F. App’x 289 (4th Cir. 2011).


73 Id. at 598.
Penal Code and supported by scholarly commentary (most commonly Wayne R. LaFave’s treatise, *Substantive Criminal Law*).

As set forth in the margin, courts have conducted such surveys and identified complete generic definitions for each of these terms except perhaps “arson.” These definitions are not

74 See *United States v. Marrero*, 743 F.3d 389, 400-01 (3d Cir. 2014) (generic murder is “defined as [1] causing the death of another person [2] either [a] intentionally, [b] during the commission of a dangerous felony, or [c] through conduct evincing reckless and depraved indifference to serious dangers posed to human life.”); *United States v. Bonilla*, 524 F.3d 647, 654 (5th Cir. 2008) (generic voluntary manslaughter is “[1] intentional [2] homicide [3] committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing”); *United States v. De Jesus Ventura*, 565 F.3d 870, 875–79 (D.C. Cir. 2009) (generic kidnapping requires [1] an act of restraining, removing, or confining another; [2] an unlawful means of accomplishing that act; and [3] “a criminal purpose beyond the mere intent to restrain the victim,” such as holding the victim for ransom or as a hostage); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1085 (9th Cir. 2015) (“[A] mens rea of extreme indifference recklessness is not sufficient to meet the federal generic definition of aggravated assault.”); *United States v. Palomino Garcia*, 606 F.3d 1317, 1331-32 (11th Cir. 2010) (generic aggravated assault involves a “[1] criminal assault accompanied by the aggravating factors of either [2][a] the intent to cause serious bodily injury to the victim or [2][b] the use of a deadly weapon”) (citing *United States v. McFalls*, 592 F.3d 707, 717 (6th Cir. 2010); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1024-25 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 327-29 (5th Cir. 2006)); *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), abrogated on other grounds by *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (generic robbery is [1] the misappropriation of property and [2] immediate danger to the person of another, met either by [a] bodily injury or [b] by means of force or putting in fear); *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2009) (adapting Fifth Circuit’s definition of generic robbery and holding that it does not encompass threats to property); *United States v. Castillo*, 811 F.3d 342 (10th Cir. 2015) (robbery that may be accomplished through threats to property is not generic robbery); *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1235-36 (10th Cir. 2009) (generic robbery does not require the use of force before or during the actual taking or attempted taking of the property, but can occur after the taking or attempt, as in during flight); *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011) (generic robbery is “the taking of property from another person or from the immediate presence of another person by force or intimidation” (internal quotation marks omitted)); *United States v. Chacon*, 533 F.3d 250, 257-58 (4th Cir. 2008) (generic forcible sex offense “requires the use or threatened use of force or compulsion,” and that compulsion may be accomplished through non-physical “power” or “pressure,” as when a rape is “accomplished by taking advantage” of someone who cannot give legal consent); *Rosemond v. United States*, 134 S. Ct. 1240, 1245, 1248-50 (2014) (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; 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”; 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”); *United States v. Garcia-Santana*, 765 F.3d 528, 535-40 (9th Cir. 2014) (generic conspiracy requires an agreement to commit a crime plus proof of an overt act in furtherance of the agreement); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014) (generic attempt requires “[1] an intent to commit the underlying offense, along with [2] an overt act constituting a substantial step towards the commission of the offense. Mere preparation to commit a crime does not constitute a substantial step. A substantial step occurs when a defendant’s actions unequivocally demonstrate that the crime will take place unless interrupted by...
always uniform, however, as courts have come to differing conclusions regarding the generic
definition for certain particular terms, inviting challenges regarding the correct generic
definition. “Kidnapping” is one such term, having been defined in different “generic” ways. If
the “generic” definition of an offense as identified by your circuit is broader than the “generic”
definition identified by another circuit, and your client would benefit under the narrower
definition, challenge your circuit’s definition as incorrect.

Even the prevailing definition may be subject to challenge. For example, the prevailing
definition of generic “murder” was identified by the Third Circuit in 2014 and encompasses not
only intentional homicides but also homicides committed through “conduct evincing reckless
and depraved indifference to serious dangers posed to human life.” The defendant there argued
(pre-Johnson) that murder with a mens rea of only recklessness should not qualify as a crime of
violence under Begay v. United States, which held that to qualify as a “violent felony” under
the ACCA’s residual clause, an offense must be “purposeful.” The Third Circuit rejected the
argument on the ground that Begay interpreted the residual clause of the ACCA, not the offenses
listed in the commentary to the career offender guideline, which it said were freestanding
“enumerated” offenses. But, as explained above, the Third Circuit’s theory is contrary to the
Supreme Court’s decision in Stinson and will likely soon be overruled. Moreover, the
Commission itself has since provided support for the proposition that only intentional offenses
qualify as enumerated offenses under the new version of § 4B1.2, consistent with Begay.

First, by moving the listed commentary offenses to the text, the Commission has
implicitly acknowledged that the listed commentary offenses were not in fact freestanding but
interpreted the residual clause, which means that they have always required an intentional mens
rea, consistent with Begay. Second, in eliminating involuntary manslaughter altogether, the
Commission stated that doing so is “consistent with the fact that involuntary manslaughter
generally would not have qualified as a crime of violence under the ‘residual clause’ under
Begay.” In other words, the Commission recognizes that if a prior conviction would not have

independent circumstances”); United States v. Garcia-Jimenez, 807 F.3d 1079, 1088-89 (9th Cir. 2015)
(state statute that eliminates the “probable desistance” test is not generic attempt).

Compare, e.g., United States v. Gonzalez-Perez, 472 F.3d 1158, 1161 (9th Cir. 2007) (generic
“kidnapping” encompasses, at a minimum, the concept of a “nefarious purpose[]” motivating restriction
of the victim’s liberty) with United States v. Gonzalez-Ramirez, 477 F.3d 310, 317-18 (5th Cir. 2007);
United States v. Moreno-Florean, 542 F.3d 445, 454-55 (5th Cir. 2008); United States v. Najera-
Mendoza, 683 F.3d 627, 630-31 (5th Cir. 2012) (together indicating that generic kidnapping does not
necessarily require a nefarious purpose), and United States v. Flores-Granados, 783 F.3d 487, 493-94
(4th Cir. 2015) (generic kidnapping does not necessarily require a nefarious purpose).


553 U.S. 137 (2008)

743 F.3d at 398.

Id.
qualified under the residual clause under *Begay*, it should not now qualify as an enumerated offense. As a result, the forms of “unintentional murder” identified by the Third Circuit as included in the definition of generic murder are not “crimes of violence” because they would not have qualified under the residual clause.

Possibly unsettled is the complete definition of generic arson. Several courts have said that generic arson requires at least a *mens rea* of maliciousness or willfulness.80 Most courts have held that generic arson encompasses acts committed against personal property, not just buildings or structures, and regardless of its value or amount of damage.81 And courts have defined the *actus reus* of generic arson as the “burning” of real or personal property.82 A recent 50-state survey conducted by a federal defender office found that most states (approximately 36) require as the *actus reus* either “setting fire to or burning”83 or other “damage” to the property by fire or explosion, so that a statute that has “turned arson into an inchoate offense” by requiring merely that the defendant “start a fire” or aid or counsel another to “start a fire”85 is not generic arson.86

80 Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013); United States v. Velez-Alderete, 569 F.3d 541, 544 (5th Cir. 2009); United States v. Whaley, 552 F.3d 904, 907 (8th Cir. 2009); United States v. Velasquez-Reyes, 427 F.3d 1227, 1230 (9th Cir. 2005).

81 See, e.g., United States v. Misleveck, 735 F.3d 983, 986 (7th Cir. 2013); United States v. Gatson, 776 F.3d 405 (6th Cir. 2015); Velez-Alderete, 569 F.3d at 546; Whaley, 552 F.3d at 906; Velasquez-Reyes, 427 F.3d at 1230; United States v. Hathaway, 949 F.2d 609, 610-11 (2d Cir. 1991); United States v. Knight, 606 F.3d 171, 174 (4th Cir. 2010).

82 See, e.g., Knight, 606 F.3d at 174; Whaley, 552 F.3d at 907; Velasquez-Reyes, 427 F.3d at 1231; United Hathaway, 949 F.2d at 610-11.


85 John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 362 (1986); see, e.g., 18 Pa. Cons. Stat. § 3301 (providing that a person commits arson when he “intentionally starts a fire or causes an explosion” or “aids, counsels, pays or agrees to pay another to cause a fire or explosion”). Many thanks
Finally, the Eighth Circuit has said that the property (whether real or personal) must be “of another,”87 relying in part on LaFave’s Substantive Criminal Law treatise describing common-law arson as “the malicious burning of the dwelling house of another.”88 The Fourth Circuit has cited the Eighth Circuit’s holding with approval.89 If generic arson requires that the property be “of another,” federal arson and many state arson statutes do not qualify as a “crime of violence.”90

Conclusion

The new definition of “crime of violence” will be ameliorating for many offenders. For some, such as those with a prior conviction for burglary or “fleeing and eluding” or escape (or any of the imagined “crimes of violence” under the now-void residual clause), the answer will be easy. But for others, the answer will require full-on litigation of the commentary argument or the definitional argument, or both. Your ability to recognize which path to take and then to navigate its complexities will be the key to your success.

to Samantha Stern, Assistant Federal Public Defender, Western District of Pennsylvania, for laying the groundwork for this analysis.

86 Even a statute that appears to require intent to burn or damage may have been interpreted by state courts to require only intent to start a fire. See, e.g., N.K.D. v. State, 799 So.2d 428, 429 (Fla. Ct. App. 2001) (lack of intent to damage “immaterial” to the issue of guilt under Fla. Stat. § 806.01, which defines arson in relevant part as “willfully and unlawfully, [] by fire or explosion, damag[ing] or caus[ing] to be damaged”).

87 United States v. Whaley, 552 F.3d 904, 906-07 (8th Cir. 2009).

88 Id. at 906 (citing 3 Wayne R. LaFave, Substantive Criminal Law § 21.3, at 239 (2d ed. 2003)).

89 See United States v. Knight, 606 F.3d 171, 173-74 (4th Cir. 2010).

90 See 18 U.S.C. § 844(i) (“Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property.”).