The Enumerated Offenses

Lexington, Kentucky

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Definition of "Violent Felony" under ACCA 18 U.S.C. 924(e)(2)(B)

[T]he term "violent felony" means any crime 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 burglary, arson, or extortion, involves use of explosives

~~or otherwise involves conduct that presents a serious potential risk of physical injury to another~~.

Definition of “Crime of Violence” at 18 U.S.C. 16

The term “crime of violence” means —

(a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

NO ENUMERATED OFFENSES

Definition of "Crime of Violence" in USSG 4B1.2(a) effective Aug. 1, 2016

(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, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. §5845(a) or [use or unlawful possession of] explosive material as defined in 18 U.S.C. §841(c).

Most were previously "commentary offenses"

Previously listed in Application Note 1 to USSG 4B1.2

- Murder
- Manslaughter (voluntary and involuntary)
- Kidnapping
- Aggravated assault
- Forcible sex offenses
- Robbery
- Extortionate extension of credit
- "[U]nlawfully possessing a firearm described in 26 USC 5845 (e.g., a sawed-off shotgun or sawed off rifle, silencer, bomb, or machine gun)"
- Aiding and abetting, conspiring, or attempting to commit a "crime of violence." [The only ones still listed in Application Note 1]

Gone

- Burglary of a Dwelling
  - actually based on empirical evidence that the vast majority of burglaries involve no physical violence and that career offenders have only 5% rate of re-arrest for burglary upon release
  - also considered courts' struggle to identify elements of generic "burglary of a dwelling"
  - added upward departure for "unusual" burglary involving physical violence
- Involuntary Manslaughter
  - Rare to be deemed a COV, and also consistent with *Begay*
- Extortionate Extension of Credit
  - no reason given

Two New Narrowing Definitions in the New Commentary

Extortion:

- “obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.”
- “limit[s] the offense to those having an element of fear or threats ‘of physical injury,’ as opposed to non-violent threats such as injury to reputation.”
- “[c]onsistent with [its] goal of focusing the career offender and related enhancements on the most dangerous offenders.”

Forcible Sex Offense

- "includes where [an element of the offense is 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"

- **But** "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."

Sexual Abuse of a Minor or Statutory Rape

Under 2241(c), only if the elements of the offense require that the defendant "knowingly engage[d] in a sexual act" with

(a) a person under the age of 12, or

(b) a person 12 or over and less than 16 and at least 4 years younger **under the circumstances in 2241(a) or (b)**:

- (a) "knowingly cause[d]" another person to engage in a sexual act by using **<u>force</u>** 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; or
- (b) "knowingly" rendered another person unconscious and thereby engaged in a sexual act with that person, or administered to another person by **<u>force</u>** 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."

Sexual Abuse of a Minor or Statutory Rape

- "Force" means "actual force," i.e., "restraint sufficient that the other person could not escape the sexual contact."
  - *US v. Fire Thunder*, 908 F.2d 272 (8th Cir. 1990)
  - *US v. Lauck*, 905 F.2d 15 (2d Cir. 1990)
  - *US v. H.B.*, 695 F.3d 931 (9th Cir. 2012)

  E.g., locking or barricading a door does not meet this test.
  - *US v. Serdahl*, 316 F. Supp. 2d 859 (D.N.D. 2008)

- 2241(c) requires a "sexual act," defined in 2246(2) not to include touching through the clothing

Other enumerated offenses – elements of the offense of conviction must satisfy generic definition

- Just because offense of conviction is enumerated by name doesn’t mean it’s a “violent felony” or “crime of violence”
- Elements of the offense of conviction must satisfy the “generic” definition
  - Determined by survey of all state and federal statutes, the Model Penal Code, definitions in respected scholarly treatise (usually LaFave’s *Substantive Criminal Law*). *See Taylor*.
  - Elements may not sweep more broadly (e.g., criminalize less culpable conduct) than the generic definition
  - If it sweeps more broadly, than not generic version of the offense. DOES NOT QUALIFY.

Elements of Generic "Burglary"
ACCA Only

[1] unlawful or unprivileged entry into, or remaining in

- » California first degree burglary, *Descamps v. United States*, 133 S. Ct. 2276 (2013).
- » Washington residential burglary, *United States v. Wilkinson*, 589 F. App'x 348 (9th Cir. 2014) (no trespass required).

[2] a building or structure (not "places, such as automobiles and vending machines, other than buildings," including boats, motorhomes, telephone booths)

- » Maryland first degree burglary, *United States v. Henriquez*, 757 F.3d 144 (4th Cir. 2014); Oregon first & second degree burglary, *United States v. Mayer,* 560 F.3d 948 (9th Cir. 2009); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc); *United States v. Cisneros,* 826 F.3d 1190 (9th Cir. 2016); West Virginia burglary, *United States v. White*, 836 F.3d 437 (4th Cir. 2016) (4th Cir. 2016).

[3] with intent to commit a crime

- » Maryland fourth degree burglary, *United States v. Martin*, 753 F.3d 485 (4th Cir. 2014); Minnesota burglary, *United States v. McCarthur,* __F.3d__, 2017 WL 744032 (8th Cir. 2017).

Taylor v. United States, 495 U.S. 575, 599 (1990)

Law In Flux: Florida Burglary

Supreme Court held non-generic b/c “building” includes curtilage. *James v. United States*, 550 U.S. 192, 212 (2007), *overruled by Johnson II on other grounds*.

- 11th Circuit (wrongly) assumed modified categorical approach could always be used for non-generic. *United States v. Weeks*, 711 F.3d 1255, 1262-63 (11th Cir. 2013).
- Then, after *Mathis*, changed course in *United States v. Esprit*, 841 F.3d 1235, 1240 (11th Cir. 2016):
  - Florida burglary defines both a dwelling and a structure as "a building . . . together with the curtilage thereof”
  - Florida caselaw proves that jurors not required to unanimously find whether building or curtilage
  - So indivisible and overbroad.
  - No longer qualifies as generic burglary.
  - Overruling Weeks
  - Court was wrong for **9 years.**

Law in Flux: Tennessee Burglary

Tennessee aggravated burglary TCA § 39–14–403

"burglary of a habitation" where "habitation" = structure for overnight accommodation; an **occupied self-propelled vehicle designed for overnight accommodation**; or a separately secured or occupied portion of or structure appurtenant to such a structure or vehicle. TCA § 39–14–401(1)

- *United States v. Priddy*, 808 F.3d 676, 683 (6th Cir. 2015) (post-*Johnson*)
  - Summarily holding that aggravated burglary is generic burglary for purposes of ACCA
- *United States v. Stitt,* 637 F. App'x 927 (6th Cir. 2016), vacated, rehr'g en banc granted, United States v. Stitt, No. 14-6158, 2016 WL 1658598 (6th Cir. Apr. 27, 2016) (pending)
  - Will answer question whether Tennessee aggravated burglary is generic burglary

Law in Flux: Kentucky Burglary

E.g., Burglary in the third degree. Ky. Rev. Stat. 511.020

- A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a **building**.
- "'Building,' in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft . . . ." Ky. Rev. Stat. 511.010
- *United States v. Brumback*, 614 F. App'x 288, 292 (6th Cir. 2015)
  - Recognized overbroad b/c includes watercraft, but (wrongly) assumed divisible.
- *United States v. Barnett*, 2016 U.S. Dist. LEXIS 96935 (E.D. Ky. July 25, 2016) (pro se *Johnson* 2255) (Hood, D.J.)
  - "Like Iowa's burglary law that the Supreme Court examined in *Mathis*, Kentucky's statute contains 'listed locations'-'not alternative elements, going toward the creation of separate crimes.'"
  - Kentucky third degree burglary no longer qualifies as generic burglary
  - Not a violent felony under the ACCA

Law in Flux: Virginia Statutory Burglary

- *Castendet-Lewis v. Sessions*, 2017 U.S. App. LEXIS 7250 (4th Cir. Apr. 25, 2017) (holding that prior precedent cannot survive *Mathis* and Virginia statutory burglary not generic burglary so not an aggravated felony)

Elements of Generic "Arson"
ACCA & USSG 4B1.2

[1] starting a fire or causing an explosion

[2] with the purpose of

[3][a] destroying a building or occupied structure of another, or

[b] destroying or damaging any property, whether his own or another's, to collect insurance for such loss.

Model Penal Code § 220.1(1), cited and quoted in *Begay*

Elements of Generic "Arson" – No Uniform Definition

- All agree that it requires **malicious** or **willful** mens rea.
  - *See Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013) (Delaware third degree arson not generic arson because lacks malicious or willful *mens rea*).
- And most courts have held that it encompasses burning of personal property, not just buildings or occupied structures.
- Otherwise, "the elements of generic arson are themselves so uncertain as to pose problems for a court having to decide whether they are present in a given state law." *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1633 (2016)

Kentucky Arson Second Degree
Ky. Rev. Stat. 513.030

Starts a fire or causes an explosion **with intent** to destroy or damage a building:

(a) Of another; or

(b) Of his own or of another, to collect or facilitate the collection of insurance proceeds for such loss.

Kentucky Arson Third Degree
Ky. Rev. Stat. 513.040

A person is guilty of arson in the third degree if he **wantonly** causes destruction or damage to a building of his own or of another by **intentionally starting a fire** or causing an explosion.

Generic "Extortion"
ACCA Only

[1] Obtaining something of value from another

[2] with his consent

[3] induced by the wrongful use of force, fear or threats of physical injury

or injury to reputation

United States v. Nardello, 393 U.S. 286, 290 (1969)

Consent is key.

- North Carolina robbery not generic extortion; robbery has an element requiring lack of consent, but extortion requires consent. *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (California robbery not extortion for same reason).
- *See also Ocasio v. United States,* 136 S. Ct. 1423 (2016) (Hobbs Act extortion is not same as Hobbs Act robbery because robbery requires lack of consent, but extortion requires consent).

Elements of Generic "Murder"
USSG 4B1.2 Only

[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. Marrero, 743 F.3d 389 (3d Cir. 2014).

Elements of Generic "Murder"

- Generic definition includes <u>unintentional</u> murder: "through conduct evincing <u>reckless</u> and depraved indifference to serious dangers posed to human life"
- However, Commission's reason for selecting its new list of enumerated offenses in the text provides support that it intends that the enumerated offenses should be **intentional** only, "consistent with" *Begay*. USSG App. C, amend. 798 (Aug. 1, 2016) (Reason for Amendment).

Kentucky Murder
Ky. Rev. Stat. 507.020

- With **intent** to cause the death of another person, he causes the death of such person or of a third person;
- Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he **wantonly engages** in conduct which creates a **grave risk of death** to another person and thereby causes the death of another person.
- "Wantonly" = person "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." Ky. Rev. Stat. 501.020(3)

Elements of Generic “Voluntary Manslaughter” USSG 4B1.2 Only

[1] intentional

[2] homicide

[3] committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.

- *See United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008)
- NOTE: decisions setting forth elements of broader term “manslaughter” will not usually be helpful.

Kentucky Manslaughter
Ky. Rev. Stat 507.030

Manslaughter first degree.

(a) With **intent** to cause **serious physical injury** to another person, he causes the death of such person or of a third person;

(b) With **intent to cause the death** of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020; or

(c) Through circumstances not otherwise constituting the offense of murder, he or she **intentionally abuses** another person or knowingly permits another person of whom he or she has actual custody to be abused and thereby causes death to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

Elements of Generic "Kidnapping" – No Uniform Definition

Encompasses, *at a minimum*, the concept of a "nefarious purpose[]" motivating restriction of the victim's liberty.

See United States v. Gonzalez-Perez, 472 F.3d 1158 (9th Cir. 2007)

- Wayne R. LaFave, 3 *Substantive Criminal Law* § 18.1(e), at 20, n.154 (2d ed. 2003) (noting that only eleven states do not specify that kidnapping requires a nefarious purpose)

- Model Penal Code § 212.1 (providing that a defendant is guilty of kidnapping only if his or her **purpose** is "(a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function").

Elements of Generic "Kidnapping" – D.C. Circuit

[1] an act of restraining, removing, or confining another,

[2] an unlawful means of accomplishing that act, and

[3] **criminal purpose beyond the mere intent to restrain the victim**, such as holding the victim for ransom or as a hostage

United States v. De Jesus Ventura, 565 F.3d 870, 875–79 (D.C. Cir. 2009)

- conducted 50-state survey and considered MPC

Elements of Generic "Kidnapping" – Fourth Circuit Is Broader

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[1] unlawful restraint or confinement of the victim,

[2] by force, threat or deception, or in the case of a minor or incompetent individual without the consent of a parent or guardian,

[3][a] either for a specific nefarious purpose or with a similar element of heightened intent, ***or***

[b] in a manner that constitutes a substantial interference with the victim's liberty.

United States v. Flores-Granados, 783 F.3d 487 (4th Cir. 2015)

- considered the statutes of 50 states and the MPC

Elements of Generic "Kidnapping" – Fifth Circuit Is Broader

[1] knowing removal or confinement,

[2] by force, threat, or fraud,

[3] plus an additional aggravating element, such as

[a] substantial interference with the victim's liberty and circumstances exposing the victim to substantial risk of bodily injury or confinement as a condition of involuntary servitude, ***<u>or</u>***

[b] with any of the following [MPC] purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function.

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).

Elements of Generic "Kidnapping" – Sixth Circuit

United States v. Soto-Sanchez, 623 F.3d 317 (6th Cir. 2010)

- "[R]equires more than unlawful confinement or restraint of the victim," but not necessarily one of the specific nefarious purposes identified by the MPC.
- Instead, "restraint plus the presence of **some aggravating factor**, such as circumstances that create a risk of physical harm to the victim, or movement of the victim from one place to another." (citing both D.C. and 5th Circuits).
- So: broader than D.C. Circuit.
- Identifies 23 states w/ nefarious purpose. No majority for any other.

Kentucky Kidnapping
Ky. Rev. Stat. 509.040

[1] unlawful restraint [2] with intent:

(a) To hold him for ransom or reward; or

(b) To accomplish or to advance the commission of a felony; or

(c) To inflict bodily injury or to terrorize the victim or another; or

(d) To interfere with the performance of a governmental or political function; or

(e) To use him as a shield or hostage; or

(f) To deprive the parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor as the term "person exercising custodial control or supervision" is defined in KRS 600.020.

Elements of Generic "Aggravated Assault" USSG 4B1.2 Only

[1] criminal assault

[2] plus, at a minimum, the **aggravating** factors of either

[a] <u>intent</u> to cause serious bodily injury to the victim, or

[b] the use of a deadly weapon.

E.g., United *States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010)

- surveyed state law, MPC, treatises

- does NOT include assault aggravated solely by identity of victim, i.e., police officer or pregnant woman

-*See also, e.g., United States v. Fierro-Reyna*, 466 F.3d 324 (5th Cir. 2006)

Elements of Generic "Aggravated Assault"

- Mens rea of "extreme indifference recklessness" is not sufficient to meet generic definition. *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1085 (9th Cir. 2015).
  - Surveyed 50 states, federal law and MPC
- *See also United States v. Duran*, 696 F.3d 1089 (10th Cir. 2012) (holding that "aggravated assault" at 4B1.2 only reaches purposeful or intentional conduct, consistent with *Begay*)
- Should be specific intent, not general intent. *See United States v. Hernandez-Rodriguez*, 788 F.3d 193, 198-200 (5th Cir. 2015) (considering the use of deadly weapon aggravating factor)

Elements of Generic "Aggravated Assault"

- Some jurisdictions retain a distinct offense of "assault" that is not merged with battery and requires only fear of injury to be sufficient for the "assault" element. (E.g., New Mexico)
- In those states, there must be actual intent to cause fear of injury to satisfy the assault element.
  - E.g., [1] intentionally causing another person to believe that he is in danger of receiving an immediate battery, [2] with the use of a deadly weapon.
  - *See United States v. Rede-Mendez*, 680 F.3d 552, 556-58 (6th Cir. 2012)
- But is it really generic "assault"? Is that equivalent to "threat to cause bodily injury"?

Kentucky Assault
Ky. Rev. Stat. 508.010

Assault in the first degree.

(a) **Intentionally** caus[ing] serious **physical** injury to another person by means of a deadly weapon or a **dangerous instrument**;

-or-

(b) Under circumstances manifesting **extreme indifference** to the value of human life he wantonly engages in conduct which creates a **grave risk of death** to another and thereby causes serious **physical** injury to another person.

Generic "Aggravated Assault"

[1] assault

[2] plus, at a minimum, the **aggravating** factors of either

[a] <u>intent</u> to cause serious **bodily** injury to the victim, or

[b] the use of a **deadly weapon**.

Kentucky Assault
Ky. Rev. Stat. 508.020

Assault in the second degree.

(a) Intentionally caus[ing] serious **physical** injury to another person; or

(b) Intentionally caus[ing] ~~serious~~ physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(c) Wantonly caus[ing] serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

Sixth Circuit

- *United States v. Collins*, 799 F.3d 554, 597 (6th Cir. 2015)
  - summarily holding that Ky. assault qualifies under the force clause because the "causing physical injury" element "necessarily" requires use, attempted us, or threatened use of physical force.
- Currently a circuit split.
  - *Contra e.g.*, *Whyte v. Lynch*, 807 F.3d 463, 470-71 (1st Cir. 2015) (§16(a)/ACCA); *United States v. Rico-Mejia*, __ F. App'x __, 2017 WL 568331 (5th Cir. 2017) (§ 2L1.2); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012) (§16(a)); *United States v. McNeal*, 818 F.3d 141, n.10 (4th Cir. 2016) (§ 924(c)(3)(A)).
- Has not confronted question whether generic.
- Is it divisible??

Kentucky Assault
Ky. Rev. Stat. 508.025

Assault in the third degree.

Person "**recklessly,** with a deadly weapon or dangerous instrument, **or intentionally** causes or attempts to cause ~~serious~~ **physical injury** to:

A state, county, city, or federal peace officer [etc.]

See United States v. Campbell, No. 5:14-cr-83, 2016 U.S. Dist. LEXIS 185532 (Dec. 20, 2016) (Wier, M.J.) (explaining why indivisible)

Elements of Generic "Robbery"
USSG 4B1.2 Only

Fifth and Ninth Circuits:

[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. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006); *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008)

Elements of Generic "Robbery"

Eleventh Circuit

[1] the taking of property from another person or from the immediate presence of another person

[2] by force or intimidation

See United States v. Lockley, 632 F.3d 1238, 1244 (11th Cir. 2011), citing 67 Am. Jur. 2d Robbery § 12:

"[Robbery] is the taking, with intent to steal, personal property of another, <u>from his or her person or in his or her presence</u>, against his or her will, by violence, intimidation, or by threatening the imminent use of force."

Elements of Generic "Robbery" -- Details

- Does not encompass mere threats to property.
  - *See, e.g.*, *Becerril-Lopez*, 541 F.3d at 891; *United States v. Castillo*, 811 F.3d 342 (10th Cir. 2015)
- Does not encompass "stealthy snatching."
  - In re Sealed Case, 548 F.3d 1085, 1090–91 (D.C. Cir.2008) (robbery by "force or violence" that includes stealthy snatching does not satisfy force clause and is not generic robbery); United States v. Villatoro-Medrano, 464 F. App'x 666, 667 (9th Cir. 2012) (statute that criminalizes stealthy snatching is not generic robbery).
- Does incorporate continuing offense theory.
  - *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1235-36 (10th Cir. 2009)
  - Use of force or threat of force can be during flight

Kentucky Robbery First Degree
Ky. Rev. Stat. 515.020

In the course of committing theft, uses or threatens the immediate use of **physical force** upon another **person** with intent to accomplish the theft and:

(a) **Causes physical injury** to any person who is not a participant in the crime; or

(b) Is **armed with a deadly weapon**; or

(c) Uses or threatens the immediate use of a dangerous instrument **upon any person** who is not a participant in the crime.

Kentucky Robbery Second Degree
Ky. Rev. Stat. 515.030

In the course of committing theft, he uses or threatens the immediate use of **physical force** upon another **person** with intent to accomplish the theft.

- May not satisfy the force clause. *See Commonwealth v. Davis*, 66 S.W. 27 (Ky. 1902)
  - "It is not so much the extent and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery."
- So will turn on whether it is generic robbery. If conviction may be sustained based on stealthy snatching alone, then not generic robbery!
  - In re Sealed Case, 548 F.3d 1085, 1090–91 (D.C. Cir.2008) (robbery by "force or violence" that includes stealthy snatching does not satisfy force clause and is not generic robbery); United States v. Villatoro-Medrano, 464 F. App'x 666, 667 (9th Cir. 2012) (statute that criminalizes stealthy snatching is not generic robbery).

Elements of Generic "Forcible Sex Offense"

- In context of 2L1.2, requires the use or threatened use of force or compulsion. *See United States v. Chacon*, 533 F.3d 250, 257 (4th Cir. 2008)
- Compulsion may be accomplished through non-physical "power" or "pressure"
  - i.e., rape accomplished by taking advantage of someone who cannot give legal consent
- Commission expressly stated that the 2016 amendment is intended to make § 4B1.2 "[c]onsistent with the definition in § 2L1.2"

Be Careful Re: Possession of a Firearm Described in 26 U.S.C. 5845(a)

- Unlawful possession of a firearm under 922(g) is *not* unlawful possession of a firearm described in 26 U.S.C. § 5845(a), no matter what the facts of the offense are.
- Categorical approach applies to both instant and prior offenses
  - Some courts incorrectly relied on commentary about the residual clause to mean that they need not apply the categorical approach when determining whether the instant offense is a COV, but could instead apply a “conduct-specific” inquiry.
  - With the residual clause and its commentary deleted, these decisions are no longer good law.

Inchoate offenses

Aiding and abetting, conspiring, or attempting to commit a "crime of violence"

USSG 4B1.2

Application Note 1

Limited authority of commentary in the balance of powers

- Comm'n is an administrative agency with only delegated powers
- To be "fully accountable to Congress" and maintain separation of powers, Comm'n is required to submit guideline amendments to Congress at least six months before effective date, which Congress can modify or disapprove. *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).
- Guidelines are equivalent to legislative rules by other agencies. *Stinson v. United States*, 508 U.S. 46, 45-45 (1993).
- In contrast, commentary only interprets or explains the guidelines and need not be submitted to Congress. *Id.* at 41-43, 45.
- 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 38.

Commentary must interpret or explain guideline text. If it interprets no text or is inconsistent with text, must be disregarded.

E.g.,

- "[T]he application notes are *interpretations of*, not *additions to*, the 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." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc)
- "[W]here commentary is inconsistent with [Guidelines] text, text controls." *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016)
- Guidelines commentary "does not have freestanding definitional power." *United States v. Leshen*, 453 F. App'x 408, 413-15 (4th Cir. 2011)
- "To read Application Note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of 4B1.2." *United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011)

Circuit split: not all courts get it right

- First, Fourth, Seventh, Eighth, and Tenth Circuits have expressly held that offenses listed in the commentary to 4B1.2 do not have freestanding definitional power.
- Fifth Circuit has required that commentary offenses satisfy one of the definitions in the text.
- Third and Eleventh Circuits have held that offenses listed in the commentary to 4B1.2 do have freestanding definitional power.
- Second Circuit has indicated that an offense listed in commentary must satisfy a definition in the text, but has held that a robbery prior was generic robbery without addressing effect of *Stinson.*

Sixth Circuit – A Little Messy

- Has said it follows *Stinson* and has recognized that commentary must be consistent with guideline text.
  - As a general matter, the text of a guideline trumps commentary about it." *United States v. Webster*, 615 F. App'x 362, 363 (6th Cir. 2015)
- But has acrobatically avoided applying *Stinson* in the past.
  - *United States v. Hawkins*, 554 F.3d 615 (6th Cir. 2009) (affirming the use of a prior conviction for possessing a sawed-off shotgun under career offender guideline, even when it had previously held in *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007), that not a violent felony under any of the three clauses of the ACCA.
  - Relied on commentary listing it as a "crime of violence"
  - Convoluted analysis that makes no sense, though seems to accept that commentary interpreted the residual clause.
  - SO still stands for proposition that commentary must interpret one of the clauses.

Analysis for inchoate commentary offenses

The listed inchoate commentary offense does not have as an element the use, attempted use, or threatened use of violent force against the person of another, so <u>does not interpret or explain 4B1.2(a)(1).</u>

- It is not one of the offenses enumerated in the text of 4B1.2(a)(2), <u>so does not interpret or explain that clause</u>.
- As a result, the commentary is flatly inconsistent with the guideline "in that following [the commentary] will result in violating the dictates of [the guideline]. *Stinson.*
- "SRA itself commands compliance with the guideline," *id.*, so that offense is not a COV within meaning of 4B1.2(a).

Inchoate commentary offenses

- Attempt
  - Included in force clause so can qualify if the underlying crime satisfies force clause and the attempt is generic attempt, *i.e.*, requires a substantial step. *US v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014); *US v. Martinez*, 602 F.3d 1166, 1173 (10th Cir. 2010); *US v. Mansur*, 375 Fed. Appx. 458, 465 (6th Cir. 2010); *US v. Davis*, 689 F.3d 349, 356 (4th Cir. 2012); *US v. Moore*, 108 F.3d 878, 880 (9th Cir. 1997)
  - Must also include the "probable desistance" test, i.e., the "requirement that the defendant's actions unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances." *See Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015) (internal quotation marks omitted).
  - Attempted *enumerated* offense cannot qualify because 4B1.2(a)(2) refers only to completed offenses, *James*, and residual clause is gone.
- Conspiracy
  - Can never qualify because not included in force clause or enumerated offense clause. See cases cited in materials. As back up, argue not "generic" conspiracy.

Inchoate commentary offenses

Aiding and Abetting

- May qualify if it is generic aiding and abetting and underlying offense satisfies the force clause or is a generic enumerated offense
- 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.