ADVISORY GUIDELINES CASES ON DIRECT APPEAL AND AT SENTENCING AFTER *BECKLES*: IDEAS AND APPROACHES

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Part I of this memo explains *Stinson* and related issues, the *Stinson* argument as it was made after *Johnson*, and where that argument works or not after *Beckles*. Part II suggests arguments for advisory guidelines cases on direct appeal in which the defendant was sentenced under the pre-August 1, 2016 residual clause or commentary. Part III sketches out some ideas for variances at sentencing and for arguing that the sentence is unreasonable on appeal. Part IV outlines an argument to eliminate any kind of predicate because the maximum sentence that could have been imposed on the defendant is too short. Part V briefly reviews the requirements of the force clause, gives some examples, and addresses the impact of *Castleman* and *Voisine*. Part VI reviews how to show that the elements of the offense reach more broadly than the generic definition or the Commission's new definition.

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I. The *Stinson* Argument in Different Contexts After *Beckles*

A. The Status of Commentary Under *Stinson* and Other Doctrines

We start with the status of commentary under *Stinson* and other doctrines because it comes into play in some of the arguments in this memo, and in a forthcoming memo on mandatory guidelines cases on collateral review.

The Sentencing Commission, as an administrative agency, may not exercise any power that Congress has not delegated to it. In the Sentencing Reform Act of 1984 (SRA), Congress delegated to the Commission the authority to promulgate "guidelines" in accordance with the Administrative Procedure Act (APA)'s notice-and-comment and hearing requirements, 28 U.S.C. § 994(x), and to "submit to Congress amendments to the guidelines" for its approval, modification or rejection six months before their effective date, 28 U.S.C. § 994(p), which makes the Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989). Commentary is neither subject to the APA's notice-and-comment and hearing requirements, nor reviewed by Congress. Indeed, as the Court recognized in *Stinson*, the SRA did not authorize the Commission to issue commentary at all. *See Stinson v. United States*, 508 U.S. 36, 41 (1993).[1] Nonetheless, the Court validated the Commission's past and future issuance

[1] The Court noted that the SRA "does not in express terms authorize the issuance of commentary," but "the Act does refer to it." *Stinson*, 508 U.S. at 41. The Court cited 18 U.S.C. § 3553(b), which was not a

of commentary by analogizing the guidelines to the legislative rules of other agencies, and the commentary to an agency's interpretation of its own legislative rules. *See Stinson*, 508 U.S. at 45. The Court noted that it had long held that "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight [as to the meaning of the regulation] unless it is plainly erroneous or inconsistent with the regulation.'" *Id*. (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Thus, the Court held that commentary issued by the Commission is valid and authoritative only if it "interprets or explains 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. *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, the only valid function of commentary is to interpret or explain the text of a guideline, and commentary has no freestanding definitional power. If it were otherwise, the Commission could issue commentary changing or adding to a guideline without complying with its delegated notice-and-comment rulemaking authority, 28 U.S.C. § 994(x), and without accountability to Congress, 28 U.S.C. § 994(p). Such action would be beyond its delegated powers and therefore invalid. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) ("Both [the] power of [agencies] to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, [] what they do is ultra vires."); *Mission Group Kansas v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998) (agency rule that is not an interpretation of its own regulation is "adopted outside of the procedures Congress has authorized the [agency] to use" and thus has no binding power).

Note: This doctrine, under which courts are permitted (or under *Stinson*, required) to defer to an agency's interpretation of its own regulation unless that interpretation is inconsistent with the regulation or plainly erroneous, originated in *Seminole Rock*, but is usually called "*Auer* deference" today. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). "*Chevron* deference" is a different doctrine. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), courts must generally defer to an agency's "legislative rule" interpreting a statute if the agency is authorized to administer the statute, the rule is promulgated pursuant to delegated authority for notice-and-comment rulemaking, the statute is ambiguous or leaves a gap for the agency to fill, and the agency's interpretation is reasonable. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006); *Christensen v. Harris*, 529 U.S. 576, 587-88 (2000). *Chevron* deference does not apply to the Commission's commentary because, among other reasons, the commentary is not the product of the Commission's delegated authority for notice-and-comment rulemaking under 28 U.S.C. § 994(x), but an "interpretation of its own . . . rules."

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congressional delegation to the Commission, but an instruction to sentencing courts. Before § 3553(b) was excised by the Court in *Booker*, it stated that in determining whether to depart, courts "shall consider only" the "guidelines, policy statements, and official commentary of the Sentencing Commission." This language was drafted by the Commission and added to § 3553(b) at its request in the Sentencing Act of 1987, Pub. L. No. 100-182 (Dec. 7, 1987). *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Pa. L. Rev. 1631, 1646-57 (2012).

Stinson, 508 U.S. at 44-45. The Court has never held that the Commission is due *Chevron* deference even with respect to a statute Congress authorized it to administer.[2]

Auer deference has come under fire as a violation of the separation of powers in recent years,[3] as has *Chevron* deference.[4] However, we think this particular challenge is best made in a mandatory guidelines case involving a commentary offense. It is too easily brushed off in the advisory guidelines context, as the Court brushed off the void-for-vagueness challenge in *Beckles*.

B. The *Stinson* Argument from *Johnson* to *Beckles*

Defendants argued in cases across the country including *Beckles* that because the residual clause was void for vagueness after *Johnson v. United States*, 135 S. Ct. 2551 (2015), an offense that was listed in the commentary that could satisfy only the residual clause (because it did not satisfy the force clause and was not enumerated in the guideline) was invalid under *Stinson*. With the residual clause struck from the guideline, the offense did not interpret or explain any text, and was inconsistent with the remaining text. The three circuits that ruled on the issue (as well as many district courts) agreed.[5]

The government argued two alternatives in its responsive brief in *Beckles*, the second of which it had never raised in any case in the lower courts. First, it argued that the commentary offenses "did not construe" the residual clause or "any other" part of the definition in the text. Brief for the United States at 50-53, *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781 (Mar. 6, 2017) (No. 15-8544). (If so, the Commission exceeded its delegated authority, and the commentary was invalid.) Second, in direct contrast, it argued that the residual clause is not unconstitutionally vague "as applied" to commentary offenses because the Commission *had* determined that those offenses satisfied the residual clause. According to the government, Beckles had flipped the "normal order of operations" by arguing first that the residual clause is stricken, then that the commentary interprets no text and is inconsistent with the remaining text.

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[2] In *United States v. LaBonte*, 520 U.S. 751 (1997), the Court rejected the Commission's interpretation of a specific directive from Congress to the Commission, 28 U.S.C. § 994(h), finding that the Commission's interpretation was "at odds" with the statute's plain language, and declining to decide "whether the Commission is owed deference under *Chevron*." *Id*. at 757, 762 n.6.

[3] *See United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id*. at 1211-13 (Scalia, J., concurring in the judgment); *id*. at 1213-24 (Thomas, J., concurring in the judgment); *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340-41 (2013) (Scalia, J., dissenting); *id*. at 1338-39 (Roberts & Alito, JJ., concurring); *Talk America v. Michigan Bell Tel.*, 554 U.S. 50, 67-69 (2011) (Scalia, J., concurring).

[4] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

[5] *See United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016).

The government claimed that the Commission could interpret a vague provision, rendering it not vague in the first place. *Id*. at 53-57. There are multiple problems with this argument.

Justice Ginsburg would have resolved the case based on the government's "as applied" argument, and Justice Sotomayor seemingly agreed. *See Beckles*, 2017 WL 855781, at *12 & n.* (2017) (Ginsburg, J., concurring in the judgment); *id*. at *13 (Sotomayor, J., concurring in the judgment). The Court did not reach the issue, and there are good reasons to think that most of the other justices would not agree.

C. Three Contexts in Which the *Stinson* Argument Could Arise

1) Advisory guidelines cases on direct appeal

Where the defendant's sentence was enhanced based on a commentary offense when the guidelines were advisory and before the Commission amended the definition on August 1, 2016, the *Stinson* argument, as it was made after *Johnson*, does not survive *Beckles*. This is not because of any argument the government made in *Beckles* or because *Beckles* did anything to undermine *Stinson*, but because our argument depended on the residual clause being void and *Beckles* held that the void-for-vagueness doctrine does not apply to advisory guidelines. However, there are a number of reasons that courts should not, or cannot, rely on the pre-August 1, 2016 commentary after *Beckles*, some of which involve *Stinson*. *See* Part II.

2) Mandatory guidelines cases on collateral review

Beckles held "only" that the "advisory Sentencing Guidelines . . . are not subject to a challenge under the void-for-vagueness doctrine." *Beckles*, 2017 WL 855781, at *9. Thus, in § 2255 cases involving mandatory guidelines, the residual clause *is* "void," and the *Stinson* argument as it has been made thus far is viable. We're working on a sample brief for mandatory guidelines cases raising that argument and other arguments, in addition to refuting the government's response in *Beckles*.

3) Inchoate offenses under the new definition--at sentencing or on appeal

The principle under *Stinson* that commentary must interpret the text of a guideline and be consistent with the text remains the law; it is untouched by *Beckles* or any argument the government made in *Beckles*. The circuits have long applied this principle in a variety of

contexts,[6] including to offenses listed in the commentary of § 4B1.2.[7] Three circuits applied it after *Johnson* to hold that a commentary offense had no independent force once the residual clause was excised as void-for-vagueness.[8] Although *Beckles* later held that the residual clause is not void-for-vagueness in advisory guidelines cases, the core principle that "application notes are *interpretations of*, not *additions to*, the Guidelines themselves,"[9] remains good law. Only the Third and Eleventh Circuits appear to take the view that commentary need not interpret or explain any text.[10]

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[6] *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).

[7] *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. 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, but noting that the commentary answers the question where neither party challenges the Commission's classification); *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).").

[8] *See United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016).

[9] *Rollins*, 836 F.3d at 742 (emphasis in original).

[10] *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

The Commission deleted the residual clause effective August 1, 2016. As before the amendment, the text of the guideline includes only completed enumerated offenses, and (other than attempted use of force under USSG § 4B1.2(a)(1)) aiding and abetting, conspiring, and attempting to commit a crime of violence are listed only in commentary. *See* USSG § 4B1.2 cmt. (n.1). Thus, under *Stinson*, an inchoate offense is a "crime of violence" only if it satisfies the force clause or the enumerated offense clause.

An aiding and abetting conviction is considered the same as a conviction for the underlying offense. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189-90 (2007). Thus, an aiding and abetting conviction can 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. 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; 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"; 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." *Rosemond v. United States*, 134 S. Ct. 1240, 1245, 1248-50 (2014).

An attempt conviction is not an enumerated offense. *See James v. United States*, 550 U.S. 192, 198 (2007), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). Thus, an attempt can never qualify as a "crime of violence" under the enumerated offenses clause (§ 4B1.2(a)(2)). Under the force clause (§ 4B1.2(a)(1)), two requirements must be met for an attempt to qualify as a "crime of violence." First, the object of the attempt must satisfy the force clause. *See James*, 550 U.S. at 197 (Florida attempted burglary "does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'"). Second, the attempt statute must satisfy the generic definition of attempt (*i.e.*, it must require intent to commit the underlying offense, and a "substantial step" incorporating the "probable desistance" test). *See, e.g.*, *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1243 (9th Cir. 2014) ("We have defined 'attempt' as requiring '[1] an intent to commit' the underlying offense, along with '[2] an overt act constituting a substantial step towards the commission of the offense[,]" which requires actions that "unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances") (internal quotation

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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 "*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).

marks and alteration omitted); *id*. at 1240 ("Because we conclude that Delaware's definition of 'attempt' criminalizes more conduct than the federal generic definition, we conclude that the district court erred in imposing the enhancement."); *James*, 550 U.S. at 197 (Florida attempted burglary "does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'"); *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1088-89 (9th Cir. 2015) ("Because New Jersey has explicitly eliminated the probable desistance test, New Jersey's definition of attempt is broader than the federal definition.").

A conviction for conspiracy can never qualify as a "crime of violence" because it is not an enumerated offense, and does not qualify under the force clause. *See United States v. Gore*, 636 F.3d 728 (5th Cir. 2011); *United States v. White*, 571 F.3d 365 (4th Cir. 2009); *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007); *United States v. Gonzalez-Ruiz*, 794 F.3d 832 (7th Cir. 2015); *United States v. Melvin*, No. 13-4857 (4th Cir. Oct. 20, 2015); *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014); *United States v. Merritte*, 2016 WL 2901661 (D. Nev. 2016); *United States v. Edmundson*, 153 F. Supp. 3d 857 (D. Md. 2015); *United States v. Luong*, 2016 WL 1588495 (E. D. Cal. 2016); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046 (N.D. Cal. 2016); *Durhart v. United States*, 2016 WL 4720424 (S. D. Fla. 2016); *Alvarado v. United States*, 2016 WL 6302517 (C.D. Cal. Oct. 14, 2016); *United States v. Shumilo*, 2016 WL 6302524 (C.D. Cal. 2016).

II. Arguments for Cases on Direct Review Where the Sentence Was Enhanced Under the Pre-August 1, 2016 Residual Clause or Commentary

A. The Offense Does Not Satisfy the Residual Clause.

Especially for offenses not listed in the former commentary, the easiest argument may be that the offense doesn't satisfy the residual clause under *Begay*, *Chambers*, or circuit caselaw. You may not have made this argument at sentencing because you were counting on *Johnson*.

Even for offenses that *were* listed in the pre-amendment commentary, you may be able to argue that they do not satisfy the residual clause. For example, a number of courts have held that possession of a firearm described in 26 U.S.C. § 5845(a) does not satisfy the residual clause in the ACCA. *See United States v. Amos*, 501 F.3d 525, 528-30 (6th Cir. 2007); *United States v. Miller*, 721 F.3d 435, 437-443 (7th Cir. 2013); *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010); *United States v. Haste*, 292 F. App'x 249 (4th Cir. 2008); *United States v. Ross*, 416 F. App'x 289 (4th Cir. 2011); *see also Johnson v. United* States, 135 S. Ct. 2551, 2564 (2015) (Thomas, J., concurring in the judgment); *id*. at 2563 (Kennedy, J., concurring in the judgment). Courts held that involuntary manslaughter does not satisfy the residual clause so is not a "crime of violence" under the career offender guideline, *see United States v. Peterson*, 629 F.3d 432, 439-40 (4th Cir. 2011); *United States v. Herrick*, 545 F.3d 53, 60 (1st Cir. 2008), and is not a "violent felony" under the ACCA, *see United States v. Culbertson*, 389 F. App'x 515, 520 (6th Cir. 2010). Courts held that aggravated assault encompassing reckless conduct does not satisfy the residual clause so is not a "crime of violence" under the career offender guideline, *see United States v. Ossana*, 638 F.3d 895, 903 (8th Cir. 2011), and is not a "violent felony" under the ACCA, *see United States v. McMurray*, 653 F.3d 367, 377 (6th Cir. 2011). Courts have held that some forms of sexual abuse of a minor, sexual abuse of a mentally disabled person, and

statutory rape do not satisfy the residual clause so are not "crimes of violence" under the career offender guideline, *see United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015); *United States v. Houston*, 364 F.3d 243, 248 (5th Cir. 2004); *United States v. Van Mead*, 773 F.3d 429, 436-37 (2d Cir. 2014), and are not "violent felonies" under the ACCA, *see United States v. Christensen*, 559 F.3d 1092, 1093-95 (9th Cir. 2009); *United States v. Thornton*, 554 F.3d 443, 449 (4th Cir. 2009); *United States v. Harris*, 608 F.3d 1222, 1232-33 (11th Cir. 2010).

If the qualifying offense was burglary of a structure other than a dwelling, you can buttress your argument that it does not satisfy the residual clause with the Commission's recent determination that no burglaries count as "crimes of violence" based on a mass of empirical evidence developed by outside researchers showing that "burglary offenses rarely result in physical violence," USSG App. C, amend 798, at 129 (2016 Supp.) (Reason for Amendment), and the Commission's previous conclusion that burglary of a structure other than a dwelling did not satisfy the force clause or the residual clause, *see* USSG § 4B1.2, cmt. 1 (1987).

B. The District Court Committed Procedural Error and Abused Its Discretion By Relying on the Residual Clause To Calculate the Guideline Range.

In its surprise decision to hold that the residual clause under the advisory guidelines is not void for vagueness, overruling all courts of appeals but one, the Supreme Court gave no guidance on some serious problems that the lower courts must now confront. The residual clause, though not "void for vagueness," is still impossible to interpret correctly, and the lower courts cannot rely on overruled caselaw to apply it.

The ACCA's residual clause suffers from "hopeless indeterminacy," *Johnson*, 135 S. Ct. at 2558, calls for "guesswork and intuition," *id*. at 2559, is "a 'judicial morass that defies systemic solution,' 'a black hole of confusion and uncertainty' that frustrates any effort to impart 'some sense of order and direction,'" *id*. at 2562 (citations omitted), and yields "anything but evenhanded, predictable, or consistent" results, *id*. at 2563. The identical residual clause in § 4B1.2(a)(2) necessarily suffers the same indecipherability.

The Court did not say otherwise in *Beckles*. It held "only that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause," *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781, at *9 (2017), and only because "the advisory Guidelines do not fix the permissible range of sentences," *id*. at *6. "That something is vague as a general matter," Justice Kennedy explained, "does not necessarily mean that it is vague within the well-established legal meaning of that term." *Id*. at *11 (Kennedy, J., concurring). In other words, the advisory guidelines' residual clause is indeed hopelessly vague; it's just not "void for vagueness" under the Due Process Clause. According to the majority, the advisory guidelines' residual clause does not violate fair notice because courts can impose any sentence regardless of the guideline range, and it does not lead to arbitrary enforcement because courts do not "enforce" the guideline range but rely on it "merely for advice." *Id*. at *8.

The Court did not deny the inaccuracy of that "advice," nor did it dispute Justice Sotomayor's reminder that the guideline range must be calculated "correctly" and that it is

impossible to correctly interpret the "inscrutably vague" residual clause. *See id*. at **15-16 (Sotomayor, J., concurring in the judgment).

Nor did *Beckles* change the fact that prior caselaw interpreting the residual clause has been overruled. The Court explained in *Johnson* that its efforts and those of the lower courts "to derive meaning from the residual clause" was a "failed enterprise," and "could only be guesswork." *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015); *id*. at 2558-60 (discussing its prior decisions interpreting the ACCA's residual clause and lower court decisions interpreting the clause in the ACCA and the career offender guideline[11]). The Court described its own four decisions interpreting the clause as "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause that confirm its hopeless indeterminacy," *id*. at 2558, and decisions of the courts of appeals as further proof that the residual clause was "nearly impossible to apply consistently," *id*. 2560 (citation omitted). The Court concluded that there was "no reliable way" to "estimate the risk posed by a crime," *id*. at 2557–58, or to determine "how much risk it takes for a crime to qualify as a violent felony," *id*. at 2558.

For these reasons, the Court expressly overruled *Syke*s and *James*, and implicitly overruled *Begay*, *Chambers*, and lower court decisions relying on those decisions. *Johnson*, 135 S. Ct. at 2557-60. Before *Johnson*, the courts of appeals relied on the Supreme Court's decisions interpreting the ACCA's residual clause to interpret the identical residual clause in § 4B1.2. "In overturning these cases, *Johnson* necessarily overruled the [circuit] cases that relied on them." *United States v. Lee*, 821 F.3d 1124, 1132 (9th Cir. 2016) (Ikuta, J., dissenting).

Yet, district courts must "begin all sentencing proceedings by correctly calculating the Guidelines range," *Gall v. United States*, 552 U.S. 38, 49 (2007), and "improperly calculating" the Guidelines range is "significant procedural error," *id*. at 51. The residual clause is impossible to interpret correctly; it has no correct interpretation. *See Johnson*, 135 S. Ct. at 2558-60, 2562-63. Thus, it is procedural error and an abuse of discretion to calculate the guideline range based on an attempt to interpret the residual clause.

Circuit judges recognized the problem before *Beckles* was decided. In *United States v. Lee*, 821 F.3d 1124 (9th Cir. 2016), the defendant was sentenced as a career offender under the advisory guidelines. He had a prior controlled substance offense, and two other prior convictions, each of which the district court held satisfied the residual clause.[12] The majority declined to decide whether *Johnson* invalidated the residual clause, instead ruling that neither offense would satisfy the residual clause under "our pre-*Johnson* caselaw." *Id*. at 1127; *see also id*. at 1128-30 (analyzing offenses under *Begay* and pre-*Johnson* circuit caselaw).

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[11] The Court analyzed four guidelines cases in reaching the conclusion that the residual clause is impossible to apply consistently. *See Johnson*, 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), and *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

[12] The offenses were (1) battery against a custodial officer, and (2) attempting, by means of any threat or violence, to deter an officer from performing a duty, or knowingly resisting, by the use of force or violence, an officer in the performance of a duty.

Judge Ikuta, in an opinion styled as a dissent but more a concurrence in the judgment,[13] would have ruled that the advisory guidelines' residual clause was not void for vagueness because the advisory guidelines "do not fix the penalty," so notice and arbitrary enforcement concerns would not rise to the level of a due process violation. *Id*. at 1133-35 (Ikuta, J., dissenting). However, she "would hold that given the residual clause's inscrutability in the ACCA context, application of the residual clause would violate the Supreme Court's instruction that the district court 'begin all sentencing proceedings by correctly calculating the applicable Guidelines range.'" *Id*. at 1136 (quoting *Gall*, 552 U.S. at 49 (citing *Rita*, 551 U.S. at 347–48)). "If *Johnson* so undermines the residual clause that it cannot be accurately interpreted, a district court would commit a procedural error and abuse its discretion if it used the Guidelines residual clause to calculate the Guidelines range." *Id*.

A panel of the Eleventh Circuit reached the same conclusion:

> How can a sentencing court correctly calculate the Guidelines range when it is forced to apply the "hopeless[ly] indetermina[te]" language of the career-offender guideline? *Johnson*, 135 S. Ct. at 2448. Courts had "trouble making sense" of the very same words when they tried to apply them under the ACCA's residual clause. *Id.* at 2559-60. The Supreme Court observed that "[n]ine years' experience trying to derive meaning from the residual clause convince[d it] that [it] ha[d] embarked upon a failed enterprise." *Id.* at 2560. This "'black hole of confusion and uncertainty' that frustrates any effort to impart 'some sense of order and direction,'" *id.* at 2562 (quoting *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)), does not somehow magically become clearer or more meaningful because the words appear in the guideline, rather than in the ACCA. Because of this muddle, a sentencing court cannot ascertain whether the challenged part of the career-offender guideline even applies when the guideline is raised, so the court necessarily cannot correctly calculate the Sentencing Guidelines range. As a result, the sentencing court cannot comply with the sentencing process's virtual statutory requirement that the sentencing court first correctly calculate the applicable Guidelines range.
>
> And, as Judge Wilson notes, the confusion only grows on appeal. Determining whether a sentence imposed by a district court was procedurally reasonable requires appellate courts to first ascertain whether the district court correctly calculated the applicable Guideline range. But we are no more skilled in applying "hopeless[ly] indetermina[te]" language than district courts.

In re Hunt, 835 F.3d 1277, 1283 (11th Cir. 2016) (Rosenbaum, J., concurring, joined by Wilson and Jill Pryor, JJ.) (This three-judge opinion was a concurrence because the relief requested – leave to file a second petition under 28 U.S.C. § 2255 on the ground that the guideline's residual clause was "void for vagueness" – was foreclosed by circuit precedent).

[13] Like the majority, she "also concluded that the appropriate disposition is to remand for resentencing." *Lee*, 821 F.3d at 1130 n.5.

Moreover, the courts cannot look to prior caselaw to apply the residual clause. As several appellate judges recognized, courts cannot rely on cases expressly or implicitly overruled by the Supreme Court in *Johnson*. *See Lee*, 821 F.3d at 1131-32 (Ikuta, J., dissenting) (explaining that the Supreme Court had overruled its own decisions and "necessarily" overruled circuit decisions that had relied on them); *id*. at 1136 ("The one thing we cannot do . . . is rely on precedent that has been overruled and effectively rendered non-existent by the Supreme Court."); *United States v. Matchett*, 837 F.3d 1118, 1142 (11th Cir. 2016) (Wilson, J., joined by Jill Pryor, J., dissenting from denial of rehearing en banc) (criticizing *Matchett*'s instruction to adhere to overruled decisions); *In re Clayton*, 829 F.3d 1254, 1262–63 (11th Cir. 2016) (Martin, J., joined by Jill Pryor, J., concurring in the result) (same).

In sum, applying the residual clause "could only be guesswork." *Johnson*, 135 S. Ct. at 2560. A "district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49 (citation omitted), but this cannot be accomplished by relying on the "black hole of confusion" that is the residual clause. *Johnson*, 135 S. Ct. at 2562. The district court thus committed procedural error and abused its discretion.

[Note: If the offense is not enumerated in § 4B1.2(a)(2) as amended August 1, 2016, you can add the paragraph below. If the offense was listed in the commentary before August 1, 2016, *but is not listed there now* (i.e., involuntary manslaughter, extortionate extension of credit, some forms of extortion and forcible sex offenses), this would strengthen your argument. But if the offense *is* enumerated in amended § 4B1.2(a)(2), the government (or the court) might argue that the Commission has now made "clear" that the generic offense satisfies the residual clause, so it would not be procedural error to use it to enhance the guideline range. There are answers to this, but it's best to avoid it.

> The Sentencing Commission, noting that "the definition of 'crime of violence' is complex and unclear," has itself "determined that the residual clause at § 4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*," and thus has "amend[ed] § 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." USSG App. C, amend 798, at 127 (2016 Supp.) (Reason for Amendment).]

[Note: When making this argument, be careful not to appear to be re-arguing *Beckles*. The argument here is not that the residual clause is unconstitutional under the void-for-vagueness doctrine, but that using it constitutes procedural error because *Gall* requires that courts calculate the guideline range correctly and it is impossible to interpret the residual clause correctly.]

C. What if the Generic Offense Was Listed in the Former Commentary?

As noted in Part I, because the residual clause in the pre-August 1, 2016 guideline is not "void" in advisory guidelines cases after *Beckles*, you can no longer argue that an offense that was listed in the commentary but satisfied only the void residual clause did not interpret or explain any text and was inconsistent with the remaining text.

1) The offense does not satisfy the generic definition.

The first choice is to argue that in addition to not satisfying the force clause, *see* Part V, the elements of the offense of conviction reach more broadly than the generic definition of the commentary offense, *see* Part VI. If so, you need go no further.

If the offense matches the generic definition, or if it is not clear enough that it doesn't, you can make any of the following arguments showing why the court should not or may not rely on the commentary.

2) The Commission was no more able to interpret the residual clause than the Supreme Court and the lower courts.

The Commission was no more capable of deciphering the inscrutable residual clause than the Supreme Court and the lower courts. Thus, reliance on the commentary to calculate the guideline range is just as procedurally unreasonable as reliance on the residual clause itself.

When it comes to interpreting an agency's regulation, the "relevant inquiry . . . is not what the best policy choice might be, but what the regulation means," and courts "are at least as well suited as administrative agencies to engage in this task." *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1222-23 (2015) (Thomas, J., concurring in the judgment); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province of the judicial department to say what the law is."). And where, as here, the language of the agency's rule is "entirely unrestricted," the agency's interpretation of its rule "is no interpretation at all." *Mission Group Kansas v. Riley*, 146 F.3d 775, 782-83 (10th Cir. 1998).

Even assuming the dubious proposition that an agency is better able than courts to interpret the text of a regulation because of its special expertise, the Commission did not use any special expertise here. It did not rely on empirical data to list any offense in the commentary; indeed, it gave no explanation at all for listing any offense in the commentary, either when it first listed offenses in the commentary in 1987 or when it repeated them in the commentary in 1989.[14] The Commission did not even indicate whether it thought that any of these offenses satisfied the force clause, the residual clause, or neither. *See* II(C.3) and II.(C.4), *infra*.

Even if the Commission intended the commentary to interpret the residual clause, it did so based on "intuition" and "guesswork," *Johnson*, 135 S. Ct. at 2559, no less than the courts did. Thus, reliance on the commentary to calculate the guideline range is just as procedurally unreasonable as reliance on the residual clause itself.

[Long Note: If the government contends or the court believes that the Commission did or "must have" relied on data, you should know that the Commission did not and could not use data

[14] *See* U.S. Sent'g Comm'n, *Notice of revisions to commentary to the sentencing guidelines and policy statements for the United States Courts*, 52 Fed. Reg. 44,674, 44,674, 44,728-29 (Nov. 20, 1987) (providing no explanation); USSG App. C, amend. 268 (1989) (stating only that "[t]he purpose of this amendment is to clarify the definition[] of crime of violence," and the "definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)").

to determine that any commentary offense satisfied the residual clause. It does not collect the relevant data, and cannot obtain it. You may need this information for reply or argument.

To conclude that a given offense "involves conduct that presents a serious potential risk of physical injury to another," the Commission would have had to determine, at minimum, the degree of risk posed in the "ordinary" case of the crime, and whether that risk amounts to a "serious potential risk." The various standards and tests are complicated, *see Johnson*, 135 S. Ct. 2557-60, but that's the minimum.

The Commission does not collect data that could answer the basic questions. The Commission's datasets include data only on circumstances that are part of the guideline calculation. Thus, it has data on what defendants' instant federal offenses were and any details of those that are part of the guideline calculation (which may or may not bear on violence or injury to another). It has no data on what defendants' prior convictions were,[15] much less on their "behavior" during those offenses or how it "subsequently play[ed] out." *Johnson*, 135 S. Ct. at 2557-58. The Commission does not have this data because the details of prior offenses are not part of the guideline calculation.

To get to square one, the Commission would have to determine the frequency with which a given offense involved violence or resulted in injury. But the Commission would face the same practical difficulties courts would face if they had to ascertain defendants' conduct on a particular occasion, and on a very large scale. It would have to obtain state court records for a large number of cases, but the records would be wholly insufficient and unreliable. *See Johnson*, 135 S. Ct. at 2562 (pointing out the "utter impracticality of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction," and that "if the original conviction rested on a guilty plea," as it usually does, "no record of the underlying facts may be available"); *Chambers v. United States*, 555 U.S. 122, 125 (2009) (referring to the "practical difficulty of trying to ascertain . . . perhaps from a paper record mentioning only a guilty plea," whether a crime "committed on a particular occasion, did or did not involve violent behavior").

Now, you might point out that the Commission conducted a study on escape crimes that was used by the Supreme Court in *Chambers* to buttress its conclusion that walkaway escape did not satisfy the residual clause. But that study only proves the point. That study was conducted only on *federal* escape crimes[16] (even though, like most prior convictions, the escape crime in *Chambers* was a state crime) *because the Commission does not have data on state crimes*. Moreover, the Commission conducted that study only under pressure due to the looming oral argument in *Chambers*.[17] *The Commission does not conduct such studies in the usual course*.

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[15] *See* Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 4 (Jan. 8, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf.

[16] U.S. Sent'g Comm'n, Report on Federal Escape Offenses in Fiscal Years 2006 and 2007 (Nov. 2008).

[17] In *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007), Judge Posner said that it was "an embarrassment to the law when judges base decisions of consequence on conjecture," and called upon the

As the Court said in *Johnson*, "even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves." *Johnson*, 135 S. Ct. at 2559. A study of the *federal* form of a crime, the only kind of study the Commission can reasonably conduct, would be skewed toward rarer and more serious forms of the crime. It is one thing to exclude a given type of offense on the basis of unrepresentative data, as the Court did in *Chambers*, and quite another to use unrepresentative data to conclude that the "ordinary" case of the crime "involves conduct that presents a serious potential risk of physical injury to another."

In *James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson*, *supra*, the Court mistakenly assumed that, before including attempts in the commentary of the career offender guideline, the Commission had reviewed empirical data on the risk of injury involved in completed burglaries and attempted burglaries. After reviewing "speculative" scenarios, *Johnson*, 135 S. Ct. at 2558, in which attempted burglaries pose the same or greater risk of physical injury as completed burglaries, *James*, 550 U.S. at 203-06, the Court said that the Commission had "come to a similar conclusion," as evidenced by its inclusion of attempt in the commentary, and that "[t]his judgment was based on the Commission's review of empirical data and presumably reflects an assessment that attempt crimes often pose a similar risk of injury as completed offenses." *Id*. at 206. But the Commission had reviewed no such data or made any such assessment. Just last year, it relied on "several recent studies" by outside researchers finding that burglaries rarely result in physical violence and that attempted burglaries were significantly less likely to be violent than completed burglaries. *See* USSG App. C, amend 798, at 129 (2016 Supp.) (Reason for Amendment); Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007* at xi, 29, 34, 36-38 (2015).[18]]

3) The commentary offenses did not interpret the residual clause in § 4B1.2(a)(2).

The listing of [OFFENSE] in the commentary is no indication that it satisfied the residual clause. Indeed, with one exception, the Commission never determined that any commentary offense satisfied either the force clause or the residual clause. Moreover, the list of commentary offenses, which remained the same after the Commission switched to the ACCA definition, interpreted the broader definition of "crime of violence" under 18 U.S.C. § 16.

As the government rightly argued in *Beckles*, "[t]he best interpretation of the former commentary is . . . that the Commission intended [the offenses listed there] to qualify as crimes of violence . . . without determining whether each offense satisfied a discrete portion of Section

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"Commission, or if it is unwilling a criminal justice institute or scholar," to conduct a study "comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return." *Id*. at 726-27. Twenty-two months later, the Commission submitted its report directly to the Supreme Court the week before oral argument on November 10, 2008. *See* Transcript of Oral Argument at 4, 15, *Chambers v. United States*, 129 S. Ct. 687 (2009) (No. 06-11206).

[18] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf

4B1.2(a)'s definition." Brief for the United States at 50-51, *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781 (Mar. 6, 2017) (No. 15-8544).

The text of the original guideline stated only that "[t]he term 'crime of violence' as used in this provision is defined under 18 U.S.C. § 16." USSG § 4B1.2(1) (1987). The commentary restated § 16(a)'s force clause and § 16(b)'s residual clause, then stated: "The Commission interprets *this* as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision." *Id*., cmt. 1 (emphasis added). The commentary further stated that a conviction for "burglary of a dwelling would be covered." *Id*. The Commission did not specify whether any of these offenses satisfied § 16's force clause or its residual clause.

[NOTE: In case it helps, the initial commentary also said that a conviction for "escape accomplished by force or threat of injury would be covered" while a conviction for "escape by stealth would not," and that a conviction for "burglary of a dwelling would be covered" while conviction for "burglary of other structures would not." *Id*. In other words, escape by stealth and burglary of a non-dwelling satisfied neither the force clause nor the residual clause.]

In 1989, when the Commission switched from the definition of "crime of violence" under 18 U.S.C. § 16 to the definition of "violent felony" under the ACCA, it defined "crime of violence" in the text by repeating the force clause of the ACCA, enumerating "burglary of a dwelling, arson, or extortion, [or] involves use of explosives," and repeating the ACCA's residual clause. USSG § 4B1.2(1) (1989). But it retained the same list in the commentary as when "crime of violence" was defined under 18 U.S.C. § 16, adding only the enumerated offense of extortion. *Id*., cmt. 2 (stating that "crime of violence" includes "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling"). It also added inchoate "crimes of violence" at that time. *Id*., cmt. 1. Again, the Commission did not specify whether any of these offenses satisfied the force clause or the residual clause.

Moreover, the commentary offenses listed in 1987 and retained verbatim in 1989 were interpreting §16's different and broader definition than the ACCA definition in the guideline under which CLIENT was sentenced. Section 16(a)'s force clause includes an offense that has as an element the use, attempted use, or threatened use of physical force against the "person *or* property of another," while § 4B1.2(a)(1) covers only offenses with an element of force against the "person of another." Similarly, § 16(b)'s residual clause includes an offense that involves a substantial risk that physical force against the "person *or* property of another" may be used in the course of committing the offense, while § 4B1.2(a)(2)'s residual clause applies only to conduct that presents a serious potential risk of physical injury "to another." Further, § 16(b)'s residual clause contains no example offenses, while § 4B1.2(a)(2) does; the latter thus narrows the guideline's residual clause to crimes that are "roughly similar, in kind as well as in degree of risk posed, to the examples themselves," *Begay v. United States*, 553 U.S. 137, 143 (2008), while the former does not. But the Commission made no change to the list in 1989. Further, the 1989 commentary adopted language from § 16(b)'s residual clause, stating that an offense is a "crime of violence" if, "by its nature," it presents the requisite risk, thereby indicating that, as in § 16(b), an offense need not be similar in kind or degree of risk to any example offense.

In sum, the listing of OFFENSE in the commentary is no indication that it satisfies the residual clause under which CLIENT was sentenced. The Commission never determined that any commentary offense satisfied either the force clause or the residual clause, and the list of commentary offenses interpreted the broader definition of "crime of violence" in 18 U.S.C. § 16.

[Note – If the commentary offense is unlawful possession of a firearm described in 5845(a), you would make only the following argument and should change the heading accordingly (if you use a heading). If the commentary offense is not unlawful possession of firearms described in 5845(a), you can and probably should include the following for contrast.]

In only one instance, the Commission identified the residual clause as the basis for including an offense in the former commentary: unlawfully possessing a firearm described in 26 U.S.C. § 5845(a). The Commission stated that it added that offense because "[a] number of courts have 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 (Reason for Amendment) (Nov. 1, 2004). However, after the Commission added this offense to the commentary in 2004, several courts of appeals held that it is not a "violent felony" under the ACCA because it does *not* involve conduct that presents a serious potential risk of physical injury to another. *See United States v. Amos*, 501 F.3d 525, 528-30 (6th Cir. 2007); *United States v. Miller*, 721 F.3d 435, 437-443 (7th Cir. 2013); *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010); *United States v. Haste*, 292 F. App'x 249 (4th Cir. 2008); *United States v. Ross*, 416 F. App'x 289 (4th Cir. 2011). Justices Thomas and Kennedy agreed. *See Johnson v. United* States, 135 S. Ct. 2551, 2564 (2015 (Thomas, J., concurring in the judgment); *id*. at 2563 (Kennedy, J., concurring in the judgment).

This only demonstrates that the residual clause is "'a black hole of confusion and uncertainty,'" *Johnson*, 135 S. Ct. at 2562, that yields "anything but evenhanded, predictable, or consistent" results, *id*. at 2563, and that the Commission is no more capable of interpreting it correctly than the courts.

[Note and possible reply for 5845(a) firearms: The Commission also stated in amendment 674 in 2004: "Congress has determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes. In the National Firearms Act, Pub. L. No. 90-618, Congress required that these firearms be registered with the National Firearms Registration and Transfer Record." USSG app. C, amend. 674 (Reason for Amendment) (Nov. 1, 2004).

In support of its statement that Congress "determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous, and when possessed unlawfully, serve only violent purposes," USSG app. C, amend. 674 (2004), the Commission said only that Congress had "required that these firearms be registered" in the National Firearms Act, Pub. L. No. 90-618 (1968). In fact, Congress made no finding that firearms described in 26 U.S.C. § 5845(a) are "inherently dangerous, and when possessed unlawfully, serve only violent purposes." *See id*. Moreover, in requiring registration of these firearms, Congress made no judgment regarding whether or not this offense was "violent" for sentence enhancement purposes. Indeed, Congress

has not enumerated this offense as a "violent felony" in the ACCA. "[I]f possession of a sawed-off shotgun were so dangerous in all instances in and of itself, federal law would prohibit the weapons altogether, rather than allowing their possession if they are registered. . . . After all, registration is clearly less of a limitation on possession than the full prohibition that applies to felons who would seek to possess any firearm, and the felon in possession statute has been rejected as a predicate felony under ACCA." *United States v. Amos*, 501 F.3d 524, 529 (6th Cir. 2007).]

4) The court cannot rely on the commentary in any event because it did not interpret *any* definition in the text and is therefore invalid.

The Commission exceeded its delegated powers by issuing commentary that did not interpret or explain *any* definition in the guideline, rendering the commentary invalid.

As the government conceded in *Beckles*, "[t]he former commentary . . . did not construe Section 4B1.2(a)(2)'s residual clause or any other part of the definition set out in the guideline's main text." Brief for the United States at 50-53, *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781 (Mar. 6, 2017) (No. 15-8544). It pointed out that the fact that the Commission retained "virtually the same list" in the commentary when it switched from § 16 to the ACCA shows that "the list did not reflect an interpretation of the main text." *Id*. at 51. Further, it said, the fact that other provisions state that the term "crime of violence" "has the meaning given that term *and Application Note 1 of the Commentary* to § 4B1.2," *id*. (quoting § 2K2.1 cmt. 1), "strongly indicates that the commentary sets out a definition of 'crime of violence' *in addition to* the definition in Section 4B1.2(a)'s main text." *Id*. In sum, the "commentary . . . defined 'crime of violence' independently of the former residual clause." *Id*. at 53.

The only valid function of commentary is to interpret or explain § 4B1.2. *Stinson*, 508 U.S. at 38, 45. "[A]pplication notes are *interpretations of*, not *additions to*, the Guidelines themselves." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (emphasis in original); *id*. at 739 (commentary has "no legal force independent of the guideline," but is "valid (or not) only as an interpretation of § 4B1.2"); *see also United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016); *United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016). In short, commentary has no "freestanding definitional power." *United States v. Leshen*, 453 F. App'x 408, 415 (4th Cir. 2011). Because the commentary listing OFFENSE neither interprets nor explains § 4B1.2, it is invalid.

[Note and Possible Reply: It may seem hard to believe that the Commission intentionally exceeded its delegated powers. However, at the time the Commission issued the list of commentary offenses in 1987 and retained it in 1989, Congress had not authorized it to issue commentary at all, yet it was issuing commentary. *See* Part I.A. It was not until *Stinson* was decided in 1993 that the Supreme Court supplied a legal basis for the Commission to issue commentary and the concomitant limits on that authority, *i.e.*, the only valid function of commentary is to interpret or explain the text of a guideline, *Stinson*, 508 U.S. at 45, and 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.]

5) Even if the Commission intended the listing of OFFENSE in the commentary as an interpretation of the residual clause, the court cannot defer to that interpretation.

The *Seminole Rock*/*Auer* deference adopted by *Stinson* is not without limits. An agency's interpretation of its own regulation is not entitled to deference when the regulation itself merely parrots a statute or is so vague it "really says nothing at all." *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1467-71 (2011) (explaining the structural underpinnings of these limits on *Auer* deference). While such circumstances are rare, *id.* at 1469, both are present here.

First, the guideline's residual clause is not the Commission's own language, but instead parrots the language of the Armed Career Criminal Act. "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase . . . statutory language." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

Second, the residual clause is a "morass that defies systemic solution," a "black hole of confusion and uncertainty," and suffers from "hopeless indeterminacy." *Johnson*, 135 S. Ct. at 2258, 2562 (citations omitted). The Commission has no power "to promulgate mush" and then "interpret" that mush through commentary to which courts must defer. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking."), *abrogated on other grounds by Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199 (2015); *Mission Group Kansas v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (refusing to defer to agency interpretation of rule so open-ended it was "entirely unrestrictive"). This limit on the Commission's power is especially true in the criminal context, where "not even [an agency's] interpretation of [its] own regulations can cure an omission or add certainty and definiteness to otherwise vague language." *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 622 (1946).

Where, as here, the guideline both "literally replicates word-for-word" a statute *and* is "so vague as to be meaningless," it presents the "easy" case requiring no deference to any purported "interpretation" of it. Stephenson & Pogoriler, *supra*, at 1469, 1470.

D. The Court of Appeals should remand the case to the district court for resentencing in light of the new "crime of violence" definition under § 4B1.2(a).

Alternatively, the Court of Appeals has the discretion to remand the case on direct review to the district court for resentencing so that the court may take into account the new "crime of violence" definition under § 4B1.2(a), which has no residual clause and came into effect on August 1, 2016. The First Circuit held exactly as such in *United States v. Wurie*, 867 F.3d 28, 36 (1st Cir. 2017). The Court ruled that "where . . . a non-retroactive substantive amendment to the Guidelines post-dates a defendant's sentencing, we have discretion to remand the case for

resentencing." *Id.*at 35 (citing *United States v. Godin*, 522 F.3d 133 (1st Cir. 2008) (per curiam) and *United States v. Ahrendt*, 560 F.3d 69 (1st Cir. 2009)).

Likewise, under similar circumstances, the Eighth Circuit in *United States v. McMillan*, 863 F.3d 1053, 1058-59 (8th Cir. 2017) remanded a case on direct review for resentencing. In *McMillan*, the defendant was sentenced before the new § 4B1.2(a) "crime of violence" definition went into effect, but at the time of sentencing, the Commission had already proposed the new guideline. *Id.* However, the district court did not consider it under 18 U.S.C. § 3553(a). Thus, the Eighth Circuit remanded the case to the district court for resentencing so that it consider the new guideline in the first instance. *Id.* at 1059. The Court reasoned:

> While it would have been permissible for the district court to consider the Sentencing Commission's proposed elimination of that clause, it did not reach this issue because both parties had solely analyzed whether McMillan's prior conviction for third degree riot qualified as a "crime of violence" under the force clause. We have often noted that *"[w]hen it would be beneficial for the district court to consider an alternative argument in the first instance, we may remand the matter to the district court*." *Tovar v. Essentia Health*, 857 F.3d 771, 779 (8th Cir. 2017) (quoting *Loftness Specialized Farm Equip.Inc. v. Twiestmeyer*, 742 F.3d 845 (8th Cir. 2014)).

McMillan, 863 F.3d at 1058-59 (emphasis added).

III. A Sentence Within the Guideline Range Is Greater Than Necessary to Satisfy the Purposes of Sentencing, and Would Create Unwarranted Disparity.

This section gives just a few ideas for variances at sentencing, or to argue that the sentence is unreasonable on appeal. It is by no means complete.

A. Arguments that Stem from *Beckles*

The basis of *Beckles*' holding that the residual clause is not void for vagueness was essentially that the guidelines' advice can be ignored. *See Beckles*, 2017 WL 855781, at *8. In that sense, *Beckles* gives new support for variances.

The Court should reject the guideline as a policy matter. *See, e.g.*, *Spears v. United States*, 555 U.S. 261, 265-66 (2009) (per curiam). Congress directed the Commission to promulgate guidelines that provide for "certainty and fairness in sentencing and reducing unwarranted sentence disparities," 28 U.S.C. § 994(f), and directed the courts to consider the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Given the confusion, uncertainty, lack of consistency, and unpredictability involved in attempting to interpret the residual clause, *Johnson*, 135 S. Ct. at 2562-63, a guideline sentence would be antithetical to these directives. Moreover, at least 88 people previously had their sentences reduced on the ground that the guidelines residual clause was "void for vagueness," Reply Brief for Petitioner app. 1, *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781 (2017) (No. 15-8544), and the Deputy Solicitor General assured the Court that they would "keep their sentences." *See*

Transcript of Oral Argument at 42-43, *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781 (2017) (No. 15-8544).

B. Arguments About Certain Predicates

If the sentence was enhanced based on burglary or attempted burglary, you can seek a variance based on the Commission's recent determination that no burglaries count as "crimes of violence" based on studies showing that "burglary offenses rarely result in physical violence." USSG App. C, amend 798, at 129 (2016 Supp.) (Reason for Amendment). The primary study showed that an average of between 0.9% and 7.6% of burglaries nationwide from 1998 to 2007 resulted in actual violence or threats of violence; that by the highest estimate, physical injury to a person occurred in 2.7% of burglaries, while violence or harm was threatened but did not occur in 4.9% of burglaries; and that attempted burglaries were significantly less likely to be violent than completed burglaries. *See* Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007* at xi, 29, 34, 36-38 (2015).[19]

The Commission's inclusion of unlawful possession of a firearm described in § 5845(a) as a "crime of violence" (first in the commentary and now as an enumerated offense) invites a policy-based downward variance under *Kimbrough*. The Commission's justification for including this offense in the commentary was that "[a] number of courts have 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."[20] But several courts of appeals subsequently held that possession of a sawed-off shotgun is not a "violent felony" under the ACCA, and Justices Thomas and Kennedy agreed.[21] In retaining this offense as an enumerated offense, the Commission simply said that it "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."[22] The Commission has provided no empirical evidence to support this statement.

Certain "controlled substance offenses": Congress directed the Commission to include offenses "described in" 21 U.S.C. §§ 841, 952(a), 955, 959, and 46 U.S.C. § 70503. 28 U.S.C. § 994(h). The Commission nonetheless added any state offense punishable by more than one year; aiding and abetting, attempt, conspiracy (state or federal); "[u]nlawfully possessing a listed chemical with intent to manufacture a controlled substance" (21 U.S.C. § 841(c)(1)); "[u]nlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled

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[19] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf.

[20] USSG App. C, amend. 674 (Nov. 1, 2004) (Reason for Amendment).

[21] *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 F. App'x 249 (4th Cir. 2008); *United States v. Ross*, 416 F. App'x 289 (4th Cir. 2011).

[22] 81 Fed. Reg. at 4744 (Reason for Amendment), available at http://www.ussc.gov/sites/default/files/20150121_FR_Final.pdf.

substance" (21 U.S.C. § 843(a)(6)); "[m]aintaining any place for the purpose of facilitating a controlled substance offense" (21 U.S.C. § 856); and "[u]sing a communications facility in committing, causing or facilitating a drug offense" (21 U.S.C. § 843(b)). *See* USSG § 4B1.2(b) & cmt. (n.1). For a defendant whose guideline range is enhanced based on an offense not included in Congress's directive, the guideline range exceeds what Congress intended. "[T]he precision with which § 994(h) includes certain [federal] drug offenses but excludes others indicates that the omission of § 846 [conspiracy] was no oversight." *United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009).

C. A Sentence at the Bottom of the Ordinary Guideline Range Is Sufficient But Not Greater Than Necessary to Satisfy the Purposes of Sentencing.

As Justice Breyer has explained, the Guidelines are based on data and experience, and thus "reflect a rough approximation" of sentences that "might achieve § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 338, 348-50, 357 (2007). The career offender guideline is not based on data or experience, and thus does not reflect § 3553(a)'s objectives. Instead, it reflects a congressional mandate to the Commission to "specify a sentence to a term of imprisonment at or near the maximum term authorized" for certain repeat offenders. 28 U.S.C. § 994(h). The Commission implemented that mandate by automatically assigning offenders an offense level tied to the statutory maximum and a Criminal History Category of VI.

Congress intended the career offender guideline to serve two purposes of sentencing, deterrence and incapacitation,[23] but it serves neither. After thirty years of experience and research, it is well-established that increasing the severity of punishment does little, if anything, to deter crime.[24] As to the need for incapacitation to protect the public against further crimes of the defendant, the Commission has consistently found that criminal history points correlate with recidivism rates, but the career offender guideline does not.

In its initial evaluation of the criminal history rules in 2004, the Commission found that each increase in criminal history category was associated with a statistically significant increase

[23] Speaking in support of the predecessor of 28 U.S.C. § 994(h), *see* S. Rep. No. 98-225, at 175 (1983), Senator Kennedy stated that "resources must be targeted on incapacitating the tiny minority of criminals responsible for the overwhelming majority of violent crimes," and that "career criminals must be put on notice that [they] will be punished by maximum prison sentences," 128 Cong. Rec. 26,517-18 (Sept. 30, 1982) (statement of Sen. Kennedy); *see also id*. at 26,512 (setting forth text of S. 2572).

[24] *See, e.g.*, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Five Things About Deterrence* (2016) ("Increasing the severity of punishment does little to deter crime."), available at https://www.ncjrs.gov/pdffiles1/nij/247350.pdf; Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (Jeremy Travis *et al*. eds., 2014) (examining empirical studies and concluding that long sentences are "not an effective deterrent"); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199, 202 (2013) ("[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis.").

in the risk of recidivism, but that there was no such association in the increase from CHC V to CHC VI. The reason for this was that increases in criminal history points were associated with increases in recidivism rates, but defendants classified as career offenders or armed career criminals are "assigned to criminal history category VI, even if they have fewer than 13 criminal history points."[25] The Commission thus concluded that the automatic assignment of offenders to CHC VI under the career offender guideline is not justified by their recidivism risk.[26] This makes sense, given that the career offender guideline requires a blanket, dramatic increase for prior offenses that meet its definitions, while the ordinary criminal history rules add points incrementally based on the type and length of sentence for prior offenses.[27]

A March 2016 report again confirmed that "recidivism rates are most closely correlated with total criminal history points,"[28] and that the career offender guideline and the armed career criminal guideline, by automatically placing defendants in CHC VI regardless of the number of points, do not. As shown by the data in that report, set forth in the footnote, persons sentenced under the career offender and armed career criminal guidelines have significantly lower recidivism rates than offenders in CHCs IV, V and VI.[29] The Commission reached the same conclusion in a report on drug offenders in February 2017.[30]

Career offenders not only are assigned to the highest criminal history category, but receive an offense level tied to the statutory maximum. But the offense level produced by the ordinary rules in Chapters Two and Three of the Guidelines is designed to reflect the "seriousness of the defendant's [instant] offense."[31] And in drug cases, the ordinary offense level is *already* greater than necessary because it is tied to mandatory minimums.[32] Since the

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[25] *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004).

[26] *Id*.

[27] *See* USSG § 4A1.1(a)-(d).

[28] U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* at 18 & fig.6, 27 (Mar. 2016).

[29] *Id*. at app. A-1 (rearrest rate of 69.5% for career offender/armed career criminals, 74.7% in CHC IV, 77.8% for CHC V, 80.1% for CHC VI); *id*. app. A-2 (reconviction rate of 47.6% for career offender/armed career criminals, 51.6% for CHC IV, 56.6% for CHC V, 59.3% for CHC VI); *id*. app. A-3 (reincarceration rate of 40.6% for career offender/armed career criminals, 43.5% for CHC IV, 49.5% for CHC V, 51.3% for CHC VI).

[30] *See* U.S. Sent'g Comm'n, *Recidivism Among Federal Drug Trafficking Offenders* 15 (Feb. 2017) (rearrest rate of 62.6% for career offender/armed career criminals, 68.1% for CHC IV, 73.8% for CHC V, 77.1% for CHC VI).

[31] *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016); *see also* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 62-67 (2003).

[32] *See, e.g.*, *United States v. Diaz*, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013).

career-offender offense level is not justified by the seriousness of the offense, it could be justified only for the purpose of incapacitation, but the Commission has found "no apparent relationship between the sentencing guideline final offense level and recidivism risk."[33]

[Note: If the government tries to refute your argument about recidivism with the Commission's career offender report, please let me know. That report is misleading and can be debunked.]

D. Aging Out, Recidivism Inversely Related to Age

Judge Posner recently explained that criminals, "especially ones engaged in dangerous activities," such as drug trafficking, gun possession, and violent crime, "weight future consequences less heavily than a normal, sensible, law-abiding person would," such that the "prospect of being in prison at age 60 is less worrisome to a 30 year old than the prospect of being in prison today," and sentence length has "less of a deterrent effect on such a person than the likelihood that he'll be caught, convicted, and imprisoned." "The sentencing judge in this case did not refer to any of this literature, and in any event gave no reason to think that imposing a 37–year sentence on Presley would have a greater deterrent effect on current or prospective heroin dealers than a 20–year or perhaps even a 10–year sentence . . . Sentencing judges need to consider the phenomenon of aging out of risky occupations." *United States v. Presley*, 790 F.3d 699 (7th Cir. 2015); *see also United States v. Smith*, 756 F.3d 1179, 1183 (10th Cir. 2014) (Gorsuch, J.) (noting that recidivism rates are inversely related to age at release) (citing Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 3, 12 (1994)[34]).

E. Data on Within- and Below-Guideline Sentences for Career Offenders

Judges are often swayed by what other judges are doing, and want to avoid disparity. In fiscal year 2015 (the most recent year for which data is available), only 25 percent of sentences for career offenders were within the guideline range, 28.8 percent were below the range pursuant to a variance not sponsored by the government, 20.6 percent were below the range pursuant to a government-sponsored variance, and 23.7 percent were below the range based on a cooperation departure.[35] A sentence within the guideline range would create unwarranted disparity.

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[33] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 (2004).

[34] https://www.bop.gov/resources/research_projects/published_reports/recidivism/oreprrecid87.pdf.

[35] *See* U.S. Sent'g Comm'n, Quick Facts – Career Offender (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY15.pdf.pdf.

IV. A Prior Conviction May Not Qualify as a Predicate for Purposes of a Federal Sentencing Enhancement Because the Maximum Sentence That Could Have Been Imposed Is Too Short.

This argument can be used to eliminate any drug or "violent" predicate under the career offender guideline, the ACCA, or 21 U.S.C. § 851.

In *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), the Supreme Court decided whether a prior Texas drug conviction qualified as an "aggravated felony" under the Immigration and Nationality Act. The specific question presented was whether Carachuri had been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year." In 2004, Carachuri was convicted under Texas law for possessing less than two ounces of marijuana (a misdemeanor) and then in 2005 for possessing a Xanax tablet without a prescription. *Id.* at 570-71. Under Texas law in effect at the time he was convicted, Carachuri could have received an enhanced recidivist sentence of more than 12 months for the 2005 Xanax conviction, but only if the state proved the fact of the 2004 marijuana conviction. Because the record of the 2005 Xanax conviction contained no finding of fact concerning the 2004 marijuana conviction, Carachuri could not have received a sentence in excess of one year for the 2005 Xanax conviction, and was thus not previously convicted of an "aggravated felony." *Id.* at 581-82. The Court emphasized that the question was whether Carachuri was "actually convicted of a crime that is itself punishable as a felony" as reflected in the record of conviction, not whether a hypothetical person could have received a sentence exceeding one year had he been convicted of the recidivist enhancement. *Id.* at 576, 581.[36]

In reaching its conclusion, the Court clarified that its earlier decision in *United States v. Rodriquez*, 553 U.S. 377 (2008) – an ACCA case – did not permit courts to consider hypothetical facts in aggravation in order to determine the maximum term of imprisonment authorized (as the lower courts and the government believed). In *Rodriquez*, unlike in *Carachuri-Rosendo*, the record of conviction established that Rodriquez was actually subject to an aggravated statutory maximum of 10 years for his Washington state drug offense, so it qualified as a "serious drug offense" for purposes of the ACCA even though he received a sentence within the unaggravated range. *See Rodriquez*, 553 U.S. at 381. In contrast, "when the recidivist finding giving rise to a 10-year sentence is not apparent from the sentence itself, or appears neither as part of the 'judgment of conviction' nor the 'formal charging document,' the Government will not have established that the defendant had a prior conviction for which the maximum term of imprisonment was 10 years or more (assuming the recidivist finding is a necessary precursor to such a sentence)." *Carachuri*, 560 U.S. at 577 n.12 (citation omitted).

The Fourth, Eighth, and Tenth Circuits have applied the reasoning of *Carachuri-Rosendo* to convictions under the sentencing schemes in North Carolina and Kansas. In *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc), the Fourth Circuit held that a prior North Carolina conviction for possession with intent to sell no more than ten pounds of marijuana was

[36] The question whether a prior offense is punishable by a maximum term of imprisonment exceeding one year is determined by the law in effect at the time of conviction. *See McNeill v. United States*, 563 U.S. 816, 817-18 (2011)

not a "felony drug offense" for purposes of a § 851 enhancement. Under North Carolina's structured sentencing scheme, Simmons could have been sentenced to more than 12 months only if the government proved (or the defendant pleaded to) aggravating factors and the state demonstrated that Simmons had a sufficiently high "prior record level." *Id.* at 241. Because Simmons had a "prior record level" of only 1 and the prosecutor alleged no facts in aggravation sufficient to warrant an aggravated sentence, he was subject to a maximum sentence of eight months' community punishment (no imprisonment). *Id.* at 241, 243. As a result, he was not convicted of an offense punishable by imprisonment by more than one year. *Id.* at 243.

In *United States v. Haltiwanger*, on remand from the Supreme Court for further consideration in light of *Carachuri-Rosendo*, the Eighth Circuit held that a prior Kansas conviction for possession of a controlled substance without affixing a tax stamp does not qualify as a "felony drug offense" for purposes of § 851. *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011). Under Kansas's sentencing system, because there was no requisite recidivist finding in the record, the defendant could not have actually been sentenced to more than seven months. 637 F.3d at 884 (reversing a prior decision upholding the 20-year mandatory minimum).

In *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014), the Tenth Circuit held that *Carachuri-Rosendo* invalidated its prior decision in *United States v. Hill*, 539 F.3d 1213 (10th Cir. 2008). In *Hill*, the court had relied on *Rodriquez* to hold that the question whether a prior Kansas conviction qualifies as a "felony" for purposes of conviction as a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) depends on the maximum statutory penalty for the aggravated offense, not the lower maximum penalty actually applicable to the individual defendant based on the unaggravated facts of conviction. In *Brooks*, it reversed course and held that under *Carachuri-Rosendo*, a prior Kansas conviction for fleeing and eluding, for which the particular defendant could not have actually been sentenced to more than seven months under the Kansas sentencing system, is not punishable by more than one year in prison. As a result, it does not qualify as a "felony" for purposes of the career offender guideline, and so is not a "crime of violence." 751 F.3d at 1213.

In the Fifth Circuit, the government has conceded that under *Carachuri-Rosendo*, a defendant previously convicted of drug offenses in Oregon and sentenced under the state's presumptive guideline system was not convicted of "felony drug trafficking offenses" for purposes of the illegal reentry guideline at USSG § 2L1.2 because the maximum sentence that the state court could have imposed under the Oregon guidelines, absent additional factfinding by a jury or factual admissions by the defendant, was 90 to 180 days. *See, e.g.*, U.S. Agreed Motion for Summary Remand, *United States v. Ernesto Martinez*, No. 14-41020 (5th Cir. Jan. 15, 2015). Under Oregon's presumptive guideline system, a judge may not legally or constitutionally impose a sentence outside the presumptive range in the absence of a jury finding of, or the defendant's agreement to, facts that authorize a higher sentence. *See State v. Dilts*, 103 P.3d 95, 99 (Or. 2004). As the government put it, "a prior state conviction must establish all the elements and sentencing factors necessary to authorize the punishment beyond one year," *id.* at 3 (citing *Carachuri-Rosendo* and *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685-87 (2013)). The Fifth Circuit remanded for resentencing.

Most recently, the Tenth Circuit held that under New Mexico's sentencing scheme in place in 1999, the maximum sentence for the state conviction at issue was the maximum of the applicable unaggravated sentencing range, where neither the government nor the judge considered an upward departure to the aggravated range, and no upward departure was imposed, though it could have been. *United States v. Romero-León*, 622 F. App'x 712 (10th Cir. 2015).

The Ninth Circuit is currently considering whether *Carachuri-Rosendo* applies to a Washington state drug conviction for purposes of determining whether it qualifies as a prior "controlled substance offense" for purposes of USSG § 4B1.2, and the issue has been fully briefed. *See United States v. Brown*, No. 16-301218 (9th Cir.). In a 2015 unpublished decision, it summarily relied on a pre-*Carachuri* case, *United States v. Murillo*, 422 F.3d 1152 (9th Cir. 2005), to reject the argument that an Oregon drug conviction did not qualify as a "felony punishable by more than one year" for purposes of the former 12-level enhancement under USSG § 2L1.2. *United States v. Fletes-Ramos*, 612 F. App'x 484, 485 (9th Cir. 2015).

The First Circuit recently relied on *Rodriquez* and circuit precedent that also relied on *Rodriquez* to reject the argument that a prior conviction for an offense prosecuted in the Massachusetts district court, which allows a sentence no greater than two and a half years, does not qualify as a "serious drug offense" for purposes of the ACCA. *United States v. Hudson*, 823 F.3d 11, 14-15 (1st Cir. 2016). There, however, the court said that the defendant "argue[d] only that [*Rodriquez*] represents a shift in authority." *Id.* at 15. In rejecting that argument, the court did not mention *Carachuri-Rosendo.* Instead, it disposed of the defendant's *Rodriquez* argument by relying on a previous decision – announced just weeks after *Carachuri-Rosendo* and without mentioning *Carachuri-Rosendo* – that there was "nothing in the Supreme Court's intervening decision in [*Rodriquez*] to require us to revisit the issue." *United States v. Weekes*, 611 F.3d 68, 72 (1st Cir. 2010).

In addition to the sentencing systems in North Carolina, Kansas, Massachusetts, New Mexico, Oregon, and Washington, there may be other state sentencing systems under which the maximum sentence a judge could have legally imposed in a particular defendant's case is less than the term required for an enhanced federal sentence. Possible such sentencing systems include those in Alabama (beginning in 2013), Alaska, Arizona, California, Colorado, Florida (1983-1998), Michigan, Minnesota, Ohio, Pennsylvania, and Tennessee (1989-2005).

V. The Offense Does Not Satisfy the Force Clause.

To satisfy the force clause, the offense must have as an element the "use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1). The phrase "physical force" means "*violent* force" — that is, "strong physical force" which is "capable of causing physical pain or injury to another person." *Johnson v. United* States, 559 U.S. 133, 140 (2010). The use, attempted use, or threatened use of that force must be intentional, not reckless or negligent. *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).

An offense can fail to satisfy the force clause because it allows a conviction (a) with de minimis force – not violent force, (b) with less than intentional mens rea, (c) with force against property, or (d) with causation of physical injury which does not equal violent force.

Most of the offenses enumerated in the new definition of "crime of violence" (or in the commentary under the old definition) have been held, or can be shown, not to satisfy the force clause. Examples include:

- Murder: *United States v. Hernandez-Montes,* 831 F.3d 284 (5th Cir. 2016) (Florida attempted second degree murder); *United States v. Watts*, 2017 WL 411341 (D. Kan. Jan. 31, 2017) (Missouri second degree felony murder); *Montoya v. United States*, 2016 WL 6810727 (D. Utah Nov. 17, 2016) (Utah attempted murder); *United States v. Martinez*, Case No. 07-cr-00236-REB-1 (D. Colo. Feb. 1, 2017) (Nevada second degree murder); *United States v. Nicks*, Case No. WJM-15-0321 (D. Colo. April 4, 2016) (Colorado second degree murder); *United States v. McCutcheon*, Case No. JFM-15-654 (D. Md. Aug. 24, 2016) (Maryland attempted second degree murder).

- Manslaughter – does not qualify if reckless mens rea: *See, e.g., United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011) (manslaughter under Colo. Rev. Stat. § 18-3-104(1)(a)); *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (manslaughter under Fla. Stat. § 782.07(1)).

- Kidnapping: *See, e.g., United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017) (federal kidnapping); *United States v. Martinez-Romero*, 817 F.3d 917 (5th Cir. 2016) (Florida kidnapping); *United States v. Najera-Mendoza*, 683 F.3d 627 (5th Cir. 2012) (Oklahoma kidnapping); *Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9th 2012) (California kidnapping); *United States v. Sherbondy*, 865 F.3d 996 (9th Cir. 1988) (Model Penal Code kidnapping).

- Aggravated Assault: *See, e.g., Whyte v. Lynch*, 807 F.3d 863 (1st Cir. 2015) (Connecticut assault requiring intentional causation of physical injury); *Chrzanoski v.Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (same); *United States v. Barcenas-Yanez*, 826 F.3d 752 (4th Cir. 2016) (Texas aggravated assault); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (Texas aggravated assault); *United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013) (New Jersey aggravated assault); *United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011) (Tennessee aggravated assault); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) (Colorado assault by drugging); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5thCir. 2006) (Texas aggravated assault); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) (Colorado assault requiring physical injury with use of a deadly weapon).

- Forcible Sex Offense: *See, e.g., United States v. Shell*, 789 F.3d 335, 341 (4th Cir. 2015) (North Carolina second-degree rape); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of a child); *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013) (Tennessee aggravated statutory rape); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of a child).

- Robbery: *See, e.g.*, *United States v. Geozos*, __ F.3d__, 2017 WL 3712155 (9th Cir. 2017) (Florida robbery); *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (Ohio robbery); *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (Massachusetts robbery); *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017 (Oregon robbery); *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (Maine robbery); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017) (Virginia robbery); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016) (Missouri robbery); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016) (Arkansas robbery); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (North Carolina robbery); *United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (Massachusetts robbery); *United States v. Dixon*, 805 F.3d 1193, 1197-98 (9th Cir. 2015) (California robbery); *United States v. Castro-Vazquez*, 802 F.3d 28, 37 (1st Cir. 2015) (Puerto Rico robbery); *In re Sealed Case*, 548 F.3d 1085 (D.C. 2008) (D.C. robbery).

  See also United States v. Sheffield, 832 F.3d 296 (D.C. Cir. 2016) (attempted D.C. robbery); *United States v. Gonzalez-Ruiz*, 794 F.3d 832 (7th Cir. 2015) (conspiracy to commit armed robbery); *United States v. Melvin*, No. 13-4857 (4th Cir. Oct. 20, 2015) (conspiracy to commit robbery with a dangerous weapon); *United States v. Merritte*, 2016 WL 2901661 (D. Nev. 2016) (conspiracy to commit Hobbs Act robbery); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046 (N. D. Cal. 2016) (same); *Durhart v. United States*, 2016 WL 4720424 (S. D. Fla. 2016) (same); *United States v. Luong*, 2016 WL 1588495 (E. D. Cal. 2016) (same); *United States v. Edmundson*, 153 F. Supp. 3d 857 (D. Md. 2015) (same).

- Arson: *See, e.g.*, *Brown v. Caraway*, 719 F.3d 583, 590 (7th Cir. 2013) (Delaware third-degree arson); *United States v. Johnson*, 227 F. Supp. 3d 1078 (N.D. Cal. 2016) (federal arson).

- Extortion: *See, e.g.*, *United States v. DeLuca*, 17 F.3d 6, 8 (1st Cir. 1994) (Rhode Island extortion)

- Unlawful Possession of a Firearm described in 26 U.S.C. § 5845(a): *See, e.g.*, *United States v. Amos*, 501 F.3d 524, 525 (6th Cir. 2007) (possession of a sawed-off shotgun).

- Unlawful possession of explosive material as defined in 18 U.S.C. § 841(c): same reasoning as possession of a firearm described in § 5845(a).

- Inchoate Offenses: *See, e.g.*, *United States v. Gore*, 636 F.3d 728 (5th Cir. 2011) (conspiracy to commit any offense); *United States v. White*, 571 F.3d 365 (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); *United States v. Hernandez-Montes*, 831 F.3d 284, 289 n.13 (5th Cir. 2016) (Florida attempted second degree murder); *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*, 135 S. Ct. 2551 (2015).

Castleman/Voisine

In *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Court interpreted "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9), defined at § 921(a)(33)(A) in relevant part as having "as an element, the use or attempted use of physical force." It held in this context that "force" means common law force (*i.e.*, offensive touching), unlike the "violent physical force" required under the ACCA by *Johnson v. United States*, 559 U.S. 133 (2010). *Id.* at 1410-13. It also held that because the "common law concept of 'force' encompasses even its indirect application," an element of causing physical injury necessarily includes use of "force in the common-law sense" *Id.* at 1414-15. In so holding, the Court reiterated that it had "declined to read the common-law meaning of 'force' into ACCA's definition of a 'violent felony,' because we found it a 'comical misfit with the defined term.'" *Id.* at 1410 (quoting *Johnson*, 559 U.S. at 145)). In a footnote, the Court emphasized that its holding was specific to the context of "misdemeanor crime of domestic violence." *Id.* at 1412 n.4 ("The Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence' [under § 16], just as we held in *Johnson* that it could not constitute the 'physical force' necessary to a 'violent felony.' . . . Nothing in today's opinion casts doubt on these holdings, because—as we explain—'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter.").

Despite the fact that *Castleman*'s holdings relate solely to the "concept of common law force," as expressly distinguished from the narrower "violent physical force" under the ACCA, the lower courts are now divided. Several have applied *Castleman* to hold (or reaffirm) that for purposes of the ACCA/Guidelines/§16(a), an element of causing physial injury or resulting injury necessarily implies the element of "violent physical force" under *Johnson* (2010), i.e., "force capable of causing physical pain or injury to another person." *See, e.g.*, *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) (USSG § 4B1.2); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2015) (USSG § 4B1.2); *Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016) (18 U.S.C. § 16(a)/ACCA); *United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012) (ACCA).

Others have held (before and after *Castleman*) that causing injury does not necessarily mean the use of "violent physical force." *See, e.g.*, *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017) (§ 2L1.2); *Whyte v. Lynch*, 807 F.3d 463, 470-71 (1st Cir. 2015) (§16(a)/ACCA); *United States v. McNeal*, 818 F.3d 141, n.10 (4th Cir. 2016) (§ 924(c)(3)(A)); *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (§ 2L1.2); *United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013) (§ 2L1.2); *United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012) (§ 2L1.2); *United States v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 201((§ 2L1.2); (*United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (§ 2L1.2); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) (§ 2L1.2); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (§ 2L1.2); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) (§ 2L1.2); *United States v. Lopez-Patino*, 391 F.3d 1034, 1037 (9th Cir. 2004) (§ 2L1.2); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (§ 16(a)); *United States v. Butler*, __ F.

Supp. 3d __, 2017 WL 2304215 (D. D. C. 2017) (ACCA);*United States v. Brown*, 2017 WL 1383640 (D.D.C. 2017) (ACCA); *United States v. Watts*, 2017 WL 411341 (D. Kan. Jan. 31, 2017) (career offender); *United States v. Fisher*, 2017 WL 1426049 (E. D. Pa. 2017) (ACCA); *United States v. Hill*, 225 F. Supp. 3d 328 (W.D. Penn. 2016) (career offender); *United States v. Fennell*, 2016 WL 4702557 (N. D., Tex. 2016) (ACCA); *Villanueva v. United States*, 191 F. Supp. 3d 178 (D. Conn. 2016) (ACCA). *In re Guzman-Polanco*, 26 I & N Dec. 713 (BIA 2016).

The good decisions recognize that the Supreme Court's analysis in *Castleman* was specific to the context of "misdemeanor crime of domestic violence," which serves a different purpose and "does different work" than the ACCA or § 16(a). *See, e.g.*, *Whyte*, 807 F.3d at 471; *Rico-Mejia*, 859 F.3d at 323 ("*Castleman* is not applicable to the physical force requirement for a crime of violence, which 'suggests a category of violent, active crimes' that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context.").

In *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Court again interpreted "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9). It held in this context that the "use" of force can be reckless. *Id.* at 2278. The Court left open the question (as it did in *Castleman*) whether §16 includes reckless behavior, *Voisine*, 136 S. Ct. at 2280 n.4, also leaving undisturbed *Castleman*'s recognition that the courts of appeals "have almost uniformly held" that "use" of force for purposes of § 16 (and thus for purposes of the ACCA and the guidelines) must be intentional. *Castleman*, 134 S. Ct. at 1414 n.8 ("the Courts of Appeals have almost uniformly held that recklessness is not sufficient"); *Voisine*, 136 S. Ct. at 2280 n.4 (pointing to *Castleman* for the proposition that courts have given § 16 and § 921(a)(33)(A) "divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states").

The lower courts are divided here too. Several courts have applied *Voisine* to hold that for purposes of the ACCA/Guidelines, a reckless *mens rea* is sufficient. *See, e.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017) (§ 2L1.2); *United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017) (ACCA); *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017) (ACCA); *United States v. Howell*, 838 F.3d 489 (5th Cir. 2016) (USSG § 4B1.2); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (ACCA).

Others have held after *Voisine* that a reckless *mens rea* is not sufficient. *See, e.g.*, *United States v. Bennett*, 868 F.3d 1 (1st Cir. 2017) (rule of lenity means *Voisine* does not apply to ACCA force clause – but opinion withdrawn due to death of defendant) (ACCA); *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (ACCA); *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017) (§ 4B1.2 - *Voisine* doesn't apply to all reckless offenses); *United States v. Butler*, __ F. Supp. 3d __, 2017 WL 2304215 (D. D. C. 2017) (ACCA); *United States v. Brown*, __ F. Supp.3d__, 2017 WL 1383640 (D.D.C. 2017) (ACCA); *United States v. Lattanzio*, 232 F. Supp. 3d 220 (D. Mass. 2017) (ACCA); *United States v. Fisher*, 2017 WL 1426049 (E. D. Pa. 2017) (ACCA); *Bennett v. United States*, 2016 WL 3676145 (D. Maine 2016) (ACCA); *United States v. Wehunt*, 230 F. Supp. 3d 838 (E.D. Tenn. 2017) (career offender); *United States v. Hill*, 225 F. Supp. 3d 328 (W.D. Pa. 2016) (career offender); *United States v. Johnson*, 227 F. Supp. 3d 1078 (N.D. Cal. 2016) (ACCA); *United States v. Sabetta*, 221 F. Supp.3d 210 (D.R.I. 2016) (ACCA);

United States v. Fennell, 2016 WL 4702557 (N.D. Tex 2016) (ACCA); *Jefferson v. United States*, 2016 WL 6023331(S. D. Ala. 2016) (ACCA); *Jaramillo v. United States*, 2016 WL 5947265 (D. Utah 2016) (ACCA); *Broadbent v. United States*, 2016 WL 5922302 (D. Utah 2016) (career offender).

VI. The Offense Does Not Satisfy the Relevant Definition – the Commission's New Definition or the Generic Definition

A. Basic Steps

First, determine the generic definition of the instant or prior offense of conviction. Unless the circuit has already decided on the generic definition, find the generic definition that works best as described below. The generic definition is the contemporary definition of the term as used by the criminal codes of most states, and can be identified through a survey of the 50 states, the Model Penal Code, LaFave's *Substantive Criminal Law*, and the dictionary definition. Second, determine the elements of the offense of conviction in your case. Third, determine whether the elements of the offense in your case reach more broadly than the generic definition or the Commission's definition (if it applies).

The instant or prior offense of conviction may 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. For two decades, courts commonly misapplied *Taylor*'s elements-based approach. In *Descamps v. United States*[37] then more recently in *Mathis v. United States*,[38] the Supreme Court stepped in to emphasize the purpose of the categorical approach,[39] 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 memo. It is enough to say here that the key to the categorical approach "is elements, not facts."[40] A crime counts as a "crime of violence" if "its elements are the same as, or narrower than" those of the

[37] 133 S. Ct. 2276, 2292 (2013).

[38] 136 S. Ct. 2243 (2016).

[39] *See Mathis*, 136 S. Ct. at 2252-53 ("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).

[40] *Descamps*, 133 S. Ct. at 2292.

generic offense or the offense as defined by the Commission.[41] 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's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries."[42] If that "most innocent conduct" or "full range of conduct" covered by the statute does not match the generic (or Commission) definition, the conviction cannot qualify as "crime of violence." *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012).

B. The First Step – Identifying the Relevant Definition

Our focus is the first step—identifying the elements of the relevant definition to which the crime of conviction will be compared.

The new definition of "crime of violence," effective August 1, 2016 does the following:

- retains the force clause;
- eliminates the residual clause;
- deletes all commentary offenses except inchoate offenses (aiding and abetting, conspiring, attempting);
- enumerates in the guideline itself murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, extortion, use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a), and use or unlawful possession of explosive material;
- eliminates "burglary of a dwelling" (and any other kind of burglary which previously counted only under the residual clause);
- eliminates involuntary manslaughter, extortionate extension of credit (previously in commentary);
- more narrowly defines "extortion" and statutory rape and sex abuse against a minor for purposes of "forcible sex offense."

USSG § 4B1.2(a) & cmt. (n.1) (2016).

Before the August 1, 2016 amendment, the Commission did not define any of the offenses enumerated in § 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)." 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."[43] The Commission, however, defined "extortion,"

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[41] *Mathis*, 136 S. Ct. at 2248.

[42] *Id.*

[43] *See* 81 Fed. Reg. at 4744 (Reason for Amendment), available at http://www.ussc.gov/sites/default/files/20150121_FR_Final.pdf.

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 below.

Although you may need them in cases on direct appeal in which the defendant was sentenced based on an offense that has been eliminated (involuntary manslaughter, extortionate extension of credit) or more narrowly defined (extortion, some forms of "forcible sex offense"), those generic definitions are not addressed below, although we refer to some of them in passing.

The relevant 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 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 (C) threat of physical injury,"[44] 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."[45] The Commission explained that this change is "[c]onsistent with [its] goal of focusing the career offender and related enhancements on the most dangerous offenders."[46] 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*[47]—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,"[48] but that sexual abuse of a minor and statutory rape are included

[44] U.S.S.G. § 4B1.2 cmt. (n.1) (eff. Aug. 1, 2016).

[45] 81 Fed. Reg. at 4744 (Reason for Amendment), available at available at http://www.ussc.gov/sites/default/files/20150121_FR_Final.pdf.

[46] *Id.*

[47] 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").

[48] U.S.S.G. § 4B1.2 cmt. (n.1) (eff. Aug. 1, 2016).

"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.[49]

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 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 (if not most) 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,[50] 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.[51] 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

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[49] *Id.*

[50] *See* 21 Okla. Stat. § 1114(A)(1).

[51] *See* 18 U.S.C. § 2246(2).

sexual contact."[52] At least one court has held that locking or barricading a door does not rise to meet the level of "force" required.[53]

"*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). In commentary, the Commission stated that "use of explosives" included use of "any explosive material or destructive device," but the Commission did not define "explosives" or "explosive material."[54] 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 and at USSG § 1B1.1 cmt. (n.1(F)) to include any "explosive . . . device" or "any combination of parts either designed or intended for use in converting any device into a destructive device."[55] With the amendment, the Commission moved the "firearm" possession offense from the commentary to the text of the guideline and added "use" of that "firearm," thereby effectively enumerating in the text "use" or "possession" of any "explosive device" or "combination of parts designed or intended for use in converting any device into a destructive device." Rather than delete "use of explosives" from the list of enumerated offenses as redundant, the Commission expanded the term in the text to "explosive *material*" as defined at § 841(c), which includes "explosives" as well as "blasting agents" and "detonators," with each term defined separately.[56]

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.[57] 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 sweeps 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.

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[52] *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).

[53] *United States v. Serdahl*, 316 F. Supp. 2d 859, 863 (D.N.D. 2004).

[54] The term "explosive" is defined in different ways by statute. *See, e.g.*, 18 U.S.C. §§ 841(d), 844(j).

[55] 26 U.S.C. § 5845(a), (f).

[56] 18 U.S.C. § 841(d) ("explosives"); 18 U.S.C. § 841(e) ("blasting agent"); 18 U.S.C. § 841(f) ("detonator").

[57] *See* 27 C.F.R. §§ 555.11, .23; ATF, *Notice of list of explosive materials*, 80 Fed. Reg. 64,446 (Oct. 23, 2015).

In any event, 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 any "explosive material" 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.[58]

"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 "explosive" devices). 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,[59] 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."[60] Cases previously holding to the contrary either improperly applied the "modified categorical" approach[61] or relied on commentary that has now been deleted by the amendment.[62]

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.[63] The Commission explained that

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[58] 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).

[59] *See Mathis v. United States*, 136 S. Ct. 2243 (2016).

[60] 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)."

[61] *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).

[62] *See, e.g., United States v. Lipscomb*, 619 F.3d 474, 478 (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 shot gun was a "crime of violence").

[63] *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 F. App'x 249 (4th Cir. 2008); *United States v. Ross*, 416 F. App'x 289 (4th Cir. 2011).

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."[64] 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,"[65]—*i.e.*, "the way the offense is defined by the criminal codes of most states."[66] 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 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."[67] These definitions are not

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[64] 81 Fed. Reg. at 4744 (Reason for Amendment), available at http://www.ussc.gov/sites/default/files/20150121_FR_Final.pdf.

[65] *Taylor v. United States*, 495 U.S. 575, 592 (1990) (identifying the generic definition of burglary).

[66] *Id.* at 598.

[67] *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. Yates*, 866 F.3d 723, 733-34 (6th Cir. 2017) (generic **robbery** is "misappropriation of property under circumstances involving immediate danger to the person"; Ohio robbery did not qualify as such because it can be committed by "minimal force"); *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

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 by different courts.[68] "Robbery" may be another, with some circuits having held that the force used for "generic" robbery is more than the force needed for robbery by stealthy snatching.[69] If the "generic" definition of an offense as identified by your circuit is broader than the "generic"

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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. 2008) (adopting 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*, 774 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. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016) (generic **conspiracy** requires an agreement to commit a crime plus proof of an overt act in furtherance of the agreement); *United States v. Hernandez-Montes*, 831 F.3d 284, 293 (5th Cir. 2016) (generic **attempted murder** requires specific intent to kill); *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 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**).

[68] *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).

[69] *In re Sealed Case*, 548 F.3d 1085, 1090–91 (D.C. Cir.2008) (robbery by "force or violence" that includes stealthy snatching 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).

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."[70] 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*,[71] 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.[72] But, as explained above, the Third Circuit's theory is contrary to the Supreme Court's decision in *Stinson*.

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*. In eliminating involuntary manslaughter from the scope of § 4B1.2, 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*."[73] In other words, the Commission recognizes that if a prior conviction would not have 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 willfulness *or* maliciousness,[74] while others have said that maliciousness is required.[75] To require maliciousness could make a difference. At least one district court has concluded that a state statute with a *mens rea* of "willfully and

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[70] *United States v. Marrero*, 743 F.3d 389, 398 (3d Cir. 2014).

[71] 553 U.S. 137 (2008)

[72] 743 F.3d at 398.

[73] *Id.*

[74] *Brown v. Caraway*, 719 F.3d 583, 590 (7th Cir. 2013) ("willfulness or maliciousness"); *United States v. Misleveck*, 735 F.3d 983, 986 (7th Cir. 2013) ("intentional or malicious"); *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015) ("intentional or malicious").

[75] *United States v. Knight*, 606 F.3d 171, 174 (4th Cir. 2010) ("malicious"); *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) ("willful and malicious"); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009) ("malicious"); *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9th Cir. 2005) ("willful and malicious").

unlawfully," but without any requirement of maliciousness, sweeps more broadly than generic arson.[76] Another has concluded that after *Mathis*, an indivisible state statute that requires a *mens rea* of "wilfully and maliciously" for one means of committing arson, but merely "some purpose or knowledge" for a second means, sweeps more broadly than generic arson.[77]

Courts have defined the *actus reus* of generic arson as the "burning" of real or personal property.[78] 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"[79] or other "damage" to the property by fire or explosion,[80] 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"[81] is not generic arson.[82]

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[76] *See, e.g.*, *Edwards v. United States*, 2017 U.S. Dist. LEXIS 8963 (S.D. Fla. Jan. 20, 2017) (Florida arson). Even if maliciousness is not a required *mens rea* for generic arson, Florida arson still should not qualify as generic arson because it lacks the generic *actus reus*, as noted below.

[77] *United States v. Webb*, __ F. Supp. 3d __, 2016 WL 6647929 (D. Mass. 2016) (Massachusetts arson).

[78] *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 609, 610-11 (2d Cir. 1991).

[79] Cal. Penal Code §§ 451, 452; Colo. Rev. Stat. §§ 18-4-102 to 18-4-105; Idaho Code §§ 18-801 to 18-803; Md. Code. Ann. Crim. Law §§ 6-102, 6-103; Mass. Gen. Laws Ann. Ch. 266, §§ 1, 2, 5, 10; Mich. Comp. Laws §§ 750.71 to 750.75; Miss. Code Ann. §§ 97-17-1, 97-17-3, 97-17-5, 97-17-7, 97-17-11; Nev. Rev. Stat. Ann §§ 205.010 to 205.050; N.C. Gen. Stat. §§ 14-59 to 14-67.1; Okla. Stat. Ann. tit. 21, §§ 1401 to 1403; S.C. Code. Ann. §§ 16-11-110, 16-11-130, 16-11-140, 16-11-170; Vt. Stat. Ann. tit. 13, §§ 502 to 504, 506, 507; Va. Code. §§ 18.2-77, 18.2-79, 18.2-81, 18.2-86; W. Va. Code §§ 61-3-1 to 61-3-3, 61-3-5.

[80] Ala. Code §§ 13A-7-41 to 13A-7-43; Alaska Stat. §§ 11.46.400 to 11.46.410; Ariz. Rev. Stat. Ann. §§ 13-1703 to 13-1704; Del. Code Ann. tit. 11, §§ 801 to 803; Ga. Code Ann. §§ 16-7-60 to 16-7-62; Haw. Rev. Stat. §§ 708-8251 to 708-8252; Ill. Comp. Stat. Ann. ch. 720, §§ 5/20-1, 5/20-1.1; Ind. Code Ann. § 35-43-1-1; Kan. Stat. Ann. § 21-5812; La. Rev. Stat. Ann. §§ 14:51 to 14:53; Minn. Stat. Ann. §§609.561 to 609.563, 609.576; Mo. Ann. Stat. §§ 569.040 to 569.055; Mont. Code Ann. §§ 45-6-102 to 45-6-103; Neb. Rev. Stat. §§ 28-502 to 28-505; N.H. Rev. Stat. Ann. § 634:1; N.Y. Penal Law §§ 150.00 to 150.20; Or. Rev. Stat. §§ 164.315 to 164.325; R.I. Gen. Laws §§ 11-4-2 to 11-4-7; Tenn. Code Ann. § 39-14-301; Utah Code Ann. §§ 76-6-102 to 76-6-103; Wash. Rev. Code Ann. §§ 9A.48.020-.040; Wis. Stat. Ann. §§ 943-.02-.04.

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

[82] 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").

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.[83] The Eighth Circuit has said that the property (whether real or personal) must be "of another,"[84] relying in part on LaFave's *Substantive Criminal Law* treatise describing common-law arson as "the malicious burning of the dwelling house of another."[85] The Fourth Circuit has cited the Eighth Circuit's holding with approval.[86] 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."[87]

[83] *See, e.g.*, *United States v. Misleveck*, 735 F.3d at 986; *Gatson*, 776 F.3d at 410; *Velez-Alderete*, 569 F.3d at 546; *Whaley*, 552 F.3d at 906; *Velasquez-Reyes*, 427 F.3d at 1230; *Hathaway*, 949 F.2d at 610-11; *Knight*, 606 F.3d at 174.

[84] *Whaley*, 552 F.3d at 906-07.

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

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

[87] *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.").