

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**CASE NO. XXXX**

**CHARLES SMITH\***

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**SENTENCING MEMORANDUM**

Defendant, Charles Smith, files this Sentencing Memorandum to (a) address the issue of whether his prior conviction for the offense of burglary of a dwelling is a “crime of violence” for purposes of §2K2.1 of the United States Sentencing Guidelines and (b) urge this Court to, in arriving at his sentence, consider the new definition of crime of violence found in the amendment to the United States Sentencing Guideline that is scheduled to take effect on August 1, 2016.

*Crime of Violence*

Though the Eleventh Circuit Court of Appeals would hold otherwise, Mr. Smith contends that his 2013 Leon County conviction for burglary of a dwelling is not a “crime of violence” for purposes of USSG §2K2.1. The United States Sentencing Commission has defined the term as an offense punishable by more than a year in prison that “(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” USSG §4B1.2(a).

Florida’s burglary statute allows a conviction for the offense if the intruder enters the curtilage and does not require that the intruder enter the dwelling. *See* Fla. Stat. § 810.011(2) (defining a dwelling as “a building or conveyance of any kind, including any attached porch,

whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, *together with the curtilage thereof*” (emphasis added). The inclusion of “curtilage” makes the statute non-generic. See James v. United States, 550 U.S. 192, 212 (2007) (“We agree that the inclusion of curtilage takes Florida’s underlying offense of burglary outside the definition of ‘generic burglary’ set forth in Taylor. . .”), *overruled on other grounds by* Johnson v. United States, 135 St. Ct. 2551 (2015); and Williams v. Warden, 713 F.3d 1332, 1345 (11<sup>th</sup> Cir. 2013) (because “Fla. Stat. § 810.02 defines dwelling to include both the structure and its surrounding curtilage, Taylor rendered it impossible to hold that § 810.02 was categorically a violent felony under the ACCA’s enumerated clause”), *cert. denied*, 135 S. Ct. 52 (2014).

The statute is also “indivisible” as that term is used in Descamps v. United States, 133 St. Ct. 2276, 2282 (2013). In United States v. Lockett, 810 F.3d 1262, 1265 (11<sup>th</sup> Cir. 2015), the court vacated an Armed Career Criminal Act enhancement predicated on two South Carolina burglary convictions, holding that the South Carolina burglary statute was non-generic, overboard, and indivisible under Descamps.<sup>1</sup> Using an example that mirrors the Florida burglary statute, the court recognized that a burglary statute would be indivisible if it included curtilage and did not require the jury to determine whether the entry was made into the curtilage or the dwelling:

Suppose a burglary statute requires entry of a “dwelling” and then defines

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<sup>1</sup>The mandate in Lockett was recalled by the Eleventh Circuit without explanation on February 24, 2016, presumably to await for the Supreme Court decision in Mathis v. United States, No. 15-474 (argument scheduled for April 26, 2016). The Eleventh Circuit’s own internal operating procedures, however, indicate that “published opinions are binding precedent” and that “[t]he issuance or non-issuance of the mandate does not affect this result.” 11<sup>th</sup> Cir. R. 36, I.O.P. 2.

dwelling as “either a house or its curtilage.” The fact that this list looks exhaustive and separates curtilage with an “or” doesn’t tell us whether jurors were required to decide whether the defendant actually entered the house or only the curtilage. And if a statute “does not require the fact finder (whether jury or judge) to make that determination,” then it is indivisible. Decamps, 133 Sup. Ct. 2293.

Lockett at 1268.

The Florida Supreme Court has held that curtilage is part of the structure or building and that burglaries involving the curtilage don’t represent a separate crime:

There is no crime denominated burglary of a curtilage; the curtilage is not a separate location wherein a burglary can occur. Rather it is an integral part of the structure or dwelling that surrounds it. Entry onto the curtilage is, for the purposes of the burglary statute, entry into a structure or dwelling.

Baker v. State, 636 So.2d 1342, 1344 (Fla. 1994). Florida’s standard burglary instruction is consistent with Baker’s description of the offense and does not require jurors to determine whether the defendant entered a building or the curtilage. *See Fla. Std. Jury Instr. (Crim.)* 13.1.<sup>2</sup>

It is because Florida’s statute does not require the jury to differentiate between entry into

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<sup>2</sup>Though the instruction varies depending on circumstances, the heart of the instruction is as follows:

To prove the crime of Burglary, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) entered a [structure] [conveyance] owned by or in the possession of (person alleged).
2. At the time of entering the [structure] [conveyance], (defendant) had the intent to commit [the crime alleged] [an offense other than burglary or trespass] in that [structure] [conveyance].

In the case of burglary of a dwelling, the instructions require the jury to determine whether the structure was a dwelling. The instruction defines both “structure” and “dwelling” to include “the enclosed space of ground and out buildings immediately surrounding” the structure or the building.

the curtilage and entry into the structure that Florida's statute indivisible. *See United States v. Estrella*, 758 F.3d 1239, 1246 (11<sup>th</sup> Cir. 2014) ("But if the statutory scheme is not such that it would technically require the jury to agree to convict on the basis of one alternative as opposed to the other, then the statute is not divisible . . ."). Because the statute is indivisible, the modified categorical approach is inapplicable. *Decamps v. United States*, 133 St. Ct. at 133. Accordingly, regardless of what the charging document may or may not say and regardless of what facts are set out in the presentence report, a Florida conviction for burglary of a dwelling does not count as a "burglary of a dwelling" for purposes of the United States Sentencing Guidelines

Mr. Smith recognizes that the Eleventh Circuit Court of Appeals has held that a conviction of Florida burglary of a dwelling statute still qualifies under the "residual clause," of USSG §B1.2(a)(2). *See United States v. Matchett*, 802 F.3d 1185, 1197 (2015). And while *Matchett* is binding precedent for this Court, Mr. Smith contends that the decision was decided incorrectly. His position is that the correct interpretation of the law is found in such cases as *United States v. Madrid*, 805 F.3d 1204, 1210 (10<sup>th</sup> Cir. 2015), where the court extended the holding in *Johnson v. United States*, *infra.*, to the residual clause of the Guidelines and found that the clause violated the Fifth Amendment guarantee of due process. *See also Cummings v. United States*, Case No. 15-CV-1219, 2016 WL 799267, \*8-9 (E.D. Wis. February 2, 2016) (where the court cites a list of cases in support of its conclusion that "the clear weight of other circuits authority supports application of *Johnson* to the guidelines (at least on direct review)")(Sip copy).

#### *Guidelines Amendment*

The United States Sentencing Commission has promulgated an amendment to the definition of “crime of violence” that is scheduled to take effect on August 1, 2016. The amendment is available on the web page of the United States Sentencing Commission at [www.ussc.gov](http://www.ussc.gov). A copy of the amendment is attached as Exhibit One. It amends § 4B1.2(a)(2) by striking the residual clause of that paragraph. It also deletes the crime of burglary of a dwelling from the enumerated offenses. The amended version reads as follows:

(a) the term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that -

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnaping, aggravated assault, a forcible sex offense, robbery, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Ex. One, pp. 5-6. In the “Reason for Amendment,” the Sentencing Commission explained that it struck the residual clause because it “implicates many of the same concerns cited by the Supreme Court in Johnson.” *Id.* at 2. The Commission deleted burglary from the list of enumerated offenses for a number of reasons, among them the fact that “several recent studies demonstrate that most burglaries do not involve physical violence”:

The amendment deletes “burglary of a dwelling” from the list of enumerated offenses. In implementing this change, the Commission considered that (1) burglary offenses rarely result in physical violence, (2) “burglary of a dwelling” is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release.

*Id.* at 3.

Mr. Smith is scheduled to be sentenced on June 16, about six weeks before the

amendment takes effect. Because of that, this Court has the authority to ignore the amendment and sentence him under the existing guideline. Subsection (a)(2) of 18 U.S.C. § 3553(a) requires sentencing courts to consider “the need for the sentence imposed - to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” Congress has charged the United States Sentencing Commission with the responsibility of modifying the sentencing guidelines over time as new information and new decisions affect sentencing rationale. *See* 28 U.S.C. § 994(o). In this instance, the Commission has concluded that a longer sentence for those in Mr. Smith’s circumstance is no longer justified on the basis of a prior burglary conviction. The conclusion carries as much weight now as it will after August 1. A sentence consistent with the new guideline would “reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense” far more so than a sentence based on the existing guideline, which relies upon assumptions that are no longer valid.

### *Conclusion*

While recognizing this Court’s obligation to follow existing precedent, Mr. Smith contends that his prior conviction for burglary of a dwelling is not a “crime of violence” because, as recognized in such cases as United States v. Madrid, *infra.*, the residual clause of USSG §4B1.2(a)(2) is so vague it violates the guarantee of due process. Should this Court, following existing precedent, conclude that the burglary offense does qualify as a crime of violence for purposes of the Guidelines, Mr. Smith asks the Court to adopt the reasoning of the United States Sentencing Commission and impose a sentence that reflects the August 1, 2016, amendment.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been furnished via electronic delivery to  
Assistant United States Attorney Herbert Lindsey this 21st day of April, 2016.

Respectfully submitted,

*s/Randolph P. Murrell*

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*\*For purposes of privacy, a fictional name has been substituted for the name of the actual defendant*