I. Potential Challenges Post-*Johnson* (Other Than Career Offender).

A. Non-ACCA gun cases under U.S.S.G. § 2K2.1.

U.S.S.G. § 2K2.1 imposes various enhancements for one or more prior "crimes of violence." According to application note 1, the term "crime of violence" has the same meaning as that found in U.S.S.G. § 4B1.2 and its commentary. *See United States v. McGill*, 450 F.3d 1276 (11th Cir. 2006) (holding prior convictions qualify as "crimes of violence" under residual clause of § 4B1.2(a)(2) and therefore increased defendant's guidelines range under § 2K2.1). Accordingly, any argument listed above as a means to attack the career offender enhancement may also be used to attack enhancements under U.S.S.G. § 2K2.1.

B. Supervised Release Violations.

Under U.S.S.G. § 7B1.1(a)(1), if the conduct is a "crime of violence" it is a Grade A violation. The commentary to § 7B1.1(a)(1) states that the term "crime of violence" as used in § 7B1.1(a)(1) is defined in U.S.S.G. § 4B1.2 and its commentary. Accordingly, any argument listed above as a means to attack the career offender enhancement may also be used to challenge the classification of conduct as a Grade A violation.

Note also that the Supreme Court vacated and remanded a supervised release case in light of *Johnson*. *See United States v. Cooper*, 598 Fed. Appx. 682 (11th Cir. 2015) (holding false imprisonment under Fla. Stat. § 787.02 is a "crime of violence" under residual clause of § 4B1.2 and, therefore, constituted a Grade A violation), *cert. granted, vacated and remanded in light of Johnson*, ___ S. Ct. ___, 2015 WL 1228957 (U.S. June 30, 2015).

C. Reentry Cases and U.S.S.G. § 2L1.2(b)(1).

U.S.S.G. § 2L1.2(b)(1)(C) provides an 8-level enhancement for defendants who were previously deported or unlawfully remained after a prior felony conviction for an "aggravated felony." The guideline commentary makes clear that "aggravated felony" is given "the meaning of that term" found in 8 U.S.C. § 1101(a)(43), which, in turn, adopts whole-cloth the definition of "crime of violence" found in 18 U.S.C. § 16(b). *See United States v. Ramsey*, 55 F.3d 580 (11th Cir. 1995) ("We look to the definition of 'crime of violence' in 18 U.S.C. § 16(b) to determine whether attempted lewd assault is an aggravated felony.").

As discussed below, precedent construing the ACCA residual clause generally applies to the residual clause in §16(b), and therefore suggests that post-*Johnson*, only the 4-level enhancement for a "felony" should apply for many priors that previously qualified as "aggravated felonies" via § 16(b).

D. *Johnson*'s Implications for the Residual Clause in 18 U.S.C. § 16(b).

Johnson strongly suggests that a successful "void for vagueness" challenge can also be made to the residual clause in 18 U.S.C. § 16(b), which defines the term "crime of violence" as "any other

offense . . . that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The only distinction between the residual clause in § 16(b) and that in ACCA is the inclusion of the phrase "or property" in § 16(b) and its omission in § 924(e)(2)(B)(ii). However, that is a distinction without a difference for our purposes.

Precedent construing the ACCA residual clause and the residual clause in U.S.S.G. § 4B1.2 has generally applied to § 16(b), and therefore suggests *Johnson* has abrogated prior "crime of violence" precedent under § 16(b). *See United States v. Keelan*, 786 F.3d 865 (11th Cir. 2015) (adopting "ordinary case" standard for analyzing § 16(b) cases pre-*Johnson*; fn.4 includes prior precedent holding that every "crime of violence" under § 4B1.2 is necessarily a "crime of violence" under §16(b); fn. 7 calls the ACCA residual clause "analogous" to the residual clause in § 16(b)).

Because § 16 provides the general definition of the term "crime of violence" used in many federal statutes, the possible abrogation of the residual clause in § 16(b) has far-reaching implications. Below are the affected statutes that we are most likely to encounter in the representation of our clients. **NOTE: this list is not exhaustive. Please let us know of any others so that we may include them here**:

1. 18 U.S.C. § 924(c)(1)(A) Enhancements.

Title 18, U.S.C. § 924(c)(1)(A) provides sentencing enhancements for "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." The definition of "crime of violence" in § 924(c)(3) is identical to the definition found in 18 U.S.C. § 16. Thus, post-*Johnson* arguments that can be used to attack § 16(b)'s residual clause may also be used to argue that the residual clause in § 924(c)(3) is void for vagueness.

2. Restitution.

The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, provides, *inter* alia, that a district court must order a defendant to pay restitution to the "victim" of a "crime of violence." The Eleventh Circuit has determined that it is the definition of "crime of violence" in 18 U.S.C. § 16 that controls. See *United States v. Keelan*, 786 F.3d 865 (11th Cir. 2015) (restitution is proper under MVRA because enticing a minor under 18 U.S.C. § 2422(b) is a "crime of violence" under residual clause in 18 U.S.C. § 16(b)). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause has implications for restitution awarded under the MVRA.

3. Mandatory Life Sentences Under 18 U.S.C. § 3559(c).

Title 18, U.S.C. § 3559(c) mandates a life sentence for certain felons who have been convicted of "2 or more serious violent felonies." § 3559(c)(1)(A)(i). Like the ACCA's definition of "violent felony," a prior offense is a "serious violent felony" under § 3559(c) if it is one of the many offenses specifically enumerated, *see* § 3559(c)(2)(F)(i), qualifies under the elements clause, *see* § 3559(c)(2)(F)(ii) ("any other offense punishable by a maximum term of imprisonment of 10

years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another"), or qualifies under the residual clause, *see id*. ("any other offense . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."). In determining whether a crime is a "serious violent felony" under § 3559(c)(2)(F)(ii)'s residual clause, the Eleventh Circuit has examined cases discussing 18 U.S.C. § 16(b)'s residual clause, describing the language of the two provisions to be "virtually identical." *See United States v. Evans*, 478 F.3d 1332, 1343 (11th Cir. 2007). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause has implications for mandatory life sentences under § 3559(c).

4. Detention Hearings.

Under 18 U.S.C. §§ 3142(f)(1), (g)(1) and 3143(a)(2), a court can detain a defendant who has been found to have committed a "crime of violence" as that term is defined in 18 U.S.C. § 3156(a)(4)(B)'s residual clause ("any other offense . . . that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."). The language of § 3156(a)(4)(B)'s residual clause is identical to that in 18 U.S.C. § 16(b). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause has implications for whether a client may be detained as a result of prior crimes of violence.

5. Extradition.

If a person has committed an offense against a national of the United States in a foreign country, 18 U.S.C. § 3181 permits the extradition of that person to the United States "without regard to the existence of any treaty of extradition" if that offense would constitute a "crime[] of violence as defined under section 16." *See* § 3181(b)(1). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause has implications for extradition proceedings.

6. Failure to Register Under SORNA.

Under 18 U.S.C. § 2250(c), a person who fails to register under the Sex Offender Registration and Notification Act and commits a "crime of violence" under "Federal Law" – which presumably includes crimes that fall within the definition of "crime of violence" under 18 U.S.C. § 16 – is subject to a term of imprisonment which shall be served consecutively to any term of imprisonment imposed for simply failing to register under 18 U.S.C. § 2250(a). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause has implications for sex offenders who have failed to register.

7. Money Laundering.

To be convicted of money laundering, the government must prove that the defendant conducted or attempted to conduct a financial transaction which involved the proceeds of "specified unlawful activity." 18 U.S.C. § 1956(a)(1). If the financial transaction occurs at least in part in the United States, the statute defines "specified unlawful activity" to include "an offense against a foreign nation involving" certain enumerated offenses, "or crime of violence (as defined in

section 16)." § 1956(c)(7)(B)(ii). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause has implications in money laundering cases.

8. Racketeering.

Under 18 U.S.C. § 1959 a defendant who "threatens to commit a crime of violence" in aid of a racketeering activity is subject to a term of imprisonment of up to five years. *See* § 1959(a)(4). The Supreme Court has noted that the definition in 18 U.S.C. § 16 was intended to apply to this provision. *See Leocal*, 543 U.S. at 6, 125 S. Ct. at 381. It, too, is therefore vulnerable to a challenge to § 16(b)'s residual clause.

9. Body Armor.

Under 18 U.S.C. § 931 (a)(1), it is "unlawful for a person to purchase, own or possess body armor if the person has been convicted" of a felony under state or federal law that would constitute a "crime of violence" as that term is defined in 18 U.S.C. §16.

10. Armor-Piercing Ammunition Enhancement.

Under 18 U.S.C. § 929(a)(1), a person in possession of or using armor-piercing ammunition during and in relation to the commission of a federal "crime of violence" is subject to a minimum mandatory five-year term of imprisonment in addition to the punishment provided for the underlying offense. Although the term "crime of violence" is not specifically defined in the statute, 18 U.S.C. § 16 presumably applies, and thus *Johnson* provides a means to attack this sentencing enhancement.

11. Use of Minors in Crimes of Violence.

Under 18 U.S.C. § 25, any person 18 years or older who intentionally uses a minor either to commit a "crime of violence" or to assist in avoiding detection or apprehension for a "crime of violence," is subject, for the first offense, to twice the maximum term of imprisonment otherwise authorized for the offense and, for each subsequent conviction, to three times the otherwise-authorized maximum term of imprisonment. Section 25(a)(1) states that the term "crime of violence" in the statute "has the meaning set forth in section 16." *Johnson*'s possible abrogation of § 16(b)'s residual clause provides a means to attack the increased penalties for use of minors.

12. Protection of Individuals Performing Certain Official Duties.

Jurors, witnesses, informants, and other "covered persons" are protected under 18 U.S.C. § 119. A defendant who knowingly makes restricted personal information about a covered person (or a member of the covered person's family) publicly available with the intent to threaten or facilitate a "crime of violence" against the covered person (or their family) is subject to a term if imprisonment up to five years. § 119(a). The statute expressly gives the term "crime of violence" the meaning given it in 18 U.S.C. § 16. *See* § 119(b)(3). Thus, *Johnson*'s possible abrogation of § 16(b)'s residual clause may limit the types of offenses that may be prosecuted under this section.

13. Explosive Materials.

Under 18 U.S.C. § 844(o), any person who knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a "crime of violence" (as defined in 18 U.S.C. § 924(c)(3)) shall be subject to a mandatory consecutive term of 10 years for a first offense, and a mandatory consecutive term of 20 years for the second or subsequent offense. *See* 18 U.S.C. § 844(h). As discussed above, the residual clause in § 924(c)(3) is identical to that found in 18 U.S.C. § 16. Thus, post- *Johnson* arguments that can be used to attack § 16(b)'s residual clause may also be used to argue that the residual clause in § 924(c)(3)(B) is void of vagueness, and therefore to attack a consecutive sentence under § 844.

Title 18, U.S.C. § 842(p) prohibits the distribution of information relating to explosives, destructive devices, and weapons of mass destruction in relation to a crime of violence. The Supreme Court has stated that provision has "as an element the commission of a crime of violence under § 16." *Leocal v. Ashcroft*, 543 U.S. 1, 7 n.4, 125 S. Ct. 377, 381 n.4 (2004). It, too, is therefore vulnerable to a challenge to § 16(b)'s residual clause.