

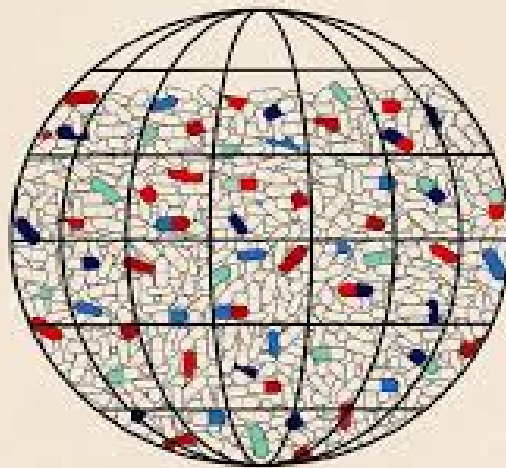
JOHNSON V. UNITED STATES, 135 S. Ct. 2551 (2015): Its Impact and Implications

ADVANCED DEFENDER CONFERENCE
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BRAVE NEW WORLD



Overview

- I. Pre-*Johnson* world
- II. Summary of *Johnson*
- III. Implications:
 - A. Armed Career Criminal Act
 - B. Career Offender
 - C. U.S.S.G. §§ 2K2.1, 7B1.1
 - D. 18 U.S.C. § 16(b) (which is used for U.S.S.G. § 2L1.2(b)(1)(C) and other federal statutes)
 - E. 18 U.S.C. § 924(c)

I. Pre-*Johnson* World

Armed Career Criminal Act: 18 U.S.C. § 924(e)

15-year mandatory minimum for felon-in-possession offense if client has three prior convictions for a "violent felony" or "serious drug offense"

"Violent felony" => Three-Part Definition

- Force Clause: offense "has as an element the use, attempted use, or threatened use of physical force against the person of another"
- Enumerated offenses: burglary, arson, extortion, use of explosives
- Residual Clause: offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Pre-*Johnson* Residual Clause Analysis

Inquiry under *James, Begay, Chambers, Sykes*: categorical approach

Do elements of offense in ordinary case:

- a. present risk of injury at similar level to enumerated offenses (generic burglary, arson, extortion, use of explosives)? +
- b. require purposeful, violent, and aggressive conduct?

II. Summary of *Johnson*

Johnson: Residual Clause Void for Vagueness

Reasons turn on uncertainty of ordinary case inquiry:

1. Grave uncertainty about how to estimate risk because no one knows how to determine what the ordinary case of a crime is: Gut instinct, common sense, statistics, google search – not sufficient guides.
2. Grave uncertainty about how to determine quantum of risk (i.e., how much risk) because quantum of risk is tied to ordinary case. Again, back to ordinary case problem.

Denies fair notice and invites arbitrary enforcement

Johnson: Expressly overrules precedent

James (2007): Florida attempted burglary qualifies as a "violent felony" under the residual clause

Sykes (2011): Indiana offense of vehicular flight from an officer qualifies as a "violent felony" under the residual clause

III. Implications: ACCA

What's left of the ACCA?

ACCA "violent felony" =

1. **Force Clause:** Has an element the use, attempted use, or threatened use of physical force against a person, or
2. **Enumerated offenses:** burglary, arson, extortion, use of explosives (determined by generic definition).

Categorical approach applies: If "most innocent conduct" or "full range of conduct" covered by the elements of the statute does not match these definitions, prior cannot qualify as "violent felony." *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012).

ACCA Force Clause: Be Careful

Almost Nothing Counts As
"Violent Felony"

Fighting Against the Force Clause

Four Key Issues to look for:

- Requires "violent force," not "unwanted touching"
- Force must be directed against a person, not property
- Requires the use of force, not merely the causation of physical injury.
- Force must be used intentionally, not recklessly or negligently

Practice Point: Many of the best force-clause cases have been litigated under U.S.S.G. 2L1.2.

Issue 1: “Violent Force” Requirement

“Violent Force” means “strong physical force” that is “capable of causing physical injury or pain” to another person. *Johnson v. United States*, 559 U.S. 133 (2010)

Examples of “unwanted touching” or “offensive touching”:

- Federal assault under 18 U.S.C. § 111(a)
 - *United States v. Bell*, ___ F.Supp.3d___, 2016 WL 344749 (N.D. Cal. 2016) (collecting federal appellate cases)
- Assault or Battery.
 - *United States v. Johnson*, 559 U.S. 133 (2010) (Florida); *United States v. Holloway*, 630 F.3d 252 (Massachusetts); *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013) (Maryland).
- Resisting arrest
 - *United States v. Aparico-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc) (Maryland); *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (Arizona); *United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (Massachusetts).
- Battery on a law enforcement officer; Battery on pregnant woman.
 - *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013) (Virginia); *United States v. Braun*, ___ F.3d ___, 2015 WL 5201729 (11th Cir. 2015) (Florida);

Issue 1: “Violent Force” Requirement

Don't be deceived by labels: Sometimes offense will have element labeled “force or violence,” but that does not mean it has element of ACCA “violent force.”

Examples:

- Federal robbery of government property. *United States v. Bell*, ___F. Supp.3d___, 2016 WL 344749 (N.D. Cal. 2016) (“violence” can be accomplished by de minimis force).
- North Carolina robbery. *United States v. Gardner*, ___F.3d___, 2016 WL 2893881 (4th Cir. 2016) (“force” can be accomplished by de minimis force).
- Massachusetts armed robbery. *United States v. Parnell*, ___F.3d___, 2016 WL 1633167 (9th Cir. 2016) (“force and violence” can be accomplished by de minimis force).
- Puerto Rico robbery. *United States v. Castro-Vasquez*, 802 F.3d 28 (1st Cir. 2015) (“violence or intimidation” can be accomplished by “slightest use of force”).
- Wisconsin/Oregon robberies. *United States v. Robinson*, Case No. 16-C-156 (D. Wisc. May 24, 2016); *United States v. Dunlap*, ___F.3d___, 2016 WL 591757 (D. Ore. 2016).
- D.C. robbery. *In re Sealed Case*, 548 F.3d 1085 (D.C. 2008) (“force or violence” defined by statute to include purse-snatching offenses: “sudden or stealthy seizure or snatching”)
 - Note: same argument excludes similar offenses, such as “larceny from the person” or “pickpocketing”

But see: *United States v. Boman*, 810 F.3d 534 (8th Cir. 2016) (finding federal robbery under Section 2111 has element of violent force)

Issue 1: “Violent Force” Requirement

Kidnapping / False Imprisonment: “physical restraint” does not automatically equal “physical force”

- *Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9th Cir. 2012) (California kidnapping does not satisfy force clause because restraint can be accomplished through “any means of instilling fear”)
- *United States v. Moreno-Flores*, 542 F.3d 445, 450-52 (5th Cir. 2008) (determining that California kidnapping statute did not include physical force as an element because the crime could be accomplished through non-physical means).
- *United States v. Gonzalez-Perez*, 472 F.3d 1158 (11th Cir. 2012) (Florida false imprisonment does not satisfy force clause because restraint can be accomplished “secretly”)
- *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988) (Model Penal Code definition of kidnapping does not require force because it covers kidnapping by trickery or deceit)

Federal kidnapping:

United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1983) (noting that a kidnapper may “use[] deceit and trickery to accomplish his purpose rather than overt force”); see also *United States v. Wills*, 234 F.3d 174, 177 (4th Cir. 2000) (“By its terms, § 1201(a) criminalizes kidnappings accomplished through physical, forcible means and also by nonphysical, nonforcible means.”); see *Torres v. Lynch*, __ S. Ct. __, 2016 WL 2903424 (2016) (suggesting that kidnapping not cv).

Issue 1: “Violent Force” Requirement

Offenses based on absence of legally valid consent do not qualify under the force clause.

- Statutory Rape
 - *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013) (Tennessee aggravated statutory rape); *United States v. Daye*, 571 F.3d 225 (2d Cir. 2009) (Vermont statutory rape); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of a child)
- Involuntary or Incompetent Consent
 - *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape of victim who is “mentally disabled, mentally incapacitated, or physically helpless”)

If “force” is an element, look for state case law extending the provision to “constructive force” (i.e., mental compulsion – not physical force) situations.

Issue 1: “Violent Force” Requirement

Offenses with a weapon element do not qualify if no active use required of weapon:

- *United States v. Parnell*, ___ F.3d ___, 2016 WL 1633167 (9th Cir. 2016) (armed robbery not a crime of violence because weapon need not be “fired, employed to effectuate robbery, used in a threatening manner, or even generally or openly displayed”).
- *United States v. Werle*, 815 F.3d 614 (9th Cir. 2016) (Washington riot statute not a crime of violence because weapon need not be used but just “readily available”)

Issue 2: Property vs. Person

Force, even violent, against **property** does not qualify under ACCA force clause.

Examples: Hobbs Act robbery/bank robbery includes threatening to injure one's **property**. That automatically disqualifies Hobbs Act robbery/bank robbery from qualifying under the force clause.

Washington state first degree robbery includes threatening injury to property; therefore, cannot qualify. *United States v. Navarro*, 2016 WL 1253830 (E.D. Wash. March 10, 2016).

Maryland robbery also includes threatening injury to property; therefore, cannot qualify. *Douglas v. State*, 9 Md. App. 647 (Md. Ct. Spec. App. 1970); *Giles v. State*, 8 Md. App. 721 (Md. Ct. Spec. App. 1970).

Ohio robbery includes threat against things - not persons; therefore, cannot qualify. *United States v. Litzy*, ___ F.Supp.3d ___, 2015 WL 5895199 (S.D.W.V. 2015).

Ohio robbery with a dangerous weapon also includes threatening injury to things. *United States v. Patterson*, 2015 WL 5675110 (N.D. Ohio Sept. 25, 2015); *United States v. Nagy*, ___ F.Supp.3d ___, 2015 WL 6870120 (N.D. Ohio 2015).

North Carolina conviction for discharging firearm into occupied building does not qualify because it is **force against property – not a person**. *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. 2015).

Issue 3: Using Force vs. Causing Injury

Offenses with elements requiring **physical injury, serious physical injury, or even death** do not equal "violent force."

This is true because physical injury can be committed without use of **strong physical force**:

- poisoning,
- laying a trap,
- exposing someone to hazardous chemicals,
- standing guard while confederate injures another,
- locking someone in car on a hot day,
- starving someone to death, neglecting a child, etc.
- placing a barrier in front of a car, which causes an accident
- leaving an unconscious person in middle of road

Issue 3: Using Force vs. Causing Injury

Examples: Offenses with **physical injury**, **serious physical injury**, or even **death** elements that do not qualify as violent felonies under the force clause:

Assault Offenses

- Connecticut assault requiring intentionally causing physical injury. *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015) (**post-Johnson**); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003)
- Puerto Rico aggravated battery requiring intentional infliction of physical injury. *Matter of Guzman-Polanco*, 26 I & N Dec. 713 (BIA 2016) (**post-Johnson**).
- Texas aggravated assault requiring intentionally causing physical injury. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006).
- Colorado assault requiring defendant to cause bodily injury **using a deadly weapon**. *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005).
- New Jersey aggravated assault requiring a defendant to cause significant bodily injury. *United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013).
- Arizona aggravated assault requiring attempt to cause injury with use of dangerous weapon. *United States v. Gomez-Hernandez*, 680 F.3d 1171 (9th Cir. 2012).
- Arizona endangerment requiring action that creates risk of imminent death or physical injury. *United States v. Hernandez-Castellanos*, 287 F.3d 876, 881 (9th Cir. 2002).

Issue 3: Using Force vs. Causing Injury

Examples: Offenses with **physical injury, serious physical injury, or even death** elements that do not qualify as violent felonies under the force clause:

Threat Offenses

- *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) (terroristic threats: threatening an act that results in serious bodily injury or death).

Child Abuse Offenses

- *United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012) (child abuse resulting in physical injury); *United States v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010) (causing physical injury to a child); *United States v. Lopez-Patino*, 391 F.3d 1034, 1037 (9th Cir. 2004) (causing child physical injury does not require use of force).

Manslaughter Offenses

- *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (Florida manslaughter).

Issue 3: Using Force vs. Causing Injury

Examples continued: Common offenses with **physical injury, serious physical injury, or even death** elements that do not qualify as violent felonies under the force clause:

- **Murder** - See *United States v. Nicks*, Case No. WJM-15-0321 (D. Colorado April 4, 2016) (second degree murder does not have element of violent physical force)
- **Robbery** (because can be done by putting in fear of *injury*)
- **Robbery with a dangerous weapon** (dangerous weapon can be poison, mace, or tear gas (or may just require mere possession of weapon))
- **Carjacking** (can be done by putting in fear of *injury*)
- **Possession of a dangerous weapon with intent to injure**
- **Sexual offenses requiring actual or threat of physical injury.**

Issue 3: Using Force vs. Causing Injury

Examples Continued: Common offenses with **physical injury, serious physical injury, or even death** elements that do not qualify as violent felonies under the force clause:

Federal crimes: Hobbs Act robbery, bank robbery, armed bank robbery, VICAR, carjacking, murder, assault, use of weapon of mass destruction,

- All can be accomplished by putting someone **in fear of physical injury or actual causing physical injury or death**, but violent force not required.

Issue 3: Using Force vs. Causing Injury

Beware:

United States v. Rice, ___ F.3d___, 2016 WL 537589 (8th Cir. 2016) (finding that Arkansas second degree battery statute with physical injury element necessarily requires violent physical force -- wrongly relies on *United States v. Castleman*, 134 S. Ct. 1405 (2014)– but see great dissent that says *Castleman* is inapposite; see also *United States v. Jordan*, ___ F.3d___ 2016 WL 556729 (8th Cir. 2016), which seems to say opposite); *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015) (rejecting government's *Castleman* theory); *In re Guzman-Polanco*, 26 I & N Dec. 713 (BIA 2016) (same).

United States v. McNeal, ___ F.3d___, 2106 WL 1178823 (4th Cir. 2016) (finding that federal bank robbery is a "crime of violence" because it is a "rare" occasion that it will occur by threat of "poison").

Also, bad cases in other Circuits and district courts, but preserve issue.

Issue 4: Intentional vs. Reckless Conduct

All offenses must require **intentional** use of violent force or **intentional** threat of violent force; reckless mens rea will not suffice.

- See *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (assault requiring defendant to recklessly cause serious physical injury using a deadly weapon); *United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011) (aggravated assault requiring defendant to recklessly cause serious bodily injury); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (assault statute requiring reckless physical injury to another); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (California robbery does not require intentional use of force); *United States v. Parnell*, __ F.3d __, 2016 WL 1633167 (9th Cir. 2016) (Mass. assault and battery with dangerous weapon has reckless mens rea).

Argue that even **if some general intent exists**, a crime satisfies the force clause *only* if it specifically requires an **intent to use or threaten violent force**.

- See *Flores-Lopez v. Holder*, 685 F.3d 857, 863 (9th Cir. 2012); *Covarrubias Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011); *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (**intentionally** discharging a firearm in a negligent manner that creates a risk of injury or death); *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013).

Issue 4: Intentional vs. Reckless Conduct

Threats: Argue intimidation/putting someone in fear of bodily injury does not equal **intentional** threat if statute does not require defendant to have intent to put another in fear of bodily injury. *See United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992) (threat under force clause "means both an **intent** to use force and a communication of that threat").

Examples of statutes that do not have intentional mens rea:

Federal bank robbery, which can be committed without proof of intent to intimidate, even though intent to steal must exist - *United States v. Yockel*, 320 F.3d 818 (8th Cir. 2003); *United States v. Kelley*, 412 F.3d 1240 (11th Cir. 2005); *United States v. Woodrup*, 86 F.3d 359 (4th Cir. 1996); **but see** *McNeal* (4th Cir. 2016) (finding that federal bank robbery satisfies intentional mens rea).

Federal first degree murder – includes felony murder, which does not require intentional use of violent force.

Federal second degree murder – can be committed with reckless disregard for human life.

ACCA Enumerated Offenses:

Be Careful

ACCA Enumerated Offenses: Must Be Generic

Generic Burglary: 3 elements

1. unlawful entry or remaining

- California first degree burglary, *Descamps v. United States*, 133 S. Ct. 2276 (2013).
- Washington residential burglary, *United States v. Wilkinson*, 589 Fed. Appx. 348 (9th Cir. Dec. 11, 2014) (no trespass required).

2. in a building (not in a vehicle, boat, or telephone booth)

- Maryland first degree burglary, *United States v. Henriquez*, 757 F.3d 144 (4th Cir. 2014); Oregon first & second degree burglary, *United States v. Mayer*, 560 F.3d 948 (9th Cir. 2009); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc)

3. with intent to commit a crime

- Maryland fourth degree burglary, *United States v. Martin*, 753 F.3d 485 (4th Cir. 2014)

Generic Arson

- Delaware third degree arson not generic arson, *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013) (lacks the generic requirement of malicious or willful *mens rea*). ***Generic arson definition not clear – *Torres v. Lynch*, ___ S. Ct. ___ (2016).

Generic Extortion

- California robbery not generic extortion because it lacks consent requirement (*United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015)).
- North Carolina robbery not generic extortion for same reason (*United States v. Gardner*, ___ F.3d ___, 2016 WL 2893881 (4th Cir. 2016)).

See also *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (Hobbs Act extortion is not same as Hobbs Act robbery).

Final ACCA Issue - Conspiracies and Attempts:

Be Careful

Conspiracies

Conspiracies **never** qualify as “crimes of violence” under the force clause or the enumerated offenses clause, **no matter what the object is of the conspiracy.**

Pre-Johnson cases:

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. Gore*, 636 F.3d 728 (5th Cir. 2011); *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) (implies conspiracy does not satisfy force clause or enumerated offenses).

Post-Johnson cases:

United States v. Gonzalez-Ruiz, 794 F.3d 832 (7th Cir. 2015) (finding conspiracy to commit armed robbery not violent felony); *United States v. Melvin*, No. 13-4857 (4th Cir. Oct. 20, 2015) (finding conspiracy to commit robbery with a dangerous weapon not a violent felony).

United States v. Merritte, 2016 WL 2901661 (D. Nev. 2016) (conspiracy to commit Hobbs Act robbery not crime of violence under force clause); *United States v. Luong*, 2016 WL 1588495 (E.D. Cal. 2016); *United States v. Edmundson*, ___ F. Supp. 3d___ 2015 WL 9582736 (D. Md. 2015) (same).

Attempts

- Do not qualify as enumerated offenses. *United States v. James*, 550 U.S. 192 (2007) (attempted burglary is not burglary).
- Qualify under force clause if (1) the object of the attempt satisfies the force clause and (2) the attempt statute must be **generic attempt**, which requires a) a **"substantial step"** and b) **"probable desistance."** *United States v. James*, 550 U.S. 192 (2007); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014) (real "substantial step" required); *United States v. Garcia-Jimenez*, 807 F.3d 1979 (9th Cir. 2015) (generic attempt requires "probable desistance" – defendant's actions indicate that crime will take place unless interrupted by independent circumstances").

III. Implications: Career Offender

Career Offender: U.S.S.G. § 4B1.1 and 4B1.2

Enhancement applies if defendant's current offense is a "crime of violence" or "controlled substance offense" and defendant has two prior convictions for "crime of violence" or "controlled substance offense."

"Crime of violence" => Three-Part Definition

- Force Clause: offense "has as an element the use, attempted use, or threatened use of physical force against the person of another."
- Enumerated offenses: burglary of a dwelling, arson, extortion, use of explosives.

[Proposed Amendment: murder, voluntary manslaughter, kidnapping, aggravated assault, ~~burglary of a dwelling~~, robbery, forcible sex offense, arson, extortion, or use of 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).]

Forcible sex offense and extortion defined in commentary]

- Residual Clause: offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

[Proposed Amendment: strike the residual clause]

Johnson Voids Career-Offender Residual Clause

Johnson should apply to render career offender residual clause (U.S.S.G. § 4B1.2(a)(2)) void for vagueness because it has identical language as that of ACCA residual clause in defining "crime of violence."

Following *Johnson*, the S.Ct. GVR'd several career offender cases, and some circuits have already indicated that *Johnson* applies. *United States v. Pawlak*, ___F.3d___, 2016 WL 2802723 (6th Cir. 2016); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015); *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016); *United States v. Welch*, 2016 WL 536656 (2d Cir. 2016); *United States v. Goodwin*, 2015 WL 5167789 (10th Cir. 2015) (assumed without deciding); *United States v. Ramirez*, 799 F.3d 845 (7th Cir. 2015) (assumed without deciding); *United States v. Talmore*, No. 13-10650 (9th Cir. 2015) (assumed without deciding); *United States v. Frazier*, 621 F. App'x 166 (4th Cir. 2005) (assumed without deciding).

Government is now conceding that *Johnson* applies to the career offender residual clause, and even conceding plain error on direct appeal where issue was not preserved at sentencing. See *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. Aug. 11, 2015); *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015); *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 17, 2015); *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015); *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015), etc.

Johnson Voids Career-Offender Residual Clause

Beware: Some cases hold that guidelines can't be unconstitutional: *United States v. Tichenor*, 683 F.3d 358 (7th Cir. 2012); *United States v. Wivell*, 893 F.2d 156, 160 (8th Cir. 1990).

But these cases should be no longer good law in light of *Peugh v. United States*, 133 S. Ct. 2072 (2013), which found advisory guidelines are subject to Ex Post Clause rooted in notice.

- See *Pawlak, Madrid, Soto-Rivera*; see also *United States v. Gallagher*, 99 F.3d 329 (9th Cir. 1996) (vague sentencing provisions may pose constitutional questions); *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003); *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015) (*Johnson* casts doubt on guidelines residual clause).

But see: *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015) (holding post-*Johnson* that vagueness doctrine does not apply to advisory guidelines).

Career Offender: *Johnson* Challenges to Instant Offense

Be Careful: Make *Johnson* challenge to instant federal offense as well as priors. If instant offense does not qualify as "crime of violence" under *Johnson*, then can't be career offender no matter what the priors are.

What's left of the Career Offender provision?

Force clause same as ACCA now but significant change coming in enumerated offenses clause:

1. **Force Clause:** Has an element the use, attempted use, or threatened use of physical force against a person, or
2. **Enumerated offenses:** burglary of a dwelling, arson, extortion, use of explosives (determined by generic definition).

[**Proposed Amendment:** murder, voluntary (not involuntary) manslaughter, kidnapping, aggravated assault, ~~burglary of a dwelling~~, forcible sex offense, robbery, arson, extortion, or use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) (sawed off shotgun, silencer bomb, machine gun), or explosive material as defined in 18 U.S.C. § 841(c).

Forcible sex offense for minors and **extortion** defined in commentary, but murder, kidnapping, voluntary m., aggravated assault and forcible sex offense for adults determined by **generic definition**]

Categorical approach: If "**most innocent conduct**" or "**full range of conduct**" covered by the statute does not match these definitions, prior cannot qualify as "crime of violence."
United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012).

What's left of the Career Offender provision?

2. Enumerated offenses continued:

Proposed Amendment:

Extortion – narrowed definition of generic extortion to obtaining something of value from another by wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury. Threat against property or reputation no longer enough.

Forcible sex offense – includes sex offenses where consent is involuntary, incompetent, or coerced.

But sexual abuse of a minor and statutory rape count only if they satisfy elements of 18 U.S.C. § 2441(c). In other words, these offenses must have following elements:

Either minor victim must be between ages 12-15 and 4 years younger than defendant + defendant engaged in sexual act using force, threats of force, rendered minor unconscious, or drugged minor, etc., or

Sexual act with minor under the age of 12.

Career Offender Commentary

Be careful with current commentary enumerated offenses:

The commentary to U.S.S.G. § 4B1.2 lists numerous enumerated offenses that do not appear in text: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, and extortionate extension of credit, etc. [will be gone in commentary with proposed amendments – most of them moved to text]

This commentary cannot expand the text of the guideline because it is not a freestanding exception. *United States v. Stinson*, 508 U.S. 36 (1993); *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015); *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011); *United States v. Litzy*, ___ F. Supp. 3d ___, 2015 WL 5895199 (S.D.W.V. 2015).

This means that enumerated offenses in commentary can now only qualify as “crimes of violence” if they have an element of “violent force” against a person.

Career Offender Commentary

Be careful with commentary inchoate offenses: conspiracy and attempt

Enumerated offenses: Under *Soto-Rivera*, *Shell*, *Armijo*, and *Stinson*, conspiracies and attempts can't qualify as enumerated offenses because text of career offender guideline only includes completed enumerated offenses. Conspiracy and attempt only included in commentary.

Force clause: Also, conspiracies noted in commentary can't qualify under force clause because not included in text of force clause. However, attempts are included in text of force clause. Nonetheless, make sure attempt is generic, i.e., requires substantial step toward commission of crime + probable desistance.

III. Implications: U.S.S.G. §§ 2K2.1 and 7B1.1 "crime of violence" residual clause

Same analysis as career offender, but instant offense does not have to qualify as "crime of violence."

III. Implications:

18 U.S.C. § 16(b) crime of violence residual clause (used for determining 8-level "aggravated felony" bump in U.S.S.G. § 2L1.2(b)(1)(C) and many other federal provisions like VICAR, Three-Strikes, Bail Reform Act).

18 U.S.C. § 16

Crime of violence definition: two clauses

1. 18 U.S.C. § 16(a) – Force Clause
2. 18 U.S.C. § 16(b) – Residual Clause

Note: No Enumerated Offenses

18 U.S.C. § 16(b)

Crime of violence definition under residual clause

Residual Clause: Offense qualifies as crime of violence if "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015) hold 16(b) void for vagueness because:

1) same categorical ordinary case inquiry applies here that was struck down in *Johnson*. See *United States v. Avila*, 770 F.3d 2014 (4th Cir. 2014); *United States v. Keelan*, 786 F.3d 865 (11th Cir. 2015); *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013).

2) same uncertainty about how to determine quantum of risk – substantial risk of injury – tied to ordinary case.

Note: The type of risk – "substantial risk" in 16(b) vs. "serious potential risk" in ACCA completely irrelevant because *Johnson* turned on ordinary case approach – not type of risk. See *United States v. Welch*, 136 S. Ct. 1257, 1262 (2016).

Pending en banc: *United States v. Gonzalez-Longoria*, ___ F.3d___, (5th Cir. 2015) (held 16(b) void for vagueness, but en banc granted).

What's left of 18 U.S.C. § 16 ?

16(a) "crime of violence" force clause same as career offender/ACCA but has element of physical force against property of another:

Force Clause: Has an element the use, attempted use, or threatened use of physical force against a person, or property of another.

But still must be violent force against property, not just injury to property – so, for example, Hobbs Act robbery, which can be violated by injury to property – even intangible property - does not qualify.

And must be force against property of another – Lookout for arson statutes that do not require as such.

Categorical approach: If "most innocent conduct" or "full range of conduct" covered by the statute does not match this definition, prior cannot qualify as "crime of violence." *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012).

III. Implications: 18 U.S.C. § 924(c)(3)(B)
“crime of violence” residual clause

Elements of 18 U.S.C. § 924(c)

Section 924(c) provides in pertinent part:

[A]ny person who, during and in relation to any **crime of violence** or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - [be sentenced to a certain number of years depending on the facts of the crime]

18 U.S.C. § 924(c)(3)

Crime of violence definition: two clauses

Identical to 18 U.S.C. § 16, but looking at instant offense rather than prior conviction:

1. 18 U.S.C. § 924(c)(3)(A)– Force Clause
2. 18 U.S.C. § 924(c)(3)(B) – Residual Clause

Note: No Enumerated Offenses

18 U.S.C. § 924(c)(3)(B): Crime of violence definition under residual clause

Same language as 18 U.S.C. § 16(b)

Residual Clause: Offense qualifies as crime of violence if "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Void for vagueness for same reasons noted under §16(b). Same **categorical ordinary case** inquiry applies to § 924(c)(3)(B).

See United States v. Fuertes, 805 F.3d 485, 498 (4th Cir. 2015); *United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009); *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995).

18 U.S.C. § 924(c)(3)(B)

Crime of violence definition under residual clause

District court cases finding 924(c) residual clause void for vagueness for same reasons 16(b) is void for vagueness:

United States v. Merritte, 2016 WL 2901661 (D. Nev. 2016); *United States v. Luong*, 2016 WL 1588495 (E.D. Cal. 2016); *United States v. Lattanaphom*, __ F. Supp.3d__, 2016 WL 393545 (E.D. Cal. 2016); *United States v. Bell*, __ F.Supp.3d__, 2016 WL 344749 (N.D. Cal. 2016); *United States v. Edmundson*, __ F. Supp. 3d__ 2015 WL 9582736 (D. Md. 2015) (finding 924(c) residual clause vfv).

Beware:

United States v. Rejon Taylor, __ F.3d__, 2016 WL 537444 (6th Cir. 2016) (holding that 924(c) residual clause is not void for vagueness).

What's left of 18 U.S.C § 924(c)(3)?

Same as 18 U.S.C. § 16(a):

Force Clause (18 U.S.C. § 924(c)(3)(A)): Has an element the use, attempted use, or threatened use of physical force against a person, or property of another (But still must be violent force against property, not just injury to property).

Examples of underlying offenses that don't fall under force clause for reasons previously noted: All conspiracies (See *Edmundson*, *Luong*, *Merritte*), Hobbs Act robbery, robbery of government property (*Bell*), carjacking, kidnapping, bank robbery, armed bank robbery, assault (*Bell*), murder, arson, racketeering, VICAR, escape.

Categorical approach: If "most innocent conduct" or "full range of conduct" covered by the statute does not match this definition, prior cannot qualify as "crime of violence." *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012).

Note: no enumerated offenses.

Beware: Badly reasoned unpublished § 924(c) cases:

Wrong use of *United States v. Castleman*, 134 S. Ct. 1405 (2014), modified categorical approach, and/or bad residual clause analysis.

United States v. Merinord, 2015 WL 6457166 (E.D.N.C. 2015) (Hobbs Act robbery); *United States v. Brownlow*, 2015 WL 6452620 (N.D. Ala. 2015) (Hobbs Act robbery); *United States v. Hunter*, 2015 WL 6443084 (E.D.Va. 2015) (Hobbs Act robbery); *United States v. Standberry*, __ F. Supp.3d __ 2015 WL 5920008 (E.D.Va. 2015) (Hobbs Act robbery); *United States v. Mackie*, 2015 WL 5732554 (W.D.N.C. 2015) (Hobbs Act robbery); *United States v. McDaniels*, 2015 WL 7455539 (E.D. Va. 2015).

United States v. Strong, 2015 WL 6394237 (W.D.N.C. 2015) (armed bank robbery); *United States v. Prickett*, 2015 WL 5884904 (W.D. Ark. 2015) (assault with intent to commit murder); *United States v. Lusenhop*, 2015 WL 5016514 (S.D. Ohio 2015) (carjacking); *United States v. Cruz-Rivera*, 2015 WL 6394416 (D.P.R. 2015) (carjacking); *United States v. Green*, 2016 WL 277982 (D. Md. 2016); *United States v. Tsarnaev*, 2016 WL 184389 (D. Mass. 2016) (various offenses including conspiracies); *United States v. Checora*, 2015 WL 9305672 (D. Utah 2015) (second degree murder).