

## CRIMES OF VIOLENCE

Federal Defender's Office  
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### USSG § 4B1.2 Defines "Crime of Violence"

- § 4B1.1: Career Offenders
  - enhances BOL & CH
- § 2K2.1: Firearms
  - enhances BOL
- § 7B1.1: VOSR
  - enhances grade of offense

### 3-Part Definition in USSG § 4B1.2

- Element Clause
- Enumerated Offenses Clause
- Residual Clause
- Plus Commentary

### CURRENT DEFINITION

"Felony" that . . .

- has as an element the use, threatened use, or attempted use of force against another person (element clause), or
- is burglary of a dwelling, arson, extortion, explosives use (enumerated offenses), or
- otherwise involves conduct that presents a serious potential for risk of physical injury to another (residual clause).

## Element Clause

- Has as an element the use, threatened use, or attempted use of force against another person
- No changes
- Beware of arguments trying to squeeze into this clause offenses that no longer qualify under other clauses

## Residual Clause

- otherwise involves conduct that presents a serious potential for risk of physical injury to another
- DELETED!!!

## Residual Clause

- USSC “determined that the residual clause at § 4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*”
- USSC struck the residual clause “as a matter of policy.”

## Residual Clause

Not in Immigration Guideline, USSG § 2L1.2

Identical in ACCA, 18 U.S.C. §924(e)(2)(B)(ii), & CO Guideline, USSG § 4B1.2(a)

DOJ concedes *Johnson* applies to CO guideline

## Removed From Enumerated Offenses

- burglary of a dwelling
- extortionate extension of credit
- involuntary manslaughter

## Burglary of a Dwelling Deleted!

USSC cited a mass of empirical evidence showing:

- “(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.”

## Burglary of a Dwelling Involving Violence

If it did involve actual violence, the USSC now invites an upward departure for **any** prior burglary involving violence, not just burglary of a dwelling.

## involuntary manslaughter

- removed from the commentary
- no longer qualifies as “crime of violence.”
- USSC recognized that involuntary manslaughter generally would have previously qualified only under the residual clause, if at all.

## “extortionate extension of credit”

- removed from the commentary
- no longer qualifies as “crime of violence.”

## Extortion

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

## Offenses Moved From Commentary To Guideline Text As Enumerated Offenses

- Murder
- voluntary manslaughter
- Kidnapping
- aggravated assault
- forcible sex offenses
- Robbery
- use or possession of a firearm described in 26 U.S.C. §5845(a) or explosive material defined in 18 U.S.C. §841©

## Use Or Possession Of A Firearm Described in 26 U.S.C. § 5845(a)

- firearm described in 26 U.S.C. § 5845(a) includes sawed-off shotgun, silencer, bomb, or machine gun
- USSC says that 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.”
- USSC continues to provide no data or other empirical evidence to support this statement, however.
- sample argument at [https://www.fd.org/docs/Select-Topics---sentencing/Sent\\_Memo\\_semiauto\\_weapon.pdf](https://www.fd.org/docs/Select-Topics---sentencing/Sent_Memo_semiauto_weapon.pdf)

## Forcible Sex Offense

- Commentary defines to include offenses that have no element of force, i.e., “offenses with an element that consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.”
- USSC provides no data or other empirical support
- sexual abuse of a minor and statutory rape count, but “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.”

## Forcible Sex Offense

- Reference to 2241 limits counting stat rape to stat rape priors that would fall under 18/2241.
- 2241 is limited to sex with (a) person under age of 12, or (b) person 12 and less than 16 and is at least 4 years younger than the other person.
- Many states have broader definitions, and some circuits deferred to those definitions.

## Forcible Sex Offense

- For priors based on conduct involving a minor between the ages of 12 and 15 (and at least 4 years younger than the other person), 2241(c) requires proof that the defendant's conduct also violated 2241(a) or (b).
- Therefore, a state offense is only a generic forcible sex offense if the state statute requires proof that the minor was between the ages of 12 and 15 (and 4 years younger) AND the defendant used force, threats of force, rendered the minor unconscious, or drugged the minor, etc.
- The only pure stat rape cases that would count would be those involving someone 11 or under.

## Downward Departure Invited

- invites downward departure at § 4B1.1 if one or both of the qualifying priors “is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense.”
- USSC explains, “application of the career offender guideline may result in a guideline range that substantially over represents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in § 4A1.3(b)(3)(A).”

## Effective

- August 1, 2016
- Retroactive?
- Clarifying?

## Sentencings Before Aug. 1st

If client is not a career offender  
under new COV definition. . .

- Ask for a policy-based variance down to the non-career offender range, relying on the Commission's lengthy Reason for Amendment, or
- Ask for a continuance.

## Sentencings Before Aug. 1st

- policy reasons demonstrate that a variance to the non-career offender range would reflect the Commission's well-supported policy decision these priors should no longer count as "crimes of violence."
- then as for a further variance under § 3553(a) based on your client's individualized circumstances

## *US v. Matchett, 802 F.3d 1185 (11th Cir. 2015)*

- Rejected the government's concession and held that the residual clause of the career offender guideline was not unconstitutionally vague.
- Held that the vagueness doctrine, which rests on a lack of notice, does not apply to advisory guidelines.
- Petition for rehearing was filed October 13, 2015.

## Dispute/Object to PSR “facts”

- Current law in the Eleventh Circuit: undisputed facts in the PSR may be relied upon at sentencing, including in imposing sentence under the ACCA or the career offender provision.
- *Shepard v. United States*, 544 U.S. 13 (2005) – limited sentencing courts to certain judicial records from the prior proceeding, rejecting reliance on police reports.
- *Descamps v. United States*, 133 S. Ct. 2276 (2013) – limited sentencing courts to elements only.

## Charging Document Alone Insufficient

- Eleventh Circuit case law: A district court may not rely on the charging document alone without ensuring that the defendant was convicted of the offense charged.
- The same proposition should hold for elements. A district court may only rely on the elements of which the defendant was convicted in the prior proceeding. *Descamps*, 133 S. Ct. at 2281-89.
- Be wary of the government (or district court) relying on the charging document as to the statute of conviction (or elements of that conviction), without ensuring that the defendant was convicted of that statute (or element).