



**Federal Sentencing Guidelines**  
 FJC Court Web  
 Alan Dorhoffer  
 Deputy Director, Office of Education

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*Johnson v. U.S.*, 135 S. Ct. 2551 (2015) <sup>2</sup>

- The Armed Career Criminal Act’s “residual clause” is unconstitutionally vague.




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**ACCA Definition of “Violent Felony”** <sup>3</sup>  
 18 U.S.C. § 924(e)(2)(B)

- *....has as an element* the use, attempted use, or threatened use of physical force against the person of another; or
- *is* burglary, arson, or extortion, involves use of explosives, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another....





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*Johnson's Potential Impact*

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- **18 U.S.C. § 16(b)**
  - 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
- **18 U.S.C. § 924(c)**
  - 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




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**§ 924(c) Is Not impacted by *Johnson***

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- *U.S. v. Hill*, --F.3d--, 2016 WL 4120667 (2d Cir. 2016)
- *U.S. v. Taylor*, 814 F.3d 340 (6<sup>th</sup> Cir. 2016)
- *U.S. v. Prickett*, --F.3d--, 2016 WL 4010515 (8<sup>th</sup> Cir. 2016)




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**18 U.S.C. § 16(b)**

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| <p><b>§ 16(b) is unconstitutional</b></p> <ul style="list-style-type: none"> <li>• <i>Golicov v. Lynch</i>, --F.3d--, 2016 WL 4988012 (10<sup>th</sup> Cir. 2016)</li> <li>• <i>Shuti v. Lynch</i>, 828 F.3d 440 (6<sup>th</sup> Cir. 2016)</li> <li>• <i>U.S. v. Vivas-Ceja</i>, 808 F.3d 719 (7<sup>th</sup> Cir. 2015)</li> <li>• <i>Dimaya v. Lynch</i>, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015)</li> </ul> | <p><b>§ 16(b) is constitutional</b></p> <ul style="list-style-type: none"> <li>• <i>U.S. v. Gonzalez-Longoria</i>, --F.3d--, 2016 WL 4169127 (5<sup>th</sup> Cir. 2016)</li> </ul> |
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**Johnson Is Retroactive for ACCA Cases**

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*Welch v. U.S.*, 136 S. Ct. 1257  
(April 18, 2016)

- *Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review
- *Johnson* was decided on June 26, 2015




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**Career Offender Cert Granted**

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- *Beckles v. U.S.*, 616 F. App'x 415 (11<sup>th</sup> Cir. 2015), cert granted, 136 S. Ct. 2510 (2016)
  - (1) Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause at §4B1.2(a)(2)
  - (2) Whether *Johnson's* constitutional holding applies to the residual clause in §4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review; and
  - (3) whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in commentary to §4B1.2, remains a "crime of violence" after *Johnson*.




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**"Crime of Violence" Definition at Career Offender (§4B1.2(a))**

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- Means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
  - has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, 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)




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### Summary of Changes to the List of Enumerated Offenses at §4B1.2

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- Moves a number of enumerated offenses from the commentary to the guideline
- Changes “manslaughter” to “voluntary manslaughter”
- **Eliminates “burglary of a dwelling”** and “extortionate extension of credit” as enumerated offenses
- Creates definitions of “forcible sex offense” and “extortion”




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### New Departure Provisions

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- Upward departure at §4B1.2 to address certain cases in which the instant offense or a prior felony conviction was a burglary involving violence
- Downward departure provision in §4B1.1 for cases in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the of sentencing for the instant federal offense (*e.g.*, South Carolina)




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### Iowa burglary 702.12

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- “An ‘occupied structure’ is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons...”




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### Burglary under ACCA

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- ACCA enumerated offenses: burglary, arson, explosives, extortion
- Generic definition of burglary:  
 “an unlawful or unprivileged entry into ... a building or other structure, with intent to commit a crime.”




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### *Mathis v. U.S.*, 136 S. Ct. 2243 (2016)

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- Iowa burglary is not a violent felony under the categorical approach because statute was too broad
- The Eighth Circuit incorrectly used the modified categorical approach because the statute did not contain multiple elements




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### *Mathis v. U.S.*, 136 S. Ct. 2243 (2016)

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- “Distinguishing between elements and facts is therefore central to ACCA’s operation.
- “Elements” are the “constituent parts” of a crime’s legal definition—the things the “prosecution must prove to sustain a conviction.”
- “At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant ... and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty”




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*Mathis v. U.S.*, 136 S. Ct. 2243 (2016)

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- “Facts, by contrast, are mere real-world things—extraneous to the crime’s legal requirements.... They are “circumstance[s]” or “event[s]” having no “legal effect [or] consequence”: In particular, they need neither be found by a jury nor admitted by a defendant. And ACCA, as we have always understood it, cares not a whit about them.”




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Iowa burglary 702.12

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- “An ‘occupied structure’ is any building, structure, appurtenances to buildings and structures, [land, water or air vehicle](#), or similar place adapted for overnight accommodation of persons... ”
- “And those listed locations are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element, as the Iowa Supreme Court has held: Each of the terms serves as an “alternative method of committing a single crime” of burglary, so that a jury need not agree on which of the locations was actually involved.”




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How to determine if a statute contains elements or facts

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- State supreme court decisions interpreting the statute
- Plain language of the statute (different penalties?)
- Jury instructions




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Elements vs Facts

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- 2.01(a)(1) Aggravated Assault
  - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse




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Robbery Offense Remands

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- *U.S. v. Parnell*, 818 F.3d 974 (9<sup>th</sup> Cir. 2016)
  - MA armed bank robbery not a violent felony
- *U.S. v. Gardner*, 823 F.3d 793 (4<sup>th</sup> Cir. 2016)
  - NC common law robbery not a violent felony
- *U.S. v. Jones*, --F.3d--, 2016 WL 3923838
  - NY first degree robbery is not categorically a crime of violence at §4B1.2




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Robbery Offense Remands

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- *U.S. v. Eason*, 829 F.3d 633 (8<sup>th</sup> Cir. 2016)
  - AR robbery is not a violent felony
- *U.S. v. Sheffield*, --F.3d--, 2016 WL 4254995 (D.C. Cir. 2016)
  - DC attempted robbery statute is not a crime of violence
- *U.S. v. Dixon*, 805 F.3d 1193 (9<sup>th</sup> Cir. 2015)
  - CA robbery is not a violent felony




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**Robbery is a Violent Felony/Crime of Violence** <sup>22</sup>

- *U.S. v. Hill*, --F.3d--, 2016 WL 4120667 (2d Cir. 2016)
  - Hobbs Act robbery is a crime of violence at 924(c)
- *U.S. v. McBride*, 826 F.3d 293 (6<sup>th</sup> Cir. 2016)
  - Here, 18 U.S.C. § 2113(a) was a crime of violence at §4B1.2
- *U.S. v. House*, 825 F.3d 381 (8<sup>th</sup> Cir. 2016)
  - Hobbs Act robbery was a "serious violent felony" under § 3559(c)(2)(F)(ii)
- *U.S. v. Duncan*, --F.3d--, 2016 WL 4254936 (D.C. Cir. 2016)
  - IN robbery is a violent felony




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**Attempted Murder and Involuntary Manslaughter** <sup>23</sup>

- *U.S. v. Hernandez-Montes*, --F.3d--, 2016 WL 3996698 (5<sup>th</sup> Cir. 2016)
  - FL attempted 2<sup>nd</sup> degree murder was not a crime of violence at §2L1.2
- *U.S. v. Benally*, --F.3d--, 2016 WL 4073316 (9<sup>th</sup> Cir. 2016)
  - Involuntary Manslaughter (18 U.S.C. § 1112) is not a crime of violence under § 924(c)




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**Assault and Battery** <sup>24</sup>

- *U.S. v. Jordan*, 812 F.3d 1183 (8<sup>th</sup> Cir. 2016)
  - AR aggravated assault (a)(1) not a violent felony
- *U.S. v. Braun*, 801 F.3d 1301 (11<sup>th</sup> Cir. 2015)
  - FL aggravated battery of a pregnant woman not a violent felony
  - FL battery on law enforcement officer not a violent felony
- *U.S. v. Fogg*, --F.3d--, 2016 WL 4698954 (8<sup>th</sup> Cir. 2016)
  - MN drive by shooting was a violent felony




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### Assault

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- *U.S. v. Garcia-Longoria*, 819 F.3d 1063 (8<sup>th</sup> Cir. 2016)
  - NE assaulting police officer a crime of violence at §2K2.1
- *U.S. v. Fields*, 823 F.3d 20 (1<sup>st</sup> Cir. 2016)
  - Massachusetts assault with a deadly weapon is a crime of violence under §4B1.2




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### Sexual Abuse of A Minor

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- *U.S. v. Alfaro*, --F.3d--, 2016 WL 4501950 (4<sup>th</sup> Cir. 2016)
  - MD 3<sup>rd</sup> degree sex. offense is forcible sex offense at §2L1.2
- *U.S. v. Madrid*, 805 F.3d 1204 (10<sup>th</sup> Cir. 2015)
  - TX aggr. sex. assault under 14 not a crime of violence at §4B1.2
- *U.S. v. Puga-Yanez*, --F.3d--, 2016 WL 3708243 (5<sup>th</sup> Cir. 2016)
  - GA child molestation is a crime of violence under §2L1.2




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### Drug Trafficking Offenses

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- *U.S. v. Hinkle*, --F.3d--, 2016 WL 4254372 (5<sup>th</sup> Cir. 2016)
  - TX delivery of heroin did not qualify as a controlled substance offense under §4B1.2
- *U.S. v. Martinez-Cruz*, --F.3d--, 2016 WL 4728806 (10<sup>th</sup> Cir. 2016)
  - 21 U.S.C. § 846 is not a drug trafficking offense at §2L1.2
- *U.S. v. Dominguez-Rodriguez*, 817 F.3d 1190 (10<sup>th</sup> Cir. 2016)
  - 21 U.S.C. § 841 is categorically a drug trafficking offense for purposes of §2L1.2




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### Highlights of §2L1.2 Amendment

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- Eliminates “categorical approach” in almost all cases
- Focuses on:
  - Number of prior illegal reentry convictions
  - Length of prior felony sentence before first order of removal or deportation
  - Length of felony sentence after reentry




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### Conditions of Probation and Supervised Release

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#### §§5B1.3 & 5D1.3

- The amendment revises, clarifies, and rearranges the conditions of probation and supervised release in order to make them easier for defendants to understand and probation officers to enforce
- The classifications of “mandatory,” “standard,” and “special” have been changed for some conditions
- Mens rea requirements are added in some conditions




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### Child Pornography and File Sharing Distribution Enhancement Application

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- The 2-level specific offense characteristic applies if the *defendant knowingly* engaged in distribution
- The 5-level specific offense characteristic applies if the *defendant* knowingly distributed in exchange for any valuable consideration with any person




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**Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016)**

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- “The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that “improperly calculat[es]” a defendant’s Guidelines range, for example, has committed a “significant procedural error.”
- The Government remains free to “poin[t] to parts of the record”—including relevant statements by the judge—“to counter any ostensible showing of prejudice the defendant may make.”




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**Alternative Sentences**

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- *U.S. v. Hentges*, 817 F.3d 1067 (8<sup>th</sup> Cir. 2016)
  - “We find it unnecessary to address whether he qualifies as a career offender, because the district court’s alternative decision to vary upward from the advisory guideline range is sufficient to justify the sentence imposed.”
- *U.S. v. Davis*, 825 F.3d 359 (8<sup>th</sup> Cir. 2016)
  - “Since the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court’s reliance on an incorrect range is sufficient to show that the error affected Davis’ substantial rights.”




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**Recent Supervised Release Conditions Remands**

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- *U.S. v. Gall*, 829 F.3d 64 (1st Cir. 2016)
- *U.S. v. Fey*, --F.3d--, 2016 WL 4363131 (1st Cir. 2016)
- *U.S. v. West*, --F.3d--, 2016 WL 3947815 (9<sup>th</sup> Cir. 2016)
- *U.S. v. Von Behren*, 822 F.3d 1139 (10<sup>th</sup> Cir. 2016)




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### Recent Restitution Remands

- *U.S. v. Mahmood*, 820 F.3d 177 (5th Cir. 2016)
- *U.S. v. Fowler*, 819 F.3d 1381907 (6th Cir. 2016)
- *U.S. v. Titus*, 821 F.3d 930 (7<sup>th</sup> Cir. 2016)
- *U.S. v. Thomsen*, --F.3d--, 2016 WL 4039711 (9<sup>th</sup> Cir. 2016)
- *U.S. v. Nosal*, 828 F.3d 865 (9<sup>th</sup> Cir. 2016)



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### Commission Resources

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