Commentary Offenses,
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Amy Baron-Evans, Jennifer Coffin

Part I explains why offenses currently listed in the guideline's commentary that do not satisfy the force clause, § 4B1.2(a)(1), and are not enumerated in § 4B1.2(a)(2) are not "crimes of violence" after *Johnson*. This is for sentencing, direct appeal and § 2255s for defendants who committed the instant offense before August 1, 2016, the effective date of the amendment deleting the residual clause and moving commentary offenses into the text.

Part II explains that the commentary offenses (that are not also enumerated in § 4B1.2(a)(2)) were intended to interpret the residual clause, in case this is useful.

Part III discusses inchoate crimes, which will remain in the commentary even after the August 1, 2016 amendment.

Part IV outlines the circuit line-up on whether commentary has freestanding definitional power.

Part V addresses a slightly different issue: whether courts may find that an instant (or prior) offense of conviction was unlawful possession of a firearm described in 26 U.S.C. § 5845(a), when the defendant was convicted only of unlawful possession of a firearm.

Background

On June 26, 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2015) that the residual clause in the ACCA is void for vagueness. The Court has since vacated and remanded fourteen lower court decisions in which defendants had been sentenced under the identical residual clause[1] in the career offender guideline.[2] The government has

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[1] When the Commission adopted the current definition of "crime of violence" in the career offender guideline, the complete reason was that "[t]he definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)." USSG, App. C, Amend. 268 (1989). The amendment was in "respon[se] to Congress's enactment of the Armed Career Criminal Act," and "the Commission amended the definition of the term 'crime of violence' based on the definition of the term 'violent felony' in the ACCA." U.S. Sent'g Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, Pt. C (Career Offenders), at 4 (2012).

[2] These included 12 career offender cases, *see Vinales v. United States*, 135 S. Ct. 2928 (2015) (11th Cir. case); *Denson v. United States*, 135 S. Ct. 2931 (2015) (11th Cir. case); *Beckles v. United States*, 135 S. Ct. 2928 (2015) (11th Cir. case); *Jones v. United States*, 136 S. Ct. 333 (2015) (11th Cir. case); *McCarthren v. United States*, 136 S. Ct. 332 (2015) (11th Cir. case); *Maldonado v. United States*, 135 S. Ct. 2929 (2015) (2d Cir. case); *Smith v. United States*, 135 S. Ct. 2930 (2015) (6th Cir. case); *Wynn v. United States*, 135 S. Ct. 2945 (2015) (6th Cir. case); *Caldwell v. United States*, 136 S. Ct. 417 (2015) (6th Cir. case); *Banks v. United States*, 136 S. Ct. 365 (2015) (6th Cir. case); *Gonzales v. United States*, 136 S. Ct. 84 (2015) (5th Cir. case); *Jones v. United States*, 135 S. Ct. 2944 (2015) (3d Cir. case), a §

conceded, and all but one court to address the issue agree that *Johnson*'s constitutional holding applies to the residual clause in the career offender guideline, which is also used by several other guidelines.[3] At the same time, the government is taking the position that offenses that would qualify as "crimes of violence" based only on the now-void residual clause -- because they do not have as an element the use, attempted use, or threatened use of "violent force" against the person of another,[4] § 4B1.2(a)(1), and are not generic burglary of a dwelling, arson, extortion, or use of explosives, § 4B1.2(a)(2) -- qualify as "crimes of violence" simply because they are listed in the commentary.

The government is wrong. Commentary has no freestanding definitional power. The only valid function of commentary is to interpret or explain the text of a guideline. Commentary that does not interpret or explain any existing text of a guideline is invalid, and commentary that is inconsistent with or a plainly erroneous reading of the existing guideline's text must be disregarded in favor of the text. With the residual clause gone, an offense listed in the commentary that that could satisfy the definition of "crime of violence" only under the residual clause is not a "crime of violence."

The offenses currently listed in the commentary (that are not also listed in the enumerated offense clause) are murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, extortionate extension of credit, "unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed off rifle, silencer, bomb, or machine gun)," and aiding and abetting, conspiring, or attempting to commit a "crime of violence." USSG § 4B1.2 cmt. (n.1). Most of these offenses as defined by state statutes or state common law have been held, or can be shown, not to satisfy the force clause.[5] If the crime of which the defendant

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2K2.1 case, *Talmore v. United States*, 135 S. Ct. 2937 (2015) (9th Cir. case), and a § 7B1.1 case, *Cooper v. United States*, 135 S. Ct. 2938 (2015) (11th Cir. case).

[3] See USSG §§ 2K1.3 & cmt. n.2 (explosive materials); 2K2.1 & cmt. n.1 (firearms); 2S1.1 & cmt. n.1 (money laundering); 4A1.1(e), 4A1.2(p) (criminal history); 5K2.17 & cmt. n.1 (departure for semi-automatic firearms); and 7B1.1(a)(1) & cmt. n.2 (probation and supervised release).

[4] *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("violent force" means "strong physical force" that is "capable of causing physical injury or pain" to another person).

[5] *See, e.g.*, *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011) (manslaughter under Colo. Rev. Stat. § 18-3-104(1)(a)); *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (manslaughter under Fla. Stat. § 782.07(1)); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (Texas aggravated assault); *United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013) (New Jersey aggravated assault); *United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011) (Tennessee aggravated assault); *United States v. Shell*, 789 F.3d 335, 341 (4th Cir. 2015) (North Carolina second-degree rape); *United States v. In re Sealed Case*, 548 F.3d 1085 (D.C. 2008) (D.C. robbery); *United States v. Yockel,* 320 F.3d 818 (8th Cir. 2003) (federal bank robbery); *United States v. Kelley*, 412 F.3d 1240 (11th Cir. 2005) (federal bank robbery); *United States v. Woodrup*, 86 F.3d 359 (4th Cir. 1996) (federal bank robbery); *Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9th 2012) (California kidnapping); *United States v. Sherbondy*, 865 F.3d 996 (9th Cir. 1988) (Model Penal Code kidnapping); *United States v. Amos*, 501 F.3d 524, 525 (6th Cir. 2007) (possession of a sawed -off shotgun); *United States v. Gore*, 636 F.3d 728 (5th Cir. 2011) (conspiracy to commit any offense); *United States v. White*, 571 F.3d 365

was convicted does not satisfy the force clause under the categorical approach, or the modified categorical approach if it applies,[6] the commentary listing the offense must be disregarded because, as explained below, it does not interpret any existing text of the guideline after *Johnson*, and is inconsistent with the remaining text.

An additional or alternative argument in some cases is that even if the commentary were valid, an offense listed in the commentary does not satisfy the generic definition of the offense. *See, e.g., United States v. Litzy*, __ F. Supp.2d __, 2015 WL 5895199, at **9-11 (S.D. W. Va. 2015). This argument will become very important for defendants who committed the instant offense after August 1, 2016, when all of the commentary offenses (except inchoate crimes) will be moved to the text. We hope to distribute a memo regarding generic definitions for these offenses sometime before the Advanced Defender Conference in June.

I. The commentary listing [OFFENSE] as a crime of violence must be disregarded because it does not interpret or explain any text of the career offender guideline that exists after *Johnson*, and is inconsistent with the remaining text of the guideline.

The Sentencing Reform Act requires the Sentencing Commission to "submit to Congress amendments to the guidelines" at least six months before their effective date, and provides that Congress may modify or disapprove such amendments before their effective date. 28 U.S.C. § 994(p). In upholding the Commission against a separation-of-powers challenge, the Supreme Court emphasized that this requirement makes the Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).

But the Sentencing Reform Act says nothing about submitting commentary to Congress, *see* 28 U.S.C. § 994(p), and indeed did not expressly authorize the issuance of commentary at all. *See Stinson v. United States*, 508 U.S. 36, 40-41 (1993). The Supreme Court nonetheless held that commentary is valid and authoritative, but *only if* it interprets a guideline, and is not inconsistent with or a plainly erroneous reading of that guideline and does not violate the Constitution or a federal statute. Because the guidelines are promulgated pursuant to an express delegation of rulemaking authority by Congress, they are "the equivalent of legislative rules adopted by [other] federal agencies." *Id*. at 44-45. Because the "functional purpose of [guidelines] commentary (of the kind at issue here) is to assist in the interpretation and application of those rules," it "is akin to an agency's interpretation of its own legislative rules." *Id*. at 45. Thus, as with other agencies' interpretations of their own regulations, *id*.,

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(4th Cir. 2009) (conspiracy to commit any offense); *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007) (conspiracy to commit any offense); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014) (Delaware attempt to commit any offense); *James v. United States*, 550 U.S. 192, 197 (2007) (Florida attempted burglary "does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'"), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015).

[6] *See Descamps v. United States*, 133 S. Ct. 2276 (2013) (holding that courts may not apply modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements).

"commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id*. at 38. Where "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43.

In other words, because Congress did not expressly authorize the issuance of commentary and there is no requirement that Congress review it, commentary is valid and authoritative only if it in fact interprets or explains the text of a guideline, and is not inconsistent with that guideline. Otherwise, the Commission could issue commentary having nothing to do with a guideline or changing the meaning of a guideline, with the same force as a guideline but with no accountability to Congress. Thus, when commentary does not interpret the text of a guideline, or is inconsistent with or a plainly erroneous reading of the text of the guideline, the commentary is invalid and must be disregarded in favor of the guideline's text.

As the Fourth Circuit has explained, guidelines commentary "does not have freestanding definitional power," but is only valid and authoritative if it interprets a guideline's text and is not inconsistent with that text. *United States v. Leshen*, 453 F. App'x 408, 413-15 (4th Cir. 2011) (prior state sex offenses did not qualify as crimes of violence under any part of the text and rejecting government's argument that they nonetheless qualified under the commentary); *accord United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) ("[The government skips past the text of § 4B1.2 to focus on its commentary," but "it is the text, of course, that takes precedence."). The First Circuit has held that "in light of the government's concession that *Johnson* invalidates the residual clause in Guidelines § 4B1.2(a)(2)," the commentary "has become inconsistent with the remaining text of the Guideline itself," and thus "provides no basis" to conclude that felon in possession of a firearm described in 26 U.S.C. 5845(a) is a "crime of violence" under § 4B1.2(a)(2). *United States v. Soto-Rivera*, __ F.3d __, 2016 WL 279364 at *8 (Jan. 22, 2016). *See also United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (rejecting government's argument that because offense was listed in commentary, there was no need for it to qualify under the definitions set out in the text; "[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)").[7]

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[7] *See also, e.g.*, *United States v. Potes-Castillo*, 638 F.3d 106, 111 (2d Cir. 2011) (rejecting government's reading of commentary that was "inconsistent with theb Guidelines section it interprets"); *United States v. Cruz*, 106 F.3d 1134, 1139 (3d Cir. 1997) (relying on *Stinson* to disregard commentary that required greater scienter than text of guideline); *United States v. Dison*, 330 F. App'x 56, 61-62 (5th Cir. 2009) ("[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note."); *United States v. Webster*, 615 F. App'x 362, 363 (6th Cir. 2015) ("[T]he text of a guideline trumps commentary about it."); *United States v. Stolba*, 357 F.3d 850, 853 (8th Cir. 2004) (rejecting adjustment supported by commentary that conflicted with the guideline because "the proper application of the commentary depends upon the limits – or breadth – of authority found in the guideline"); *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (when a "conflict exists between the text and the commentary," "the text of the guidelines governs"); *United States v. Fox*, 159 F.3d 637, at *2 (D.C. Cir. 1998) (declining to follow commentary that "substantially alters" the requirements of guideline's text).

Accordingly, [OFFENSE] is not a "crime of violence" within the meaning of USSG § 4B1.2(a). [OFFENSE] does not have as an element the use, attempted use, or threatened use of violent force against the person of another, and so does not interpret or explain § 4B1.2(a)(1). [OFFENSE] is not one of the offenses enumerated in § 4B1.2(a)(2), and so does not interpret or explain that clause. [OFFENSE] could only qualify as a "crime of violence" if it interprets or explains the residual clause. That it cannot do because the residual clause is void. [OFFENSE] is inconsistent with the remaining text of the guideline because it does not have an element of force and is not enumerated in the guideline. Because the commentary is flatly inconsistent with the guideline "in that following [the commentary] will result in violating the dictates of [the guideline], the Sentencing Reform Act itself commands compliance with the guideline." *Stinson*, 508 U.S. at 43.

II. The Commission's actions after *Johnson* confirm that the offenses listed in the commentary (that are not also listed in the text) were the Commission's interpretation of the now-void residual clause.

As noted above, you will need to show that a commentary offense could only qualify, if at all, under the now-void residual clause. In some cases, it may be useful to explain to the court that the Commission intended these offenses as its interpretation of the residual clause.

One of the offenses - "unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed off rifle, silencer, bomb, or machine gun)" – was expressly included because some courts at the time (before *Begay v. United States*, 553 U.S. 137 (2006) and subsequent decisions) had held that "possession of certain of these firearms, such as a sawed-off shotgun, is a 'crime of violence' due to the serious potential risk of physical injury to another person." USSG App. C, amend. 674 (Nov. 1, 2004).

The Commission has now confirmed that the other offenses listed in the commentary as "crimes of violence" (and not listed in the guideline itself) were based on its determination that the offense "otherwise involves conduct that presents a serious risk of physical injury to another." The Commission said that because "the statutory language the Court found unconstitutionally vague" in *Johnson* is "identical" to the career offender guideline's residual clause, it proposed to "delete the residual clause" and to "move[] all enumerated offenses to the guideline," in order "to make the guideline consistent with *Johnson*."[8] On January 21, 2016, the Commission adopted an amendment (effective Aug. 1, 2016 absent congressional disapproval) deleting the residual clause and moving the following offenses from the commentary to the text at § 4B1.2(a)(2): murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, and unlawful possession of a firearm described in 26 USC

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[8] U.S. Sent'g Comm'n, *News Release: U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence* (Aug. 7, 2015), http://www.ussc.gov/news/press-releases-and-news-advisories/august-7-2015; *see also* Notice of Proposed Amendments to the Sentencing Guidelines and Commentary at 6, 8-9, http://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20150811_FR_Proposed.pdf.

5845(a).[9] The movement of these offenses from the commentary to the text reflects the fact that they no longer interpret or explain any text in the guideline now that the residual clause has been deleted.

III. Inchoate Crimes.

The Commission has not proposed any change to the present commentary stating that the term "crime of violence" "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." But for the reasons set forth above—and both before and after the 2016 amendment—these offenses cannot qualify as a "crime of violence" merely because they appear in the commentary. After *Johnson*, such an offense qualifies only if it satisfies the force clause or is listed as an enumerated offense, and even then only if it is not broader than the generic offense.

Attempt. Attempt offenses are included in the text of the force clause, so an attempt conviction may qualify as a "crime of violence" if he underlying crime attempted satisfies the force clause, and the attempt is generic attempt. Generic attempt requires a "substantial step" toward the completed crime. *See United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014).

Attempt offenses are not included in the list of enumerated offenses, so an attempted enumerated offense does not qualify as a "crime of violence." In *James v. United States*, the Supreme Court concluded that "attempted burglary" is not "burglary" because the enumerated offenses in the ACCA refer only to completed offenses. 550 U.S. 192, 198 (2007). The enumerated offenses at § 4B1.2 likewise refer only to completed offenses. While the Court held in *James* that an attempted enumerated offense could satisfy the residual clause, *see id.* (holding that attempted burglary counted because it satisfied the residual clause), that aspect of *James* has been overruled by *Johnson*.

Conspiracy. Conspiracy offenses are neither included in the text of the force clause nor listed as an enumerated offense, so they do not qualify as "crimes of violence." *See, e.g.*, *United States v. Gonzalez-Ruiz*, 794 F.3d 832, 836 (7th Cir. 2015) (finding post-*Johnson* that conspiracy to commit armed robbery does not satisfy the force clause and is not an enumerated offense under the ACCA, so is not a "violent felony"); *United States v. Melvin*, 2015 WL 6445433 (4th Cir. 2015) (finding post-*Johnson* that conspiracy to commit robbery with a dangerous weapon does not satisfy the force clause and is not an enumerated offense under the ACCA, so is not a "violent felony"); *United States v. Edmundson*, __ F. Supp. 3d __, 2015 WL 9582736 (D. Md. Dec. 30, 2015) (finding post-*Johnson* that Hobbs Act conspiracy not a "crime of violence" under the force clause or as an enumerated offense under 18 U.S.C. § 924(c)(3)); *see also United States v. White*, 571 F.3d 365 (4th Cir. 2009) ("[a]pplying a categorical analysis to the Conspiracy Offense, we observe that it does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another'" and concluding that it does not satisfy the force

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[9] U.S. Sent'g Comm'n, Amendment to the Sentencing Guidelines, Jan. 21, 2016, http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf.

clause under the ACCA); *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007) ("Because Colorado law does not require proof of the use, attempted use, or threatened use of physical force to sustain a conviction for conspiracy to commit second degree burglary, Fell's prior conviction does not qualify as a violent felony pursuant to § 924(e)(2)(B)(i). Neither does it qualify under the first clause of § 924(e)(2)(B)(ii), since it does not involve the use of explosives and it is not burglary, arson, or extortion."); *United States v. Gore*, 636 F.3d 728, 731 (5th Cir. 2011) (holding that Texas conspiracy to commit aggravated robbery does not satisfy the force clause of the ACCA because the only elements that must be found by the jury to convict are that the defendant agreed to commit robbery and engaged in one of the acts enumerated in the robbery statute, which may or may not satisfy the force clause); *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) (implying that Nevada conspiracy to commit robbery does not satisfy the force clause and is not an enumerated offense under the ACCA; holding that it qualified under the residual clause), *vacated and remanded in light of Johnson*, 135 S. Ct. 2926 (2015).

Aiding and Abetting. Aiding and abetting is not included in the force clause or listed as an enumerated offense. However, because a conviction on an aiding and abetting theory is considered the same as a conviction for the underlying offense, *see Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007), a conviction for an offense as an aider and abettor may qualify as a "crime of violence" if it is generic aiding and abetting and the underlying offense either satisfies the force clause or is a generic enumerated offense. *Cf. id.* at 190-91. Generic aiding and abetting requires proof that the defendant (1) took an affirmative act in furtherance of the underlying offense (2) with the intent of facilitating the commission of the offense. *See Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). The intent requirement is satisfied only when the government proves the person "actively participate[d] in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 1248-49. The required knowledge must be "advance knowledge," which means "knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Id.* at 1249-50.

IV. Circuit Line-up Regarding Whether Commentary Has Freestanding Definitional Power

Summary

You should preserve this issue even if you are in a circuit that has expressly held that offenses listed in the commentary of § 4B1.2 have freestanding definitional power. The issue is being raised in two petitions for certiorari that we know of.

1. For purposes of establishing a split for a petition for certiorari, the First, Fourth and Tenth Circuits have expressly held that offenses listed in the commentary of § 4B1.2 do not have freestanding definitional power, and the Fifth Circuit has required that commentary offenses satisfy one of the definitions in the text. *See United States v. Soto-Rivera*, __ F.3d __, 2016 WL 279364 at **5-8 (Jan. 22, 2016) (holding that in the absence of the residual clause after *Johnson*, an offense that does not satisfy § 4B1.2(a)(1) and is not enumerated in § 4B1.2(a)(2) does not interpret any text in the guideline and is thus not a "crime of violence"); *United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the

'residual' or 'otherwise' clause in § 4B1.2(a)(2). Thus, to qualify, it must 'otherwise involve[] conduct that presents a serious potential risk of physical injury to another.'"); *United States v. Leshen*, 453 F. App'x 408, 415 (4th Cir. 2011) ("[F]orcible sex offenses' does not have freestanding definitional power."); *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015) ("[T]he government skips past the text of § 4B1.2 to focus on its commentary," but "it is the text, of course, that takes precedence."); *United States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011) (rejecting the government's argument that Colorado manslaughter qualifies as a crime of violence simply because it is listed in the commentary and need not qualify under the definitions set out in the text; "[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)."); *United States v. Lipscomb*, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (possession of a sawed-off shotgun must satisfy the residual clause in the text, and noting that the commentary answers the question where neither party challenges the Commission's classification).

The Third, Seventh and Eleventh Circuits have held that offenses listed in the commentary of § 4B1.2 do have freestanding definitional power, although the Seventh Circuit is likely to overrule *Raupp* in *Rollins*. *See United States v. Marrero*, 743 F.3d 389, 397-401 (3d Cir. 2014) (holding that Pennsylvania third-degree murder was a "crime of violence" because "murder" was listed in the commentary and the Pennsylvania offense corresponded to the third prong of the generic definition of murder; no analysis of whether the offense satisfied any definition in the text); *United States v. Alfrederick Jones*, No. 14-2882, Order (Nov. 9, 2015) (denying certificate of appealability because "whether or not *Johnson* invalidates the residual clause in U.S.S.G. § 4B1.2(a), appellant's designation as a career offender did not rely on that clause," but rather "relied on [commentary] list[ing] robbery as an enumerated predicate offense," so *Johnson* "is not relevant in appellant's case"); *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012) (split panel holding that commentary can say anything that the text does not expressly prohibit); *United States v. Rollins*, 800 F.3d 859 (7th Cir. 2015), reh'g granted, judgment vacated (Oct. 6, 2015); *United States v. Hall*, 714 F.3d 1270, 1272-74 (11th Cir. 2013) (wholly misunderstanding and relying on *Stinson* to hold that it is bound by commentary that does not interpret any text); *Beckles v. United States*, 616 F. Appx. 415, 416 (11th Cir. Sept. 29, 2015) (per curiam) (after Supreme Court GVR in light of *Johnson*, holding that "*Johnson* . . . does not control this appeal," because "Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a 'crime of violence,'" and "*Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender," and "*Hall* remains good law and continues to control in this appeal"); *Denson v. United States*, 804 F.3d 1339, 1340-44 (11th Cir. 2015) (after Supreme Court GVR in light of *Johnson*, holding that "*Johnson* has no impact on the issues in this appeal," relying on *Hall* and *Stinson* to reiterate that commentary that does not interpret text is binding, and *Johnson* does not apply to the guidelines under *Matchett*).

2. Note that the Fourth Circuit in *Hood* held that a commentary offense is a crime of violence so long as it satisfies the text of the residual clause, but need not satisfy the Supreme Court's purposeful, violent and aggressive requirements for a violent felony. 628 F.3d at 671-73. This is consistent with *Stinson*.

The Sixth Circuit has done something different, paying lip service to *Stinson* while deferring to commentary that, under its own analysis, is inconsistent with the text. The court held in *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007) that possession of a sawed-off shotgun was not a violent felony because it did not present a serious potential risk of physical injury to another, that is, the offense did not satisfy the words of the residual clause without considering any Supreme Court gloss. *Id*. at 528-30. Then, in *United States v. Hawkins*, 554 F.3d 615 (6th Cir. 2009), it held that the same offense was a crime of violence under the guidelines. It recognized that "Guidelines commentary 'that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Id*. at 618 (quoting *Stinson v. United States,* 508 U.S. 36, 38 (1993). It then asserted, without citation to any authority, that its task was "not to independently interpret the language of" the guideline, thus allowing it to ignore its reasoning in *Amos*. *Id*. Rather, its task was to decide "whether the Sentencing Commission's own interpretation of the Guideline in its official note is a 'plainly erroneous reading,'" and concluded that the Commission's interpretation could not be "plainly erroneous" because six other circuits had found that possession of a sawed-off shotgun satisfied the residual clause. *Id*.

Thus, the Sixth Circuit purported to comply with *Stinson*, but at the same time avoided it by asserting that its task was not to interpret the guideline, and by failing to use the test *Stinson* requires, i.e., where following the commentary results in violating the guideline, the Sentencing Reform Act itself commands compliance with the guideline. Yet, the *Hawkins* court expressly recognized that commentary must be consistent with some part of the text, here the residual clause. With the residual clause gone, the Sixth Circuit should hold that the commentary is a plainly erroneous reading of the guideline, and that because following the commentary will result in violating the dictates of the guideline, the Sentencing Reform Act itself commands compliance with the guideline.

3. The Second Circuit in *United States v. Walker*, 595 F.3d 441 (2d Cir. 2010) found that South Carolina strong arm robbery was a "crime of violence" because robbery is listed in the commentary and the definition of South Carolina strong arm robbery corresponds to the generic definition of robbery. *Id*. at 445-47. The court mentioned *Stinson* in passing but did not address its effect at all. The defendant argued only that South Carolina strong arm robbery did not satisfy the generic definition of robbery; he did not argue that the offense had to satisfy one of the definitions in the text. *Id*. at 446. So, this decision does not stand for the proposition that commentary has freestanding definitional power.

In other cases, the Second Circuit indicated that an offense listed in the commentary must satisfy a definition in the text. In *United States v. Garcia*, 57 F. Appx. 486 (2d Cir. 2003), the court made no mention of the commentary and held (before *Curtis Johnson v. United States*, 559 U.S. 133 (2010)) that the defendant's convictions for attempted robbery in the second degree satisfied the force clause. *See also United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (analyzing the elements and concluding, before *Curtis Johnson v. United States*, 559 U.S. 133 (2010), that the defendant's third degree robbery conviction fit within the force clause, no mention of the commentary); *United States v. Anderson*, 2009 WL 2171301, at *1 (2d Cir. July 21, 2009) (mentioning that robbery is listed in the commentary and concluding, before *Curtis*

Johnson v. United States, 559 U.S. 133 (2010), that defendant's third degree robbery conviction satisfied the force clause).

More recently, however, in *United States v. Scott Avitto*, No. 15-265 (E.D.N.Y.), the court held that neither New York robbery in the second degree nor New York robbery in the third degree satisfy the force clause under *Curtis Johnson v. United States*, 559 U.S. 133 (2010), which requires an element of violent physical force; Second Circuit cases previously holding New York robbery in the second or third degree either pre-dated *Curtis Johnson* or were summary orders that did not address that case and are non-precedential; *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidates the residual clause; and thus, the listing of robbery in the commentary is not authoritative under *Stinson*. *See* Sentencing Transcript (March 14, 2016).[10]

See further discussion of Second Circuit cases under Details.

4. There does not appear to be any potentially bad (or on-point good) law in the Eighth, Ninth or D.C. Circuits.

Details

1st Circuit – rejects treating commentary as having freestanding definitional power

The First Circuit has long recognized that commentary that is inconsistent with the text carries no weight and must be disregarded. *See United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (recognizing that "commentary carries no weight when [it is] inconsistent with the guideline's text"); *United States v. Chuong Van Duong*, 665 F.3d 364, 368 (1st Cir. 2012) (disregarding application note that conflicted with text).

In *United States v. Soto-Rivera*, __ F.3d __, 2016 WL 279364 (Jan. 22, 2016), the court held that "in light of the government's concession that *Johnson* invalidates the residual clause in Guidelines § 4B1.2(a)(2)," the commentary "has become inconsistent with the remaining text of the Guideline itself," and thus "provides no basis" to conclude that felon in possession of a firearm described in 26 U.S.C. 5845(a) is a "crime of violence" under § 4B1.2(a)(2). *Id*. at *8. Commentary "'interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.'" *Id*. at *5 (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)). "'[W]here

[10] The court found that Section 160.10(1) of the New York second degree robbery statute, which consists of forcibly stealing property when "aided by another person actually present," is not a crime of violence under the force clause, but said in *dicta* that Section 160.10(2)(a), which consists of "forcibly stealing property when the defendant causes physical injury to any person who is not a participant in the crime," is. Tr. at 9. The government offered no *Shepard* documents to show under which subsection Avitto was convicted, and the PSR said it was Sec. 160.10(1). The court's conclusion regarding section 160.10(2)(a) is *dicta* and should be challenged. Causing physical injury is not an element of violent force.

commentary is inconsistent with [Guidelines] text, text controls.'" *Id*. at *6 (quoting *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015)). Passive possession of any kind of firearm does not satisfy the force clause under § 4B1.2(a)(1), and is not enumerated in § 4B1.2(a)(2). *Id*. Thus, "in the absence of the residual clause, there is nothing within § 4B1.2(a)'s text to serve as an anchor for Application Note 1's inclusion of possession of a machinegun within the definition of crime of violence." *Id*. To use the note as a basis independent of the guideline "would be inconsistent with the post-*Johnson* text of the Guideline itself." *Id*. The government's reliance on *Beckles v. United States*, 616 Fed. Appx. 415 (11th Cir.2015) (unpublished) is unavailing. *Id*. at *7. *Beckles* relied on *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), which decided that possession of a sawed-off shotgun was a crime of violence when the residual clause was still valid. "*Beckles* (like *Hall* before it) was grounded in the very language which the government itself now says must be excised from the Guidelines," so its "reasoning and rationale are inapposite here." *Id*.

2d Circuit – law is unsettled but question is open

In *United States v. Stevens*, 66 F.3d 431 (2d Cir. 1995), the court found that the district court erred by apportioning the sentence consistent with an example in the commentary to § 2J1.7 that "is inconsistent with that guideline." *Id*. at 436 (relying on *Stinson*). In *United States v. Potes-Castillo*, 638 F.3d 106 (2d Cir. 2011), the court rejected the government's reading of an application note to § 4A1.2(c) because it was "inconsistent with the Guideline section it interprets." *Id*. at 111 (citing *Stinson*, 508 U.S. at 43).

In *United States v. Walker*, 595 F.3d 441 (2d Cir. 2010), the court found that South Carolina strong arm robbery was a "crime of violence" because robbery is listed in the commentary and the definition of South Carolina strong arm robbery corresponds to the generic definition of robbery. *Id*. at 445-47. The court mentioned *Stinson* in passing but did not address its effect at all. The defendant argued only that South Carolina strong arm robbery did not satisfy the generic definition of robbery; he did not argue that the offense had to qualify under one of the clauses in the text. *Id*. at 446. Thus, it cannot be said that the court held that commentary has freestanding definitional power.

In other cases, the Second Circuit indicated that an offense listed in the commentary must satisfy a definition in the text. In *United States v. Garcia*, 57 F. Appx. 486 (2d Cir. 2003), the court made no mention of the commentary and held (before *Curtis Johnson v. United States*, 559 U.S. 133 (2010)) that the defendant's convictions for attempted robbery in the second degree satisfied the force clause. *See also United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (analyzing the elements and concluding, before *Curtis Johnson v. United States*, 559 U.S. 133 (2010), that the defendant's third degree robbery conviction fit within the force clause, no mention of the commentary); *United States v. Anderson*, 2009 WL 2171301, at *1 (2d Cir. July 21, 2009) (mentioning that robbery is listed in the commentary and concluding, before *Curtis Johnson v. United States*, 559 U.S. 133 (2010), that defendant's third degree robbery conviction satisfied the force clause).

In a recent unpublished and non-precedential decision, the Second Circuit said that the defendant's two prior convictions for New York second degree robbery were "categorically

crimes of violence under U.S.S.G. § 4B1.2(a)(1)" because the offense has an element of force. *United States v. Kornegay*, 2016 WL 877950, *4 (2d Cir. Mar. 8, 2016) (unpub.). The court added, "Moreover, robbery is specifically listed as a crime of violence in the Guidelines Commentary." *Id*. The appellant did not argue, and the court did not address, that New York second degree robbery does not satisfy the force clause under *Curtis Johnson,* or that the commentary has no freestanding definitional power under *Stinson*.

More recently, in *United States v. Scott Avitto*, No. 15-265 (E.D.N.Y.), the district court held that neither New York robbery in the second degree nor New York robbery in the third degree satisfy the force clause under *Curtis Johnson v. United States*, 559 U.S. 133 (2010), which requires an element of violent physical force; Second Circuit cases previously holding New York robbery in the second or third degree either pre-dated *Curtis Johnson* or were summary orders that did not address that case and are non-precedential; *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidates the residual clause; thus, the listing of robbery in the commentary is not authoritative under *Stinson*. *See* Sentencing Transcript (March 14, 2016).[11]

Lesson: Raise the *Stinson* issue in the Second Circuit.

3d Circuit – holds commentary has freestanding definitional power

In *United States v. Cruz*, 106 F.3d 1134, 1138-39 (3d Cir. 1997), the Third Circuit relied on *Stinson* to disregard commentary that required greater scienter than the text of the guideline. In *United States v. Smith*, 751 F.3d 107 (3d Cir. 2014), the court said in passing: "Guidelines Commentary 'that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Id.* at 118 n.8 (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

In *United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014), the Third Circuit held that Pennsylvania third-degree murder was a "crime of violence" because "murder" was listed in the commentary and thus "enumerated," and Pennsylvania third-degree murder corresponded to the third prong of the generic definition of murder. *Id.* at 397-401. It said that *Begay*'s prohibition against counting reckless crimes applied only in residual clause cases, not commentary offense cases. *Id.* at 398. While commentary must be consistent with the text of the guideline it interprets under *Stinson*, *id.*, "Application Note 1 . . . is not an erroneous reading of USSG § 4B1.2. It merely supplements the numbered provisions of § 4B1.2 and unambiguously states that 'crime of violence' *includes*' ten specific crimes." *Id*. This appears to mean that the

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[11] The court found that Section 160.10(1) of the New York second degree robbery statute, which consists of forcibly stealing property when "aided by another person actually present," is not a crime of violence under the force clause, but said in *dicta* that Section 160.10(2)(a), which consists of "forcibly stealing property when the defendant causes physical injury to any person who is not a participant in the crime," is. Tr. at 9. The government offered no *Shepard* documents to show under which subsection Avitto was convicted, and the PSR said it was Sec. 160.10(1). The court's conclusion regarding section 160.10(2)(a) is *dicta* and should be challenged. Causing physical injury is not an element of violent force.

commentary is freestanding; it could not mean that the commentary must interpret either the force clause or the residual clause because it never examines whether Pennsylvania third-degree murder satisfies either clause. It then cites cases that treated commentary offenses as having freestanding definitional power (if they met the generic definition) and said it was acting "consistent with these precedents" in treating commentary offenses as "enumerated offenses." *Id*. at 399. This novel terminology apparently means that the commentary offenses are like offenses enumerated in 4B1.2(a)(2), i.e., freestanding. The court then went on to find that Pennsylvania third-degree murder corresponded to the third prong of the generic definition of murder. *Id*. at 399-401.

In *United States v. Alfrederick Jones*, the Third Circuit broke with *Stinson* without citation to any decision and without any briefing on the effect of *Johnson* in light of *Stinson*. The government argued simply that *Johnson* was irrelevant to this case because robbery is enumerated in the commentary. Jones was given no opportunity to respond before the COA was denied. In denying the certificate of appealability, the panel said: "With respect to the United States Supreme Court's remand of this matter for consideration in light of *United States v. Johnson*, 135 S. Ct. 2551 (2015), . . . we conclude that, whether or not *Johnson* invalidates the residual clause in U.S.S.G. § 4B1.2(a), appellant's designation as a career offender did not rely on that clause. Rather, the District Court relied on the part of Application Note 1 which lists robbery as an enumerated predicate offense. Id. at § 4B1.2(a), cmt. n.1. Accordingly, the 2015 *Johnson* decision is not relevant in appellant's case and does not warrant a certificate of appealability." *United States v. Alfrederick Jones*, No. 14-2882, Order (Nov. 9, 2015).

On January 7, 2016, Jones argued in a Petition for Rehearing With Suggestion for Rehearing En Banc that the commentary is not freestanding and was invalidated by *Johnson's* invalidation of the residual clause, the text the commentary was intended to elucidate. On January 22, 2016, the petition for rehearing by the panel and the court en banc was denied without comment.

4th Circuit – rejects treating commentary as having freestanding definitional power

In *United States v. Hood*, 628 F.3d 669 (4th Cir. 2010), the Fourth Circuit held that North Carolina possession of a weapon "of mass death and destruction" (defined to include any shotgun with a barrel less than 18 inches or an overall length of less than 26 months) constitutes a crime of violence even though it does not meet *Begay*'s "violent" and "aggressive" requirements, because it is listed in the commentary, *id*. at 672-73, and the commentary is not "contrary to the guideline itself, or plainly erroneous," *id*. at 672, because the offense "presents a serious potential risk of physical injury to another," which the defendant did not dispute, *id*. at 671. The court expressly recognized that even if an offense is listed in the commentary, it must satisfy a definition in the text: "Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2). Thus, to qualify, it must 'otherwise involve[] conduct that presents a serious potential risk of physical injury to another.'" *Id*. at 671.

Thus, *Hood* held that a commentary offense is a crime of violence so long as it satisfies the text of the residual clause, but need not satisfy the Supreme Court's purposeful, violent and

aggressive requirements for a violent felony, which complies with *Stinson*. With the residual clause gone, the Fourth Circuit would reach the correct result, a conclusion that is bolstered by the next two decisions.

In *United States v. Leshen*, 453 F. App'x 408 (4th Cir. 2011), the defendant was convicted of being a felon in possession, and the court increased the base offense level under § 2K2.1(a)(1)(B) based on two or more prior crimes of violence. *Id*. at 411. On plain error, the court of appeals concluded that the larceny conviction was too old, *id*., and that two sex offenses were not crimes of violence, *id*. at 412-16. The sex offenses did not satisfy the force clause, *id*. at 412-13, the enumerated offense clause, *id*. at 413, or the residual clause, *id*. at 413-14. The government argued that the sex offenses are crimes of violence because the commentary lists "forcible sex offenses." *Id*. at 414. *Stinson* holds that when commentary is "inconsistent with, or a plainly erroneous reading of that guideline," "the Sentencing Reform Act itself commands compliance with the guideline." *Id*. at 414-15. Thus, "the government cannot, simply by referring to the commentary . . ., escape the need to link the commentary (and Leshen's convictions) to either prong of the definition." *Id*. at 415. "[F]orcible sex offenses' does not have freestanding definitional power." *Id*.

In *United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015), the defendant was convicted of being a felon in possession of a firearm and his base offense level was increased under § 2K2.1(a)(4)(A) based on a prior conviction for North Carolina second degree rape. *Id*. at 338. The court held that the offense did not satisfy the force clause or the residual clause, *id*. at 341, and rejected the government's argument resting entirely on the listing of "forcible sex offense" in the commentary. *Id*. at 343. "[T]he government skips past the text of § 4B1.2 to focus on its commentary," but "it is the text, of course, that takes precedence." *Id*. at 340 (citing *Stinson*, 508 U.S. at 43). The commentary "serv[es] only to amplify that definition [in the text], and any inconsistency between the two [is] resolved in favor of the text." *Id*. at 345.

For this argument, do not use *United States v. Litzy*, __ F. Supp.2d __ (S.D. W. Va. 2015). It recites *Stinson* and *Shell* but does no *Stinson* analysis related to the fact that the residual clause is gone. It assumes commentary offenses still stand after *Johnson*. It just does an analysis of whether Ohio robbery is generic robbery and concludes that it is not. It also mistakenly relies on *Kosmes*, a 2L1.2 case, for the idea that the commentary offenses still stand.

5th Circuit – requires commentary offenses to satisfy one of the definitions in the text

In *United States v. Dison*, 330 F. App'x 56 (5th Cir. 2009) (per curiam), the Fifth Circuit had to decide whether defendants who altered currency rather than manufacturing currency in its entirety should be sentenced under 2B1.1 as the defendants argued, or 2B5.1 as the government argued. The conflict was between commentary to 2B5.1 (which said defendants who altered currency should be sentenced under 2B1.1) and commentary to 2B1.1 (which said it did not apply to either). It ultimately decided on 2B1.1 under the rule of lenity. Although this was not a case of a conflict between text and commentary, the court said: "The commentary to a Guideline section is authoritative unless it is a plainly erroneous reading." *Id*. at 61 (citing *Stinson*, 508 U.S. at 38). "[I]f the Guideline text and the commentary are inconsistent, the Guidelines

language controls." *Id*. "[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note." *Id*. at 61-62.

In *United States v. Ashburn*, 20 F.3d 1336 (5th Cir. 1994), the Fifth Circuit rejected the defendant's argument that he could not receive a two-level enhancement "if an express threat of death was made," under § 2B3.1(b)(2)(F), because the commentary says the threat must be made to a victim and he only threatened bystanders. The court said that "we are bound to follow the Commentary unless it can be shown to be inconsistent with the Guidelines," and "because we find such an inconsistency, we are not constrained by the Commentary's interpretation of the Guidelines." *Id* at 1340-41.

In *United States v. Lipscomb*, 619 F.3d 474 (5th Cir. 2010), the Fifth Circuit recognized that an offense listed in the commentary must satisfy a definition in the text. The instant offense was unlawful possession of a firearm under 18 U.S.C. § 922(g), and the indictment (which the court of appeals said the district court could consider because the commentary says the court can consider "the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted" in determining whether an offense satisfies the residual clause, *id*. at 478 n.5), alleged that the defendant "possessed a sawed-off shotgun." *Id*. at 477. The court recognized that the instant offense had to satisfy the residual clause. *Id*. It said that the commentary answers that question where neither party challenged the Commission's classification. *Id*. at 477 & n.3.

The dispute in *Lipscomb* was over whether the court had to use the categorical approach, using the indictment only to determine the statute of conviction, to determine whether the instant offense of conviction was a "crime of violence." The majority said it did not because *Taylor* and its progeny were decided under the ACCA and did not address the guidelines' commentary, and requiring the defendant to have been convicted of possessing a sawed-off shotgun would render the commentary meaningless for § 922(g) offenses. (That's right!) *Id*. at 477-78. (This issue is addressed in Part V.)

6th Circuit – purports to comply with *Stinson* but gets around it

The Sixth Circuit has said that "the text of a guideline trumps commentary about it." *United States v. Webster*, 615 F. App'x 362, 363 (6th Cir. Jun. 25, 2015) (citing *Stinson*, 508 U.S. at 38).

In *United States v. Hawkins*, 554 F.3d 615 (6th Cir. 2009), the court affirmed the use of a prior conviction for possessing a sawed-off shotgun to classify the defendant as a career offender. The court acknowledged that it had held in *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007) that possession of a sawed-off shotgun was not a violent felony under any of the three clauses of the ACCA. *Id*. at 616-17. But, it said, the guidelines commentary lists the offense as a crime of violence. *Id*. at 617. "The Supreme Court has made clear that Guidelines commentary 'that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Id*. at 618 (quoting *Stinson v. United States,* 508 U.S. 36, 38 (1993). The court got around this by saying that its task was "not to independently interpret the language of" the guideline, but to decide "whether the Sentencing Commission's own interpretation of the Guideline in its official

note is a 'plainly erroneous reading,'" *id.*, and the Commission's interpretation could not be "plainly erroneous" because six other circuits had found that possession of a sawed-off shotgun satisfied the residual clause. *Id.*

Thus, the Sixth Circuit purported to comply with *Stinson* by asserting that its task was not to interpret the guideline so that it could ignore its analysis of the identical text in *Amos*, and by distorting the test *Stinson* requires, i.e., where following the commentary results in violating the guideline, the Sentencing Reform Act itself commands compliance with the guideline. But *Hawkins* did expressly recognize that commentary must be consistent with some part of the text, here the residual clause. With the residual clause gone, the Sixth Circuit would be hard pressed to hold, even under its "plainly erroneous" test, that the commentary is not a plainly erroneous reading of the guideline.

Note that in response to nothing apparent in the opinion, the court claims that "this commentary was submitted to Congress," relying solely on the Commission's internal rule of procedure stating that it will "endeavor" to include commentary in submissions to Congress. *Id.* at 617 n.1. Whatever the Commission "endeavors" to do with any particular commentary and whether it does so or not, when "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Stinson*, 508 U.S. at 43.

7th Circuit – holds commentary has freestanding definitional power as long as the guideline does not affirmatively prohibit the commentary's interpretation; likely to be overruled very soon

In *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012), the majority (Easterbrook and Posner) recognized that application notes are authoritative "unless the notes conflict with the text." *Id.* at 759. The court claims that the listing of conspiracy in the note "cannot" conflict with the text "because the text . . . does not tell us, one way or another, whether inchoate offenses are included or excluded." *Id.* "[T]he Commission is free to go its own way," although "[i]t can't do this by application notes that contradict the text of the Guideline," but the note here only addresses a question "left open by the text," *i.e.*, "the treatment of inchoate offenses." *Id.* at 760. The gist of *Raupp* is that commentary can say anything that the text does not expressly prohibit. It does not in any way say that commentary cannot stand alone without text to interpret, and strongly indicates that it can do just that.

Judge Wood dissented. *Id.* at 761-66. She correctly states that conspiracy does not satisfy the elements or enumerated offense clauses, and cannot be used as a predicate unless it satisfies the residual clause, but that the majority "has concluded that it does not need to address" whether it does because it "plays a trump card" from the commentary. *Id.* at 762. "If the Sentencing Commission is entitled to broaden the Guideline so that it applies to non-violent crimes such as the version of conspiracy that Indiana has adopted, then my colleagues are correct that this language checks Raupp's argument. In order to reach that result, they assume that the treatment of inchoate offenses is left open by § 4B1.2, and that all the Commission has done . . . is to fill in a blank. In my view, however, the inclusion of all conspiracy offenses is inconsistent with the language of the Guideline, and thus the expansion implicit in the Application Note is

incorrect under established principles of administrative law." *Id*. In *James* and *Sykes*, the Court held that attempts can be violent felonies *only if* they satisfy the residual clause. *Id*. at 763. The majority cites *Auer* and *Stinson* but "fails adequately to consider whether the 'guideline which the commentary interprets will bear the construction.'" *Id*. at 764 (quoting *Stinson*, 508 U.S. at 46). "There is a significant difference between the procedures that the Sentencing Commission uses when it promulgates the Guidelines and those that it uses when it writes commentary or policy statements . . . When an agency like the Sentencing Commission uses a regulation as a springboard for an 'interpretation' that goes beyond the boundaries of the original regulation, *Auer* and *Stinson* tell us that it has gone too far. That is exactly what the Sentencing Commission did here, when it decided that the phrase 'presents a serious potential risk of physical injury to another' could be stretched to include Indiana's inchoate offense of conspiracy to commit robbery." *Id*. at 766.

In *United States v. McMillian*, 777 F.3d 444 (7th Cir. 2015), the court (Posner, Easterbrook and Woods) rejected the defendant's argument that he could not get two points for use of a computer under 2G1.3(b)(3)(B) because the commentary states that the increase is intended to apply only when a computer is used to communicate directly with a minor or a person who exercises custody, care or supervisory control of the minor. *Id*. at 449. "But the note is wrong," because the guideline provides a 2-level enhancement whenever the defendant uses a computer to entice or encourage a person to engage in prohibited sexual conduct with the minor, which the defendant did when he advertised the minors on Craigslist. "When an application note clashes with the guideline, the guideline prevails." *Id*. at 450.

United States v. Rollins, 800 F.3d 859 (7th Cir. 2015) (Sykes, Kanne and Gilbert), reh'g granted, judgment vacated (Oct. 6, 2015), was vacated for panel rehearing. The opinion is no longer available on westlaw but is available on PACER.

The court understood the parties to agree that *Johnson* had no effect on this case in light of *Tichenor*, and Rollins did not ask that *Tichenor* be overruled. Slip op. at 2. "Rollins' conviction for possession of a short-barreled shotgun qualifies, if at all, only under [the residual clause]." *Id*. at 8. We previously held that possession of a short-barreled shotgun is not a violent felony under the residual clause of the ACCA. *Id*. at 8. That the same result should apply under the same clause in the guidelines "makes sense as a matter of law and logic." *Id*. But the commentary says the offense is a crime of violence. Id. at 8-9. *Stinson* holds that commentary has controlling weight unless it is plainly erroneous or contradicts the text of the guideline itself. *Id*. at 9. Rollins maintains that "the application note *necessarily* conflicts with the career-offender guideline based on our holding in *Miller*, which interpreted the identical residual-clause language of the ACCA." *Id*. But this argument is "foreclosed" by *Raupp*. *Id*. *Raupp* essentially says commentary has freestanding definitional power. *Id*. at 10-11. "Under existing law, the application note controls." *Id*. at 12. But things might be different if *Johnson* applies to the guidelines and *Tichenor* is overruled. *Id*. at 12-13.

The Seventh Circuit heard oral argument in *Rollins* on December 2, 2015, and it looks good for us.

Note: The vacated *Rollins* decision cites five decisions from other circuits that it says "similarly deferred to the Sentencing Commission's authority to interpret the career-offender guideline via application notes that depart from judicial interpretations of the ACCA." Slip op. at 11 n.3. It cites *Hall* (11th), *Hood* (4th), *Lipscomb* (5th), *Hawkins* (6th), and *Ankeny* (9th). None but *Hall* gave commentary freestanding definitional power. *See* cases discussed elsewhere.

8th Circuit – have looked but found no case indicating commentary has freestanding definitional power

In *United States v. Stolba*, 357 F.3d 850 (8th Cir. 2004), the Eighth Circuit rejected an obstruction of justice adjustment invited by the commentary for "shredding a document or destroying ledgers upon learning that an official investigation . . . is about to commence," where the guideline expressly limits the adjustment to conduct "during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." *Id*. at 853. "'Commentary which functions to 'interpret [a] guideline or explain how it is to be applied' controls . . . but if 'commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.'" *Id*. at 852-53 (quoting *Stinson*, 508 U.S. at 42-43. "Furthermore, 'the proper application of the commentary depends upon the limits-or breadth-of authority found in the guideline that the commentary modifies and seeks to clarify.'" *Id*. at 853 (quoting *United States v. Clayton,* 172 F.3d 347, 355 (5th Cir. 1999).

9th Circuit – have looked but found no case treating commentary as having freestanding definitional power

In *United States v. Williams*, 110 F.3d 50 (9th Cir. 1997), the court found that Oregon attempted second-degree kidnapping did not satisfy the force clause. *Id*. at 52. "We must therefore determine whether [it] 'presents a serious potential risk of physical injury to another.'" *Id*. The court noted that it had previously held that "kidnapping" was a violent felony under the residual clause, and that other courts had followed that holding to find that "kidnapping" is a crime of violence. "Indeed, Application Note 2 specifically provides that kidnapping is a crime of violence." *Id*. at 52-53. Earlier in the opinion, the court observed in a footnote that the note includes attempts. *Id*. at 52 n.1. We affirm, period.

Williams thus recognizes that an offense has to satisfy a definition in the text, even if it is listed in the commentary. It does not indicate in any way that the commentary is freestanding. True, it does zero analysis of whether *attempted* kidnapping also satisfies the residual clause, but this appears to be just because the case is so old. There is no indication whatsoever that an attempted kidnapping could be a crime of violence even if it did not satisfy the residual clause simply because attempt is included in the commentary.

In *United States v. Ankeny*, 502 F.3d 829 (9th Cir. 2007), the court of appeals reversed the district court for applying the career offender guideline to three felon-in-possession counts, but affirmed its application to one count under 26 U.S.C. § 5861(d) for possessing an unregistered firearm. *Id*. at 841. (The term "firearm" for purposes of the chapter in which 5861 appears is defined under § 5845(a), so Ankeny, unlike Lipscomb and Beckles, was convicted of

possessing a firearm as defined under § 5845(a).) The court's conclusion was based on its own previous decision finding that "possession of an unregistered firearm of the kind defined in [26 U.S.C.] § 5845" satisfies the residual clause. *Id*. The decision is not based on the commentary at all. The Commission had not yet listed possession of firearms described in 26 U.S.C. § 5845(a) in the commentary.

10th Circuit - most recent decision rejects treating commentary as having freestanding definitional power

In *United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011), a § 2K2.1 case, the Tenth Circuit rejected the government's argument that Colorado manslaughter qualifies as a crime of violence simply because it is listed in the commentary and need not qualify under the definitions set out in the text. *Id*. at 1234-37. "To read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)." *Id*. at 1236.

In *United States v. Traversa*, 2015 WL 6695662 (D. Utah Nov. 3, 2015), the district court allowed the defendant to withdraw his plea, which was based on his belief that he would be classified as a career offender. The court found it likely that *Johnson* invalidated the residual clause, and rejected the government's argument that a robbery conviction that failed to satisfy the elements clause could be a crime of violence based solely on the commentary. "[W] here the commentary is inconsistent with the text of the Guidelines, the text of the Guidelines controls." *Id*. at *4 n.3 (citing *Stinson v. United States*, 508 U.S. 36, 43 (1993) and *Armijo*, 651 F.3d at 1237).

In another § 2K2.1 case that predated *Armijo*, *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010), the court took a contrary approach regarding the defendant's two prior Arizona attempted burglary convictions. The court concluded that they were not "violent felonies," *id.* at 1168-73, but that they were "crimes of violence," *id*. at 1173-75. The reasons are unpersuasive, internally inconsistent, and contrary to *Stinson*. The court begins by placing great emphasis on that fact that the Commission "chose to use a different term, *crime of violence*, rather than *violent felony,*" in its caption. *Id*. at 1173. So what? Congress directed the term "crime of violence," *see* 28 U.S.C. § 994(h), and the Commission chose to adopt the definition of that term from the definition of "violent felony" in the ACCA, *see* USSG, App. C, Amend. 268 (1989). Following the court's logic, once the Commission chose that definition, it was not free to define it differently in the commentary.

The court acknowledged that under *Stinson*, commentary is invalid when it is inconsistent with the text, but claimed that it could be "reconciled" in one of two ways. *Id*. at 1174. First, the note could be "viewed as a definitional provision" that tells us that the text includes attempts. *Id*. If so, the note has freestanding definitional power even when it is inconsistent with the text, contrary to *Stinson*.

Second, the note "may reflect the Sentencing Commission's view" that attempted burglary satisfies the residual clause. *Id*. If so, that view is inconsistent with the Tenth Circuit's own interpretation of the very same text in the ACCA in the very same opinion, and so again is contrary to *Stinson*.

Finally, the court says that the inclusion of attempted burglary "may be 'wrong' as a factual matter (if attempts do not actually present risks comparable to those created by completed offenses," but "it is not the guideline language in itself that dictates a result different from what the application note prescribes." *Id.* at 1175. But the court found in the same opinion that the very same "language" dictates a different result from the note. And now that they mention it, the Commission has now found that including even burglary in the text was factually wrong because "several recent studies demonstrate that most burglaries do not involve physical violence."[12]

Not only does *Martinez* make no sense, it can no longer be good law after *Armijo*. No court of appeals, including the Tenth Circuit, has cited *Martinez* for the proposition that commentary has freestanding definitional power, except for the majority in *Raupp* (which relies on it), and the dissent in *Raupp* (which denigrates it). As noted above, *Raupp* will likely be overruled.

11th Circuit – treats commentary as having freestanding definitional power, and anyway, *Johnson* does not apply to the guidelines so residual clause remains

1) In *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), the Eleventh Circuit wholly misunderstood *Stinson* and indeed gave the commentary freestanding power based on *Stinson.*

It held that Hall's prior conviction for possessing an unregistered sawed-off shotgun on violation of 26 USC 5861(d) is a crime of violence under the following chain of reasoning:

-The text of the guideline has three clauses (elements, enumerated, residual). *Id.* at 1272.

-We rely on decisions interpreting the residual clause of the ACCA in deciding whether an offense is a crime of violence. *Id.* Under circuit precedent applying *Begay*, possession of a sawed-off shotgun is not a violent felony under the residual clause of the ACCA. *Id.* at 1273.

-"However, the Supreme Court has made clear that 'commentary in the [Sentencing] Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Id.* at 1272 (quoting *Stinson*, 508 U.S. at 38).

-The government says the guideline commentary is "binding on us," and that cases analyzing the ACCA are not controlling because ACCA says nothing about whether possession of a sawed-off shotgun is a violent felony, whereas the guideline commentary says it is.

-"We hold that *Stinson* controls, and that the definition of 'crime of violence' [in] the commentary is authoritative. Although we would traditionally apply the categorical approach to

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[12] U.S. Sent'g Comm'n, Amendment to the Sentencing Guidelines at 3, Jan. 21, 2016, http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf.

determine whether an offense qualifies as a 'crime of violence,' we are bound by the explicit statement in the commentary that '[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.,* a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'' . . . [T]he commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself," and "because 'the commentary to § [4B1.2] defines 'crime of violence' very differently than the ACCA does, ... we cannot say that the definition of 'crime of violence' provided in the commentary to § [4B1.2] is a plainly erroneous reading of the guideline.'" *Id*. at 1274.

Under this "reasoning," the commentary need not interpret any text, so *Johnson*'s elimination of the residual clause is irrelevant.

Two of the decisions the Supreme Court vacated in light of *Johnson* relied on *Hall* to hold that an offense listed in the commentary was a "crime of violence." *See Denson v. United States*, 135 S. Ct. 2931 (2015) (vacating *Denson v. United States*, 569 F. App'x 710 (11th Cir. 2014) (affirming denial of 28 U.S.C. § 2255 motion because sawed off shotgun was "crime of violence" under guidelines' commentary); *Beckles v. United States*, 135 S. Ct. 2928 (2015) (vacating *Beckles v. United States*, 579 F. App'x 833 (11th Cir. 2014) (same).

2) In *Beckles*, the defendant was classified as a career offender based on his instant offense under 18 USC 922(g) because the PSR found that the offense involved a firearm described in 26 USC 5845(a). On direct appeal, the Eleventh Circuit improperly (as later explained in *DesCamps*) applied the modified categorical approach to 922(g), an indivisible statute, and found that the offense was possession of a firearm described in 26 USC 5845(a) because the PSR found that the offense involved a firearm described in 26 USC 5845(a) and Beckles didn't object to the PSR's finding. *United States v. Beckles*, 565 F.3d 832, 841-45 (11th Cir. 2009). (See Part V for further discussion.)

The Eleventh Circuit later affirmed the denial of Beckles' first § 2255 on a different ground. It had decided in *Hall* (four years after the direct appeal) that "commentary [is] controlling over *Begay* and [circuit precedent applying *Begay* to the ACCA], because the commentary did not violate the Constitution or a federal statute, and was not inconsistent with, or a plainly erroneous reading of, the guidelines text." *Beckles v. United States*, 579 F. Appx. 833, 834 (11th Cir. 2014) (per curiam).

The Supreme Court vacated and remanded for further consideration in light of *Johnson*. *Beckles v. United States*, 135 S. Ct. 2928 (2015).

On remand, the Eleventh Circuit again affirmed, opining that "*Johnson* . . . does not control this appeal," because "Beckles was sentenced as a career offender based *not* on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying Beckles's offense as a 'crime of violence,'" and "*Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines or about the Guidelines commentary underlying Beckles's status as a career-offender." *Beckles v. United States*, 616 F. Appx. 415, 416 (11th Cir. Sept. 29, 2015) (per curiam). "*Hall* remains good law and continues to control in this appeal." *Id*.

On October 21, 2015, Beckles filed a petition for rehearing en banc, arguing that (1) Matchett's directive that courts adhere to the reasoning of cases interpreting the ACCA abrogates commentary interpreting the guidelines residual clause to include possession of a sawed-off shotgun because commentary has no freestanding power and its only valid function is to interpret the text, circuit precedent holds that the ACCA residual clause does not include possession of a sawed-off shotgun, and the panel's conclusion cannot be reconciled with *Matchett*; and (2) if the court rehears *Matchett* and concludes that the guidelines residual clause is unconstitutionally vague, the court should consider whether an offense listed in commentary that is not enumerated in the text and does not satisfy the elements clause can qualify as a crime of violence.

Rehearing was denied on February 11, 2016.

3) In *Denson*, the Eleventh Circuit affirmed the denial of Denson's § 2255 claiming that counsel was ineffective for failing to object to his classification as a career offender based on his prior Florida conviction for possessing a short-barreled shotgun. *Denson v. United States*, 569 F. Appx. 710 (11th Cir. June 17, 2014) (per curiam). Relying on *Hall,* the court said that "[b]ecause this guidelines commentary is authoritative and binding, possession of such a firearm qualifies as a 'crime of violence' without resort to the 'categorical approach' traditionally used to determine whether an offense falls within the residual clause of U.S.S.G. § 4B1.2(a)(2)." *Id*. at 711. It said that reliance on *Begay* and circuit precedent applying *Begay* to hold that the very same Florida offense was not a violent felony under the ACCA is foreclosed by *Hall*. *Id*. at 712. Repeating its misuse of *Stinson* and its failure to understand what "inconsistent with the guidelines text" means, the court said that in *Hall*, it "concluded that because '*Stinson* controls,' and the guidelines commentary designating the possession of a short-barreled shotgun as a crime of violence is authoritative and binding, the usual 'categorical approach' used in *Begay* and *McGill* to determine if an offense falls within the residual clause does not apply," and "'the commentary provision violates neither the Constitution nor any other federal statute, and it is not inconsistent with, or a plainly erroneous reading of, the guideline text itself.'" *Id.* at 712-13.

The Supreme Court vacated and remanded for further consideration in light of *Johnson*. *Denson v. United States*, 135 S. Ct. 2931 (2015).

On remand, the court concluded that "*Johnson* has no impact on the issues in this appeal." *Denson v. United States*, 804 F.3d 1339, 1340 (11th Cir. 2015). It reinstated and repeated the same opinion, and added a section on *Johnson*, in which it says that *Johnson* does not apply to the Guidelines per *Matchett*, and anyway, it was not ineffective to fail to anticipate *Johnson*. *Id*. at 1343-44.

Denson filed a petition for certiorari on December 23, 2015. It was distributed for the February 19th conference, but that conference was canceled because of Scalia's death. The Court did not call for a response from the government, but it might in Monday's orders (2/29/16).

DC Circuit – have searched but found no case indicating that the commentary has freestanding definitional power

In *United States v. Fox*, 159 F.3d 637 (D.C. Cir. 1998), the D.C. Circuit rejected commentary that appeared to add a requirement to the vulnerable victim adjustment that the defendant subjectively targeted a person because of her vulnerability, where the guideline required only that the defendant objectively knew or should have known of her vulnerability. "To the extent the 'made a target' language can be read to impose a requirement that a defendant select his victim *because* of her vulnerability . . ., we think it is inconsistent with the text of the Guideline, and therefore will not follow it. Read that way, the Commentary substantially alters the Guideline's intent requirement." *Id*. at *2.

V. Can a Court Find That an Instant Offense of Conviction Was Unlawful Possession of a Firearm Described in 26 U.S.C. § 5845(a), When the Defendant was Convicted Only of Unlawful Possession of a Firearm under 18 U.S.C. § 922(g)?

Some courts have found that an instant offense under § 922(g) was a "crime of violence" under § 4B1.2, *i.e.*, unlawful possession of firearm described in 26 U.S.C. § 5845(a), by looking beyond the elements of the offense of conviction.[13] They have done so by improperly applying the modified categorical approach, or by relying on commentary in Application Note 1 that is tied directly to the residual clause. Both approaches are no longer good law.

In its 2009 decision in *United States v. Beckles*, 565 F.3d 832 (11th Cir. 2009), the Eleventh Circuit found that the instant offense of conviction under § 922(g) was a conviction for possession of a sawed-off shotgun (a firearm described in 26 U.S.C. § 5845(a)) by applying what it believed to be the modified categorical approach authorized by *Taylor* and *Shepherd*. The court expressly noted that the same law applies to evaluating both prior and instant convictions, and clearly intended to apply *Shepherd*'s modified categorical approach when it decided that it could look beyond the elements of the offense of conviction (there, by looking to allegations in the PSR to which the defendant did not object) to determine that the instant offense was unlawful possession of a sawed-off shotgun. *Id.* at 843-44 & n.2. But like many courts before the Supreme Court decided *Descamps* in 2013, the court improperly applied the modified categorical approach to this indivisible statute based on a finding that the statute, here 18 U.S.C. § 922(g), was categorically overbroad. *Id.* at 843.[14]

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[13] Courts do not appear to have done this with respect to prior convictions, at least since the Supreme Court confirmed in *Begay* that the categorical approach applied to the residual clause.

[14] "Plainly, a violation of 18 U.S.C. § 922(g)(1) encompasses both conduct that the Sentencing Guidelines explicitly says is not a crime of violence and conduct that the Sentencing Guidelines explicitly denominates as a crime of violence. All that is required to violate 18 U.S.C. § 922(g) is that a convicted felon knowingly possess any firearm. Thus, this conviction encompasses conduct involving the possession of a standard firearm as well as the possession of a firearm that specifically meets the criteria of 26 U.S.C. § 5845(a). . . . Where an ambiguity exists and the underlying conviction may be examined, the district court can rely on the 'charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.' [*United States v.*] *Aguilar-Ortiz*, 450 F.3d [1271,] 1276 [11th Cir. 2006] (*quoting Shepard v. United States*, 544 U.S. 13, 16, [] (2005))." *Beckles*, 565 F.3d at 843.

The Supreme Court later clarified in *Descamps* that the modified categorical approach may not be used merely because the statute of conviction is categorically overbroad; the statute must be divisible by its elements into alternative offenses, at least one of which qualifies as a predicate offense and one or more others that do not. *See* 133 S. Ct. 2276, 2285-86, 2293 (2013). Section § 922(g) is not divisible in that manner. Thus, after *Descamps*, it is clear that the Eleventh Circuit improperly applied the modified categorical approach in 2009 in *Beckles* to find that the instant conviction under § 922(g) was a conviction for possession of a sawed-off shotgun. The Eleventh Circuit has now declared that Beckles' instant offense of conviction is a "crime of violence" based solely on the commentary listing unlawful possession of a firearm described in 26 U.S.C. § 5845(a) as a "crime of violence." *See Beckles v. United States*, 616 F. Appx. 415, 416 (11th Cir. Sept. 29, 2015) (per curiam). However, under a properly applied categorical approach, which the Eleventh Circuit previously said applies, *see Beckles*, 565 F.3d at 843, a conviction under § 922(g) should never count as a conviction for possession of a firearm described in § 5845(a), and so should never be a "crime of violence" regardless of whether the Commission has declared, in commentary or the text of § 4B1.2, that unlawful possession of a firearm described in 26 U.S.C. § 5845(a) is a crime of violence.

Note: The situation is different when the instant offense of conviction is an offense for which the type of firearm is actually an element of the offense. Such an offense may be a "crime of violence" if possession of a firearm described at § 5845(a) is a valid predicate offense under the relevant recidivist provision. *Cf. United States v. Amparo*, 68 F.3d 1222, 1224-26 (9th Cir. 1995) (applying *Taylor*'s categorical approach to hold that an instant conviction for possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. § 5861(d), which defines "firearm" as a firearm described in 26 U.S.C. § 5845(a), is a "crime of violence" under the residual clause at 18 U.S.C. § 924(c)(3)(B), which at the time was believed to be valid). For the reasons set out in Part I, after *Johnson* invalidated the residual clause, possession of a firearm described at § 5845(a) cannot qualify simply because it is listed in the commentary. Effective August 1, 2016, it will be an enumerated offense in the text of § 4B1.2(a)(2). At that time, the elements of the defendant's offense will have to satisfy the generic definition of possession of a firearm described in 26 U.S.C. § 5845(a), and a conviction under 18 U.S.C. § 922(g) will not.

Other courts have taken a different route to find that a conviction for unlawful possession of a firearm under § 922(g) is a conviction for unlawful possession of a firearm described in § 5845(a) for purposes of § 4B1.2—one that eschews the categorical approach altogether and *depends on the existence of the residual clause*.

In *United States v. Lipscomb*, the Fifth Circuit declined to apply the categorical approach in order to find that an instant conviction for unlawful possession of a firearm under § 922(g) is a "crime of violence" for purposes of the residual clause at § 4B1.2 because the indictment described the offense as a sawed-off shotgun. 619 F.3d 474, 479 (5th Cir. 2010). It reached this conclusion by relying on commentary in Application Note 1 to § 4B1.2, which currently states that an offense is a "crime of violence" if "the conduct set forth (*i.e.,* expressly charged) in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another."

The Tenth and Eighth Circuits have also directly or indirectly relied on this commentary to permit a conduct-specific inquiry for purposes of determining whether an instant offense of conviction satisfies the residual clause. *See United States v. Riggans*, 254 F.3d 1200, 1203-04 (10th Cir. 2001) (expressly rejecting the categorical approach when determining whether the instant offense of bank larceny qualified as a "crime of violence" under the residual clause in favor of "a conduct-specific inquiry" and further rejecting the suggestion in Note 1 that the inquiry was limited to the conduct alleged in the indictment: "As the government observes, to limit the court's inquiry to the indictment would lead to absurd results where, as here, there is undisputed evidence that this criminal offense presented a serious risk of harm to others" (internal quotation marks omitted)); *United States v. Williams*, 690 F.3d 1056, 1069 (8th Cir. 2012) (rejecting the modified categorical approach and relying on *Riggans* to hold that court was permitted to "consider the readily available trial evidence" to assess whether the instant offense of conviction under 18 U.S.C. § 844(e) (conveying a threat in interstate commerce about the destruction of life and property by explosives) qualified as a "crime of violence").

In contrast, the Ninth and Fourth Circuits have clearly held that the categorical approach applies equally to instant and prior offenses for purposes of determining whether a conviction satisfies the residual clause under § 4B1.2. *See United States v. Piccolo*, 441 F.3d 1084, 1087 (9th Cir. 2006) (prior circuit precedent applying *Taylor* to instant offense for purposes of determining whether it was a "crime of violence" under 18 U.S.C. § 924(c)(3)(B) "dictates that we do the same with respect to current offenses" under § 4B1.2, and holding that walkaway escape under 18 U.S.C. § 751(a) is categorically not a "crime of violence" because it criminalizes conduct that does not satisfy the residual clause); *United States v. Martin*, 215 F.3d 470, 474-75 (4th Cir. 2000) (holding that court may look only to the facts charged in the indictment that correspond to the elements of the offense of conviction for purposes of determining whether bank larceny categorically satisfies the residual clause, and finding that it does not).

Johnson effectively resolved this division by invalidating the residual clause, which dictates that the commentary that is explicitly tied to it at Application Note 1 is likewise invalidated. In any event, effective August 1, 2016, the residual clause and the commentary tied to it at Application Note 1 are deleted from § 4B1.2. Either way, courts may no longer rely on commentary in § 4B1.2 (referring to "conduct set forth (*i.e.,* expressly charged)" as authorizing a conduct-specific inquiry for determining whether a conviction for unlawful possession of a firearm under 18 U.S.C. § 922(g) is a conviction for unlawful possession of a firearm described in § 5845(a).